

PUMP COURT
TAX CHAMBERS

The concept of 'fixed establishment' and its relevance for VAT

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Fixed Establishment

- Why is it relevant?
- Is there a definition?
- Where does it come from?
- What does it mean?
- Is it a uniform concept?

Why is it relevant?

Common examples:

- Place of Supply: Articles 44 and 45 PVD
- TOMS: Article 307 PVD
- Refunds – Directive 2008/09/EC and 13th Directive
- Provisions relevant to liability, for example:
 - Article 192a PVD
 - Special schemes (e.g. telecoms, broadcasting, e-services: Article 358a and 369a PVD)
- Grouping (UK Only)

Is there a definition?

- In legislation, only for the purposes of place of supply: Regulation 282/2011/EU
- Article 11.1 (B2B):

*"any establishment... 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 (B2C):

*"any establishment... 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** which it supplies."*

Where does that come from?

- **Welmory** (C-605/12) at [43] – [47] and [58]: Court tells us CJEU case law “directly inspired” the wording of Article 11 of the 2011 Regulation
- For example:
 - **Berkholz** (C-168/84)
 - **Faaborg-Gelting** (C-231/94)
 - **ARO Lease** (C-190/95)

The Classic Formulation

An establishment that “is of a certain minimum size, and both the human and technical resources necessary for the provision of the services are permanently present”

Berkholz [18]

An establishment that “has a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of the services”

ARO Lease [15]

A Point to Note

- These cases were concerned with the old place of supply rule in Art 9 of 6th Directive (now, in the main, relevant only to B2C supplies).

- Just how important is this?

In any event, what does it mean?

- The need for human **and** technical resources?
 - Compare *Berkholz* and *RAL Channel Islands* (AG only)
- Whose resources?
 - Discussed at length in *RAL* and *Welmory*, and considered in *Hastings Insurance Services*
 - Ownership v. Control?
 - The level of control?
 - Base on the need for “permanence” and “stability”
 - The relevance of economic ties

The resources necessary to provide services

- How many resources are required?
- A minimum size?
- Understanding *Berkholz* and *Faaborg Gelting*?
- *ARO Lease* and *RAL* provide greater clarity
- Considered and applied in *Hastings*
- A question of fact and degree in each case in assessing the resources that, as a minimum, are required (*Hastings* [565])
- And what constitutes the necessary framework will vary according to the particular context (*Hastings* [568])

ARO Lease

- Car leasing business established in the Netherlands
- Cars leased to customers in Belgium
- No “framework” in Belgium for drawing up, signing and administering contracts, or for taking management decisions
- Only self-employed intermediaries, customers and leased vehicles

RAL Channel Islands

- Guernsey Co operating slot machines in UK
- Guernsey Co subcontracted day-to-day management to another group company
- Did Guernsey Co have an FE in the UK?
- Not all resources need to belong to/be under the control of the supplier
- Contrasts the resources “directly involved” in making supplies to customers, with those needed to carry out ancillary or auxiliary “practical” tasks (e.g. security, cleaning and maintenance).

What about subsidiaries?

- **Question:** Can a subsidiary be an FE of a parent company?
- Contrast issue of whether the human and technical resources of a subsidiary could amount to an FE of the parent through control of resources
- Case to consider:
 - ***DFDS*** (C-260/95)
 - ***Welmory***
 - ***Dong Yang Electronics*** (C-547/18)

DFDS

TOMS, English subsidiary of Danish company

AG:

- *Berkholz* formulation, but adds concepts from other areas (competition, freedom of establishment)
- Does the subsidiary act as an 'entirely independent agent' or an 'auxiliary organ'?

Court:

- Applies that test: was the agent 'independent from' the principal?
- Relevant: agent was wholly-owned by principal + contractual obligations
- Here, subsidiary was a "mere auxiliary organ" of the parent company, so there was an FE

BUT see AG Kokott in both ***Welmory*** and ***Dong Yang***

Welmory

Economic activities of two companies linked by a cooperation agreement, under which Cypriot company uses staff and resources belonging to Polish company

- *AG Kokott:*
 - A taxable person (TP) cannot *as such* constitute an FE of a different TP
 - But human and technical resources of one TP might be put at disposal of another TP as if their own
- *Court:*
 - Fact that the activities “form an economic whole” is not material
 - Services supplied by one company to another distinct from those supplied to consumers

Dong Yang Electronics

Polish undertaking, contracting with South Korean company, but receiving parts from a Polish subsidiary to process them and then returning them to the Polish subsidiary

- *AG Kokott:*

- In ***Welmory***, the Court was “able to avoid giving an answer” on subsidiary as FE
- Fundamental reservations about a subsidiary also being an FE, other than in cases of abuse
- Five reasons why *DFDS* did not assist, including: it concerned TOMS, not automatically transferrable

- *Court:*

- Cannot be ruled out that subsidiary may constitute an FE of parent
- BUT supplier is not to infer there is an FE in a Member State merely because subsidiary exists there
- Supplier is not required to examine contractual relationship between parent and subsidiary

Overlap with direct tax?

- Concept of **Permanent Establishment** in double tax treaties, covered in OECD commentary
- Some similar concepts appear, but **not identical**, e.g.:
 - Place of business (e.g. premises, machinery, equipment)
 - Fixed (degree of permanence)
- PE can be created by persons acting on behalf of the enterprise, **habitually concluding contracts** for the enterprise
- BUT not where that person is acting in the ordinary course of his business as an **independent agent**
- Do not read across from PE
- *Hastings* [513]: VAT Expert Group's concerns that tax authorities are incorrectly equating FE and PE

Is 'fixed establishment' a uniform concept?

- The different focus of Arts 44 and 45 PVD, reflected in Art 11.1 and 11.2 of the 2011 Regulation:

"to receive and use the services supplied to it for its own needs"

v.

"to provide the services which it supplies"

- A body of case law concerned with the latter, but not the former
- To what extent is that case law relevant:
 - a) To the interpretation of Article 11.1 of the Regulation, and
 - b) To the interpretation of the term "fixed establishment" more generally?

The ability to receive and use a supply

- On the face of it very little is required
- But must the ability to make supplies also be implied?
- *Welmorey AG* – “it is doubtful whether... every structure which... is able to use services for its own needs would not at least have the possibility of supplying services itself” [original emphasis]
- Why? And supplies of what (e.g. preparatory/ancillary tasks)?
- In any event, note no need for actual supplies
- Existing case law clearly has some relevance, but that relevance is limited (e.g. understanding the requirement for permanence)

Don't construe "FE" in a vacuum

- The term "fixed establishment" should take its meaning from:
 - (a) The context in which it is employed; and
 - (b) The overall wording and objective of the provision in which it appears.
- This is a well-established approach to construing provisions of EU law (see, for example, *ADV Allround* at [26])

Other examples of a nuanced approach

- For the purposes of TOMS the term FE appears to have a unique meaning (*Welmory AG* and *Dong Yang Electronics*)
- Directive 2008/09/EC and the 13th Directive:
 - ***Planzer Luxembourg*** (at [56]) – preparatory or auxiliary tasks
 - ***Daimler and Widex*** (at [39]) – the making of or ability to make supplies is distinct from question whether an undertaking has an FE. For the purposes of the 8th and 13th Directives the two requirements are cumulative.
- Consider wording and purpose of Art 192a PVD – liability – undertaking is only established in member state in which it makes supplies if it has an FE in that state which “intervenes” in those supplies

UK Grouping

- Section 43A VATA – *“two or more bodies corporate [under common control] are eligible to be treated as member of a group if each is established or has a fixed establishment in the UK...”*
- Note the extra-territorial scope of the UK rules
- FE is not defined in VATA
- Purpose and context:
 - Aim of grouping is administrative simplification, treating entities whose independence is little more than a technicality as a single taxable person
 - It is well settled that a VAT group can include non-taxable persons (e.g. *EC v Ireland*)
 - Economic benefits that may arise are an “inevitable consequence” of grouping

Future Developments (CJEU)

- ***Titanium Limited*** (C-931/19), property letting:
 - Are human **and** technical resources always necessary? Can a property without human resources be an FE?
- ***Berlin Chemie*** (C-333/20), sales of goods, B2B:
 - Must the company have human and technical resources that belong to it? Or is it sufficient to have immediate and permanent access to those resources through an affiliated company which it controls since it holds the majority of its shares?
 - Must the FE be **directly involved** in decisions relating to the supply of goods? Or is it sufficient to have resources through contracts with a third-party which are capable of having a **direct influence** on the volume of sales? (e.g. marketing, regulatory, advertising, storage)

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Q&A, moderated by Laura Ruxandu

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