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Sub-Group on the topics for discussion
Welmory sp. z o.o. (Case 605/12)

Contents

1. BACKGROUND AND PURPOSE OF THIS PAPER

The case *Welmory sp z.o.o* ("*Welmory*") raises the issue on the meaning of the expression 'fixed establishment' for the purpose of article 44 VAT Directive 2006/112/EC.

It is the first judgement which addresses the concept of fixed establishment in the context of the "place of supply" rules after the adoption of the "VAT Package" 2008 and the construction of provisions of the Implementing Regulation 282/2011.

However, when considering the elements required for a fixed establishment, the Court applied the same basic principles as in the past, which remain unaltered. In fact, it expressly stated that the "case-law on the interpretation of Article 9(1) of the Sixth Directive can in principle be applied mutatis mutandis to the interpretation of Article 44 of the VAT Directive".

'Fixed establishment' is a concept of Union Law, the interpretation of which cannot be left to the discretion of the Member States. For this reason, and in view of the considerable practical importance of this question, it is essential to provide taxpayers and tax authorities in the EU with a uniform definition of the elements that give rise to the existence of a fixed establishment.

The concept of 'fixed establishment' is mentioned 13 times in different provisions of the Directive[1], as well as in the Directives related to the refund of VAT[2]. Therefore the concept has wider impact than the context of the *Welmory* case itself. It is vital to ensure that construction of the concept of fixed establishment is uniform and consistent wherever it is used in EU VAT law unless the context otherwise requires. It is also recognised that the application of this concept to any individual case is likely to be fact sensitive, so each individual case may turn on its facts.

The purpose and aim of this document is to analyse the elements which configure a fixed establishment for Value Added Tax purposes in general, in the light of CJEU case law and of the *Welmory* judgement in particular.

2. THE WELMORY JUDGEMENT

Welmory Ltd ("W") was established in Cyprus. It organised sales by auction on an online sales platform. W sold 'packets of bids' to customers ("C") which gave C a right to make an offer to purchase goods being auctioned.

[1] For example the expression is used in provisions in the VAT directive concerning the place of supply of gas and electricity (articles 38 and 39), the place of supply of travel agent services (article 307), the application of invoicing rules (articles 219a and 221) and electronically supplied services and the MOSS (articles 358a and 369a).

[2] Council Directive 2008/9/EC, article 3(a).

W entered into a cooperation agreement with a Polish Company ("P"). W subsequently acquired 100% of the share capital of P; however, the Court's decision was based on the premise that at the material time, the two companies were still independent of each other. Under the cooperation agreement, P agreed to make available an internet auction site and supply associated services of leasing servers needed for the site to function and display the goods being auctioned. P undertook principally to sell goods on that site. W used P's staff to make the supplies.

C, having purchased bids from W made an offer for goods sold by P. The purchase was completed if C's bid was the highest.

Ps' income consisted of:

a. sale proceeds of the goods sold by auction; and
b. remuneration received from W which corresponded to part of the sale proceeds of bids sold by W to C.

P issued invoices for services provided to W (advertising, servicing, provision of information and data processing). P took the view that as W was established in Cyprus, VAT was payable by W, so did not invoice the VAT.

The Polish tax authority took the view that P's services were supplied to a fixed establishment of W in Poland so that Polish VAT was due on the amounts invoiced by P to W.

On reference to the CJEU, the reformulated question before the court was in what circumstances must W (established in Cyprus), having received services from P (established in Poland), be regarded as having a 'fixed establishment', within the meaning of article 44 of the VAT Directive, in Poland for the purposes of determining the place of taxation of those services?

The Court concluded:

c. Since the wording of article 44 of the VAT Directive is similar to the wording of article 9(1) Sixth Directive, the Court's case law on the interpretation of article 9(1) can in principle be applied mutatis mutandis to the interpretation of article 44 of the VAT Directive (para 43).

d. A provision such as article 44 is a rule determining the place of taxation of supplies of services by designating the point of reference for tax purposes. Therefore, it was:

    i. first necessary to determine the primary point of reference in order to establish the place of supply of services; and

    ii. then to define the criteria which must be satisfied for the person receiving services (W) with its place of business in one Member State (Cyprus) to be regarded as having a fixed established in another Member State (Poland) (paras 50 to 52).

e. The most appropriate and primary point of reference is the place where the taxable person has established his business. Only if that place of business does not lead to a rational result or creates a conflict with another Member States that another establishment may come into consideration (para 53). The place where a taxable person has established his business is objective, simple, practical and offers great legal certainty, being easier to verify than, for example the existence of a fixed establishment (para 55). The place of business is also mentioned first in article 44.

f. For the purposes of Art. 44, it may be deduced from the Court's prior case-law, which directly inspired the wording of Article 11 of the Implementing Regulation, that 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 (paras. 57-58).

Therefore, W must have in Poland "at the very least a structure characterised by a sufficient degree of permanence, suitable in terms of human and technical resources to enable it to receive in Poland the services supplied to it by [P] and to use them for its business, namely running the electronic auction system in question and issuing and selling 'bids'" (para59). The Court observed:

i. The fact that W could carry on its business without requiring an effective human and material structure in Poland is not determinative. Such a business requires "at least a structure that is appropriate in terms especially of human and technical resources, such as appropriate computer equipment, servers and software" (para 60).

ii. The national court has exclusive jurisdiction to verify facts to assess whether W had necessary human and technical resources in Poland for it to be able to receive services supplied and to use them for the operation of the auction sales website and issuing and selling bids (para 62).

iii. The fact that W and P were linked by a cooperation agreement, that their activities form an economic whole and that their results are of benefit essentially to consumers in Poland is not material for determining whether W has a fixed establishment in Poland (para 64).

g. W had to have an establishment which was characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business in order for it to have a fixed establishment in Poland. That was for the national court to determine (para 65).

Annex 1 to this note contains some additional facts by way of background.

3. ISSUES ARISING FROM THE JUDGEMENT

Facts similar to those of this case may arise across many economic sectors, especially in an age of increasing electronic commerce. It gives rise to questions of wider application, namely when there is or not a fixed establishment, and regarding the relationship between this concept and the place where the taxpayer's business is established. That is directly relevant to cross-border trade within the EU.

A primary issue is what scale of human and technical resources are required for there to be a fixed establishment. In particular in what circumstances would outsourced human resources (as opposed to dependent employees) and leased equipment (as opposed to assets owned by the taxpayer) give rise to a fixed establishment and sufficient permanence?

Subsidiary questions which arise and which are considered below include:

a. What criteria must be used for testing whether a branch or alleged fixed establishment is able to receive supplies and use them for the operations in question? Is there a relevant difference between the definitions in Art. 11 (1) and Art. 11 (2) of the Implementing Regulation, and is it convincing that the ECJ assumes this distinction to apply also to periods prior to the entry into force of Art. 11?

b. Is a representative office capable of being a fixed establishment and if so, in what circumstances? The meaning of a representative office should be defined.

c. What is the remaining relevance of ECJ case C-396/02, DFDS; in particular, to what extent may other taxpayers constitute an "agency fixed establishment"? The relationship to an agency permanent establishment for direct tax purposes, as currently defined in Art. 5 (5) OECD-MC and as possibly extended according to the BEPS Action 7 discussion draft, should be clarified.

Although the VAT test for a fixed establishment ("FE") is different to the test for a permanent establishment ("PE") for direct taxes, there may be some merit in identifying the differences in the tests. Is it possible to have a FE but not a PE and vice versa? Is there evidence that a tax authority's decision on whether there is a FE is or may be influenced by a conclusion that there is a PE and vice versa? To what extent could the OECD Model Treaty Commentary and related case law regarding the concept of a "server PE" also offer guidance for the purposes of determining a "server FE"? Why is the approach for VAT different from the approach to the criteria for determining whether there is a PE? Developments in the OECD's ongoing BEPS work on identifying a PE should be taken into account and not disregarded.

Is the underlying rational for the CJEUs conclusion anti-abusive even though the case is not directly concerned with abuse?

4. LEGAL PRINCIPLES

Sixth Directive 77/388/EEC and Directive 2006/112/EC (before 1 January 2010)

The place where a service was supplied was deemed to be:

- the place where the supplier had established his business or had a fixed establishment from which the service is supplied, or
- in the absence of such a place of business or fixed establishment, the place where he had his permanent address or usually resided (article 9(1).

Articles 9(2) and (3) contained further provisions, which are referred to where appropriate.

VAT Directive 2006/112/EC (from 1 January 2010)

Supplies to taxable persons (article 44)

The place of supply of services to a taxable person is where that person has established its business.

However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services is the place where that fixed establishment is located.

In the absence of such a place of establishment or fixed establishment, the place of supply of services is the place where the taxable person who receives such services has his permanent address or usually resides.

Supplies to non-taxable persons (article 45)

The place of supply of services to a non-taxable person is where the supplier has established its business.

However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services is the place where that fixed establishment is located.

In the absence of such a place of establishment or fixed establishment, the place of supply of services is the place where the supplier has his permanent address or usually resides.

Chapter 3 of Title V also contains further provisions which may be referred to where appropriate.

Implementing Regulation 282/2011

Recital 14 in the preamble to the Implementing Regulation states:

> 'To ensure the uniform application of rules relating to the place of taxable transactions, concepts such as the place where a taxable person has established his business, fixed establishment, permanent address and the place where a person usually resides should be clarified. While taking

> into account the case law of the Court of Justice [of the European Union], the use of criteria which are as clear and objective as possible should facilitate the practical application of these concepts.'

For the purposes of articles 44 and 45 of the VAT Directive 2006/112/EC, the place where the business of a taxable person is established is the place where the functions of the business's central administration are carried out (article 10(1)). Article 10 contains further provisions which may be referred to as necessary.

For the application of article 44 of the VAT Directive 2006/112/EC, a 'fixed establishment' is any establishment, other than the place of establishment of a business referred to in article 10 of this Regulation, 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(1)).

For the application of specified articles (including articles 45 and 192a), a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in article 10 of this Regulation, 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 (article 11(2)).

Articles 12 to 13a contain further provisions concerning the permanent address and usual residence of natural persons and where a non-taxable person is established.

Some observations on the above provisions

- The VAT Directive, in contrast to the Sixth Directive, contains separate provisions for supplies to taxable persons and non-taxable persons essentially because the place of supply is different dependant on the status of the customer.

- Article 9 in the Sixth Directive was a deeming provision. The VAT Directive provisions are definitive.

- Article 9 of the Sixth Directive was not supported by defining provisions, such as those appear in the Implementing Regulation.

- Recital 14 to the Implementing Regulation states that if the criteria for determining where a taxable person has, inter alia, a fixed establishment is clear and objective, that "should facilitate the *practical application*" of the concept.

- Article 10(1) of the Implementing Regulation introduces a central administration test, which is entirely new, although based on EU Case Law[3].

- Article 11(1) of the Implementing Regulation introduces a test of whether the taxable person to whom the supply is made is able to receive and use the services for its own needs. This was noted in [57] of the Court's judgment in *Welmory.*

- Article 11(2) of the Implementing Regulation introduces a test of whether a taxable person is able to provide the services which it supplies.

[3] Judgment of June 28, 2007, Planzer Luxembourg (C-73/06), [60] et seq.

- Whether anything turns on any one or more of these observations remains to be seen in how member states implement these provisions and possibly how the case law of the CJEU develops.

Principles derived from the case law of the CJEU on the provisions of the Sixth Directive

(a) The aim of article 9 of the Sixth Directive was to:

> "...establish a rational demarcation of the ambit of different national systems of value added tax legislation by **specifying in a uniform manner** the place of tax connection for the supply of services..." and
>
> "... avoid, firstly, conflicts of jurisdiction which may lead to double taxation and, secondly, to avoid non-taxation of receipts, as stated in paragraph (3), although only for specific situations" (*Berkholz* Case 168/84 [14] [4]; emphasis in bold added[5]; *Welmory* [43] and [51])

(b) The CJEU in *Berkholz* also established:

> "it is for the tax authorities of each member state to determine, on the basis of options offered by the directive which is the most appropriate point of connection from a fiscal viewpoint for a particular service" ([17]). In *Welmory*, the Court stated that "the national court has exclusive jurisdiction to verify such factors", ie whether or not the criteria for a fixed establishment is met in a given case. ([62])..
>
> "According to Article 9(1) the place where the supplier has established his business appears in this respect to be the preferred point of connection in the sense that there is an advantage in referring to some other establishment from which the service is supplied only if the connection with the principal place of business does not lead to a rational solution from the tax viewpoint or results in a conflict with another member-State." ([17]; in *Welmory*, the Court referred to the "primary point of reference" at [52] and [53])
>
> "... the connection of a particular service to an establishment other than the principal place of business only comes into question if that establishment has a sufficient minimum strength in the form of the permanent presence of the human and technical resources necessary for supplying specific services" ([18]. See also *DFDS* Case C260/95, [20]. In *Welmory*, see [58])

(c) The CJEU in *ARO Lease BV Case* C-190/95 added

> "an establishment must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question **on an independent basis**" ([16], emphasis in bold added. Also see [33] of Advocate General Kokott's opinion in *Welmory* and the Court's decision at [58] *y*))
>
> "19. Consequently, when a leasing company does not possess in a member state either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up or management decisions taken and thus to enable the services in question to be supplied on an independent basis, it cannot be regarded as having a fixed establishment in that state.

[4] References to paragraph numbers of the CJEU's decision or the opinion of the Advocate General are shown in the form "[*number*]".

[5] AG Cosmas's opinion *Faaborg-Gelting Linien* C-231/94, at [12] states, with reference to authorities, that the conceps set out in the VAT Direictive are Community concepts. That would include the concept of fixed establishment. That derives support from the Court's decision in *Berkholz* and its reference to the "uniform manner" in which the place of supply should be determined.

20. It is, moreover, clear from both the wording and the aim of art 9(1) and (2)(e) of the Sixth Directive and from the judgment in *Hamann* that neither the physical placing of vehicles at customers' disposal under leasing agreements nor the place at which they are used can be regarded as a **clear, simple and practical criterion**, in accordance with the spirit of the Sixth Directive, on which to base the existence of a fixed establishment.[6]

21. The existence of other factors and other transactions, such as those which take place in Belgium, ancillary and supplementary to the leasing services, cannot invalidate that conclusion. The fact that customers choose their vehicles themselves from Belgian dealers has no bearing on the place of establishment of the supplier of services. Nor can the self-employed intermediaries who bring interested customers into contact with ARO be regarded as permanent human resources within the meaning of the case law cited above. Finally, the fact that the vehicles concerned in the main proceedings are registered in Belgium, where road tax is also payable, relates to the place where they are used, and that factor, in accordance with the case law cited above, is irrelevant for the purposes of applying art 9(1) of the Sixth Directive." (emphasis in bold added)

(d) In *DFDS* Case C260/95, the Court held that

"...consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system." and "Systematic reliance on the place where the supplier has established his business could in fact lead to distortions of competition, in that it might encourage undertakings trading in one member state to establish their businesses, in order to avoid taxation, in another member state which has availed itself of the possibility of maintaining the VAT exemption for the services in question " ([23]).

(e) In the same case, which was concerned with the question whether a subsidiary company, which had its own legal personality, of a parent company could give rise to a fixed establishment, the Court held that it was where

"... that company, which acts as a mere auxiliary organ of the [parent company], has the human and technical resources characteristic of a fixed establishment." ([29])

(f) In *FCE Bank* C-210/04 the Court stated that:

"39. It should be noted that the OECD Convention is irrelevant since it concerns direct taxation whereas VAT is an indirect tax."

(g) In *Planzer Luxembourg* Case C-73/06 it stated:

"56. A fixed installation used by the undertaking only for **preparatory or auxiliary activities**, such as recruitment of staff or purchase of the technical means needed for carrying out the undertaking's tasks, does not constitute a fixed establishment"[7] (emphasis in bold added).

[6] The Court in *Welmory* also referred to criteria, whcih shoudl be "clear, simple and practical and offers great legal certainty" ([55]).

[7] AG La Pergola's opinion on DFDS case referred to the capability of a fixed establishment to carry out taxable transactions so that it refers solely to an establishment from which services may be provided: the fact that the Community legislature decided not to adopt an opinion put forward by the Value Added Tax Committee — and included in the Proposal for a Nineteenth Directive — which contemplated a new paragraph, paragraph to Art. 9, would have adopted an extensive definition of fixed establishment embracing any fixed installation of a taxable person, *'even if no taxable transaction can be carried out there.* '

Welmory

Welmory is the first case concerned with the construction article 44 of the VAT Directive and provisions in the Implementing Regulation.

The decision of the Court is summarised above. The following observations are derived from the opinion of Advocate General Kokott.

- Recital 3 of Directive 2008/8, first sentence, states that

  > "For all supplies of services the place of taxation should, in principle, be the place where the actual consumption takes place." [5].

- The "foundations" for interpreting the term "fixed establishment" are based on two ideas, namely (1) the allocation between the Member States of the power to tax and (2) the avoidance of an unreasonable administrative burden on taxable persons ([19] and [22]).

- As to the first of those ideas,

  > "the uniform determination throughout the EU of the place of supply of a service is specifically intended to determine unequivocally the right to tax and thereby avoid both double taxation and non taxation"

  and that assists in guaranteeing legal certainty [26].

- As to the second of those ideas, there must be legal certainty [29].

- The CJEU in *DFDS* only interpreted the special rule in article 307(2) of the VAT Directive in which the single service is to be taxed under special rules applying to tour operators [36].

- For reasons of legal certainty, the precedence in consistent case-law given by the CJEU to the place of business (referring to *Berkholz* , *ARO Lease* and other cases) should also be extended to the application of Article 44 of the VAT Directive [44].

- "In the case of doubt, the assumption is that no fixed establishment exists" [45].

- It is for the referring court to make a finding on the basis of the facts, to which it alone as full access [46].

- It is not necessary for the taxable person to have at its disposal human resource employed by it or technical resources which it owns [48]. However, based on the requirement of sufficient degree of permanence for a fixed establishment, the taxable person must nevertheless "have comparable control over the human and technical resources" [51].

- The establishment must be capable of using services for its own needs [54].

5. RELATIONSHIP BETWEEN THE VAT IMPLEMENTING REGULATION AND THE CJEU'S CASE LAW

The CJEU held that its case law on article 9(1) of the Sixth Directive can "in principle be applied mutatis mutandis to the interpretation of article 44 of the VAT Directive" (paragraph 43). It also held that as the objective of the Implementing Regulation is to ensure a more uniform application of the VAT system the conclusion set out in the last sentence had support in the Implementing Regulation. Annex 2 sets out analysis of the basis on which that conclusion may be challenged.

6. PERMANENCE TEST

The definition of a Fixed Establishment in Article 11 Regulation 282/2011 requires that a Fixed Establishment is "characterised by a sufficient degree of permanence", thus adding a time element to the definition. The question arises what amounts to a 'sufficient degree of permanence'. Related questions include whether sufficient degree of permanence is identified by reference to transactions carried out by an operator or some other factors. For example can the carrying out of a single transaction (even if performance of contract requires a longer period of e.g. 3 to 6 months), amount to a sufficient degree of permanence? The requirement of "permanence" forces tax payers and tax authorities to consider a multitude of factors over an uncertain period of time to establish that requirement with a certain degree of legal certainty.

In paragraph 51 of her opinion as of May 15, 2014, Advocate General Kokott postulated that employment and lease contracts are required in particular in relation to the human and technical resources. In paragraph 52 of her opinion, Advocate General Kokott refers to the possibility of a taxable person having immediate and constant access to human and technical resources of a different taxable person. The terms "employment contract" as well as "constant access" may not provide a sufficient minimum period, in particular where employment is or may be of short duration.

It might be taken from the opinion of Advocate General Kokott in *Welmory* that a single transaction of a taxable person acting for another taxable person on its own cannot constitute a fixed establishment.

The discussions in the VAT committee (88th meeting July 13-14, 2009, document taxud.d.1(2009)358416-634) also referred to the human and technical resources needing to be **permanently present** as well as the **degree of** needing to be **sufficient**. That approach follows established CJEU jurisprudence, which has repeatedly referred to "resources necessary… are permanently present", (see *Berkholz*, C-68/84; *DFDS* C-260/95; *Planzer Luxembourg Sárl*, C-73/06).

The examples 6 and 8 in Annex 3 show that the presence of an operator in another Member State may only over time morph into a fixed establishment. The difficulty is identifying at which point in time the line is crossed from not having a fixed establishment to one arising. Each case is likely to be fact sensitive. The question will then be, whether such an emerging fixed establishment is considered for VAT purposes with retro-active effect (*ex tunc*) or only from the point in time in which the presence of the VAT payer has crossed the line to a permanent presence (*ex nunc*).

An *ex-nunc*-assumption of a fixed establishment exposes operators to a risk of penalties and interests on VAT, as the operator may not be able to recognize the point at which a fixed establishment arises.

An *ex-tunc*-approach would create even greater risk to penalties and interest on VAT.

Additionally, there is risk of double-taxation if the Member State of principal establishment has a different approach with regard to the permanence test.

Legal certainty may be achieved by establishing a rule or rules which set criteria for whether or not there is a fixed establishment. For example, Article 5 para. 3 (b) of the UN Model Double Taxation Convention (2011) on the definition of a service permanent establishment provides:

The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.

For VAT purposes, consideration should be given to whether a similar rule could be established, or alternatively, rules similar to the more traditional concept of a permanent establishment (with stronger emphasis on the aspect of a "fixed" establishment) as defined in Art. 5 para. 1 OECD Model Convention. Guidance to operators may for example indicate circumstances in which a fixed establishment would not arise where an operator does not have suitable human and technical resources before the expiry of a certain minimum period such as 183 days except in circumstances indicated by such guidance (see Example 8 in Annex 3). Regarding building sites and construction projects, the 12-months requirement of Art. 5 para. 3 OECD Model Convention could be applied for the purposes of a Value Added Tax assessment, too (see Examples 3 and 4 in Annex 3. This would avoid mismatches in the direct and indirect tax treatment of such sites. Moreover, while the concept of permanent establishment generally serves a purpose within the context of direct taxes that is different from the objectives underlying the notion of fixed establishment within the framework of the VAT Directive, both concepts seem to coincide regarding the relevance of the requirement of sufficient permanence: it indicates a sufficiently stable nexus with the relevant jurisdiction of economic activity and thereby ensures that taxation in this jurisdiction can be effectively complied with by the taxpayer and administered by tax authorities.

In any event, it should be acknowledged that in contrast to a position for direct tax, the supplier and customer must be in a position to determine the existence of a 'fixed establishment at the time when the transaction is carried out, rather than merely from an *ex post* perspective after the end of the tax period. The principle of legal certainty requires that they must be able to rely on criteria and corresponding evidence that is available for them in the due course of carrying out their business. If the permanence of the taxable person's fixed establishment is in issue, it would therefore seem appropriate to permit reliance on that taxable person's intentions, at the time of the transaction, to establish a 'permanent' presence within the meaning of the relevant criteria, as supported by

objective evidence to be procured upon request of tax authorities[8]. If a counterparty of taxable person has to assess the 'permanence' of the establishment of the taxable person party to the transaction, the counterparty should be allowed to rely on the factual information and declarations provided by taxable person, and in particular on a VAT identification number provided for the fixed establishment in issue, and verify that information by normal commercial security measures, in analogy to the provision of Art. 20 VAT Implementing Regulation.

Interaction with Article 47 Vat Directive

Where article 47 (supply of services connected with immovable property) applies, the concept of fixed establishment is "irrelevant" for determining the place of supply of the services[9] but might be "relevant" for determining the person liable to pay VAT. Article 47 applies regardless of the existence of any fixed establishment of the supplier or of the recipient; and the place of supply of services is where the land is located. The supplier is obliged to comply with all obligations, including registration for VAT and accounting for VAT, in the Member State where the land is located unless the member state provides for tax to be accounted for by the recipient of the supply pursuant to article 194 or 199 VAT Directive. Nevertheless, in this respect article 192a VAT Directive[10] has to be considered and thus, it must be determined whether the land related supply was provided in the Member State where the land is located with the involvement of a fixed establishment of the supplier. Essentially a single land related supply would be within the scope of article 47 VAT Directive.

Article 47 gives rise to a number of complex issues. The European Commission has published draft explanatory notes on its application which should be considered in relation to land related services. Those notes only deal with land related services. They do not deal with other unrelated supplies the operator may make. In the case of such other unrelated supplies[11], the rules on fixed establishment considered in this paper would apply as well as any other applicable rules, such as those on the place of supply or on the person liable to pay VAT.

7. SUITABLE STRUCTURE IN TERMS OF HUMAN AND TECHNICAL RESOURCES

Article 11(1) and (2) of the Implementing Regulation require, in addition to sufficient degree of permanence, characteristics of a "suitable structure in terms of human and technical resources" to enable an operator to receive and use the services supplied to it for its own needs or as appropriate, to provide the services which it supplies.

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8 See, by analogy, CJEU 14 February 1985, case 268/83, Rompelman, EU:C:1985:74, para. 24.

9 Draft explanatory notes published by the European Commission on 4 June 2015, paragraph 26 in section 1.10.

10 Note: Article 192a VAT Directive is of general application "*For the purpose of this Section…*[Section 1 Person liable for payment of VAT to the tax authorities].."including article 194 and 199 VAT Directive.

11 For example the place of supply for services unrelated to land that are acquired by an establishment that qualifies as a fixed estabishment in Member State A has to be defined according to article 44 VAT Directive, even if the services acquired are used by that fixed establishement for providing land related services within the scope of article 47 VAT Directive in Member State B for which the fixed establishment is liable to pay VAT in member state B.

Generally, the CJEU has regarded this criteria to be cumulative[12], such that both human and technical resources must be present to a sufficient degree for there to be an FE. By necessity, the sufficiency or adequacy of the structure in terms of human and technical resources must be assessed on a case-by-case basis, in the context of the specific facts and circumstances, recognising the following factors.

- One scenario may require a different level of human and/or technical resources than another scenario.

- Due regard should be given to the nature of the business activity and the human resource and/or the technical resource needs of that activity as a whole.

- The nature of business activity is particularly relevant in the context of e-commerce businesses, which are operationally dependent on technical resources, such that the presence of key technical resources in a country may arguably give rise to an FE . There is little CJEU guidance on this matter since most CJEU case law deals with 'traditional' businesses involving direct supplier-customer interaction. *Welmory* was the first case in the context of e-commerce businesses. By their nature, such businesses rely on certain resources more than others, such as an information technology platform and remote customer support functionality. In *Welmory* the CJEU attributed relevance to the specific resources such as computer servers, software, servicing and the system for concluding contracts with consumers, maintaining that if, upon assessment of the facts by the national court, these resources were not present in the territory then the court would be led to conclude that the company did not have an FE in the territory since it did not have the necessary infrastructure to receive services and use them for their business.[13]

- Technological developments have enhanced the ability for enterprises in the digital economy to carry on activities without requiring the level of infrastructure that a traditional business requires. That allows flexibility and in certain cases enables businesses to operate remotely from a multiple locations, in some cases even with little human intervention. However, arguably the reluctance of the Court to find the existence of an FE in a number of the FE cases may suggest that the mere presence of a server and other technological facilities in a location other than where an enterprise has established its business should not give rise to an FE, in particular where that server is the sole nexus to the location concerned. If one were to decide otherwise, the rationality test contemplated above in section 5 could nevertheless lead to the result that the place of supply is not where the server is located but where the business is established.

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[12] In *Berkholz* the criteria were expressly cumulative ("both human and technical resources"), whilst in later cases a less rigid approach appears to have been adopted.

[13] Paras 61 and 63. The relevance of 'technical' resources was also highlighted by AG Poaires Maduro in *Ral Channel Islands* in whose view the relevance of the resources should be viewed in the context of the operations in question, such that it is those resources which are directly involved in the provision of the supply, i.e. the conclusion and performance of customer contracts, which must be under the direct dependence of the supplier in order for a conclusion to be drawn that an FE exists. The AG held that in this sector (amusement arcades) the slot machines are the crucial and sole structure that has to be under the direct dependence of the taxable person to allow the conclusion that it is where these are installed that an FE exists.

- The notion of 'human resources' suggests need for the presence of staff / personnel of the business. Employees of a business can give rise to an FE. In specific cases the question may arise how many employees are required for there to be an FE. AG Kokott in *Welmory*, stated that it is not necessary that the human resources must be employed by the taxable person. The availability of such resources over which the taxable person has 'comparable control' may be sufficient. This view reflected the opinion of AG Poiares Maduro in *RAL Channel Islands* who maintained that it is not absolutely indispensable that persons are the taxable person's own staff for an FE to be created. AG Maduro referred to the 'dependence' of the human resources. The view here was that whilst in principle, one taxable person should not as such constitute a fixed establishment of another separate taxable person, where the second taxable person outsources staff from the first taxable person, who places them at the former's disposal and under his control, then that could result in a sufficient degree of 'dependence' of one entity over the other such that could give rise to the existence of a FE. The notion of 'comparable control' suggests a level of control comparable to that typically exercised by an entity over employees. It suggests that where employees of one entity are placed under the control and direction of another entity, which exercises a sufficient level of influence over the duties and functions of those employees, that could give rise to an FE if a sufficient degree of other resources are also present. The supply of staff should not automatically give rise to the creation of an FE. However, it is possible that the placing of staff at the disposal of another taxable person could result in the satisfaction of the human resources requirement. That could be especially so, if viewed in the context of the activities of the taxable person and other resources available to that person. By contrast, the mere fact that a subcontractor is entrusted with carrying out certain activities for the taxable person, and in doing so relies on employees that continue to be under his direction – rather than under the direct control of the taxable person – is not sufficient to assume that the latter disposes of the necessary human resources to create a fixed establishment (see Examples 2, 3, 5, 6, 7 and 8 in Annex 3). In a similar vein, it is not necessary that the taxable person owns the technical resources that it relies on in order to carry out its business activities. It is sufficient that such resources are put at its disposal or made available upon request by the client or by a third party on a contractual basis, or that they are generally accessible during the performance of the service (see Examples 4, 6 and 8 in Annex 3).

- The human and technical resources should be sufficient for and capable of the supply of services of the business (for the purposes of applying article 45 of the VAT Directive) or receiving the services required for the business (for the purposes of applying article 44 of the VAT Directive). The two requirements in article 11 of the Regulation are not intended to establish two different definitions for there to be an FE which exist independently of each other, i.e. the 'purchasing' FE and the 'supplying' FE[14].

[14] We understand that this is also the view of the Commission Services, as expressed in VAT Committee Working Paper 857, footnote 5.

Art. 11 VAT Implementing Regulation 282/2011 furthermore presupposes the existence of a "structure" in relation to the relevant human and technical resources. This can only be assumed if there is a sufficiently stable nexus of the business activities to certain premises where those activities are coordinated and organized on-site. A merely transient or incidental connection of certain business activities with a particular site (such as the examples mentioned in paras 4 et seq. of the Model Commentary to Art. 5 OECD Model Convention) is not sufficient to constitute a fixed establishment (see Examples 4, 5, 6 and 8 in Annex 3).

Agents

In legal terms the notion of agent refers generally to that person who acts on behalf of another person, typically having the authority to negotiate on behalf of another person (the Principal) or to negotiate and conclude transactions in the name of and/or on behalf of the Principal. The VAT Directive distinguishes between the agency relationship into two distinct categories for the purposes of determining the liability of the supply of agency/intermediary services namely

- the Disclosed Agent, i.e. the agent acting in the name and on behalf of a disclosed Principal (for example, the 'Commercial Agent'[15]); and

- the Undisclosed Agent, i.e. the agent acting in its own name but on behalf of an undisclosed principal[16] (for example, the 'Commission Agent' or 'Commissionaire').

The presence of agents / intermediaries of a principal in a country could in certain circumstances constitute a *suitable structure in terms of human and technical resources* for the purposes of creating an FE of the principal in that country. The CJEU in *ARO Lease* stated that it may be concluded that whether a business having an agent in a jurisdiction can be said to have an FE in that jurisdiction, ultimately depends on the extent to which that business is able to carry out its activities in that jurisdiction (through the agent) "on an independent basis"[17]. The activities performed by the agent, and the relationship between the agent and the principal are relevant determining criteria. In particular, the basic premise resulting from CJEU case-law is that the key factor would be that of 'dependence'. For example, in *DFDS* the CJEU held that in order to determine whether the travel agent actually had an establishment in the Member State in question, it was necessary first to ascertain whether or not the 'sales and port agent' operating in that State on its behalf was independent from him.

[15] The definition of 'commercial agent' in Directive 86653/EEC refers to: "a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal." The concept of commercial agency was examined by AG La Pergola in DFDS, in the context of examining the issue of dependence, more specifically in determining under what circumstances the agent must be regarded as distinct from its principal.

[16] Article 28 of the VAT Directive.

[17] ARO Lease C-190/95, para. 19.

The activities of a 'dependent agent'[18] who acts on behalf of the principal in business activities, and which has limited operational autonomy, may create a FE of the principal. This presupposes that the agent is carrying out economic activities on the instruction and under the control of the principal. The notion of 'dependence' has been examined from a structural and functional perspective.[19] Relevant considerations in the assessment of the role of the agent and the notion of 'dependence' would be:

- whether the agent is involved in the negotiation, conclusion and execution of contracts relating to the business of the company (i.e. supplies to third parties). In *ARO Lease* self-employed intermediaries who merely brought potential customers into contact with ARO, and were not involved in the drawing up or performance of the contracts did not, in the opinion of the Court, constitute 'permanent human resources' for the purposes of creating an FE;

- it may be inferred that an agent's involvement solely in certain preparatory or promotional aspects of the businesses would not be sufficient

- the activities of agents involved in the negotiation, conclusion and execution of contracts for the procurement of goods or services which relate to the internal operations of the business are arguably not sufficient to amount to an FE;

- whether the agent bears any of the financial risks may be relevant to the assessment. This criterion was considered by the AG in *DFDS* with reference to the CJEU decisions in competition cases dealing with the application of article 85 EEC (now article 81 EC), maintaining that *"representatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking"*.[20] The link between the economic risks and 'dependence' was also considered relevant by the CJEU in *FCE Bank* (pursuant to AG Leger's point on this matter).

The above considerations also may apply in the context of the definition of a recipient fixed establishment within the meaning of Art. 44 VAT Directive, as can be inferred from the conclusions drawn in section 9 below. Furthermore, the 'permanence' criterion stipulated in article 11 of the Regulation may be interpreted as requiring that the activities of the agents are exercised on a regular basis, having regard to the nature of the business activities of the Principal and the operations carried out within the country in which the agent is present, and not merely on a one-off / intermittent basis.

[18] The notion of a 'dependent agent' is one which is commonly associated with the OECD Commentary to article 5 of the OECD Model Treaty. It is acknowledged that the independent vs. dependent agent reflects the basic 'Agency PE' test for the purposes of tax treaties based on the OECD Model and that the notion of FE is a community concept that is independent of the concept of Permanent Establishment.

[19] AG La Pergola in *DFDS.*

[20] see Joined Cases 40/73 to 48/73, 50/73, 54 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 539.

Where applying the above criteria still leaves doubt as to whether an agency gives rise to an FE, the rationality test may engage to assist in reaching a conclusion (see the section on the rationality test).

8. FIXED ESTABLISHMENT THROUGH A PARENT SUBSIDIARY RELATIONSHIP

The CJEU has dealt with the issue of whether a parent subsidiary relationship can give rise to a fixed establishment in another Member State in several cases[21]. Most extensive considerations was given by the Court (and Advocate General) in the *DFDS*' case.

In *DFDS* the starting point in the Court's analysis was to decide whether

> *"*the travel agent actually has such an establishment in the Member State in question, it is necessary first to ascertain whether or not the company operating in that State on behalf of the agent is independent from him"[22].

Therefore the basic position of the Court was that a separate legal entity may constitute a fixed establishment of another taxable person only if it is not independent from that taxable person. The question arises how independence falls to be tested. As a starting point, the mere fact that a subsidiary is wholly owned does not mean that it is not independent: the presumption is that it is independent.

In *Daimler* the Court pointed out that

> "it is sufficient to note that a wholly-owned subsidiary such as that referred to by the national court is a taxable legal person on its own account and that the purchases of goods at issue in the main proceedings were not made by it"[23].

In her opinion on Welmory AG Kokott made even stronger statement confirming exceptionality of the situation where a separate legal entity may be considered a fixed establishment of another person:

> *"*... it serves the purpose of legal certainty in regard to the person liable for tax if *a* legal person with its own legal personality cannot at the same time be the fixed establishment of a different legal person"[24].

However, in *DFDS* the fact that the subsidiary had its own legal personality and owned its premises were considered by the Court not to be conclusive, on their own, from the perspective of independence. Instead, the Court stated "*DFDS's subsidiary is wholly owned by it and as to the various contractual obligations imposed on the subsidiary by its*

[21] C-260/95, DFDS AS, joined cases C-318/11 and C-319/11, Daimler AG and Widex AS and C-605/12, Welmory.
[22] para 25.
[23] para 48.
[24] para 36.

parent, shows that the company established in the United Kingdom merely acts as an auxiliary organ of its parent"[25].

In other words, the finding that the subsidiary was bound by several contractual obligations which imposed significant restrictions on the operations of the subsidiary was a strong indicator that it was not independent from its parent company and, in consequence, was acting as an auxiliary organ of its parent. Such lack of independence led the Court to conclude that the subsidiary was a fixed establishment of its parent company.

This was confirmed in *Daimler* where the CJEU, referring to its judgment in DFDS, stated that

> "in the case which gave rise to the judgment in DFDS, the independence status of the subsidiary was disregarded in favour of the commercial reality only to ascertain which of the parent company and the subsidiary had actually carried out the active taxable transactions of supplies of services in dispute in the main proceedings and, subsequently, which was the Member State of taxation for those transactions"[26].

That statement emphasises that a formally independent legal entity may constitute a fixed establishment of another entity only in specific circumstances where the real independence of that entity is lost. Therefore the situation where formally independent legal entity may constitute a fixed establishment of another entity should be seen as exceptional (see Example 7 in Annex 3).

In her opinion in *Welmory* AG Kokott expressed the following views on the DFDS' judgment.

> "In this judgment the Court can be understood as stating that a company which, although having its own legal personality, is completely controlled by its parent company may be regarded as a fixed establishment of the parent company. For the present case this would be significant inasmuch as the Cypriot company was, for part of the period disputed in the main proceedings, Welmory's sole shareholder"[27].

She has also agreed with the CJEU in that

> "the judgment in DFDS is not, however, capable of general application."

Accordingly, the mere fact that an entity is wholly owned by another entity does not in itself conclusively create a fixed establishment of that latter entity. The fact that the parent company may be in a formal position to control the policy and management of the subsidiary by virtue of its shareholding and power to appoint management is necessary but not sufficient to compromise the independence of the subsidiary. Something more is necessary (see Example 1 in Annex 3)

That was endorsed by the CJEU in *DFDS*, where the Danish parent company (DFDS AS) and its UK subsidiary (DFDS Ltd)

[25] para 26.
[26] para 49.
[27] para 35.

> concluded an agency agreement which placed several obligations on the subsidiary, few of them of specific importance. By this agreement UK subsidiary became obliged, among others, to consult with the parent company employment of management staff as well as its marketing and advertising activities. DFDS Ltd was also not allowed to work for other passenger transport companies without the parent company's prior consent.
>
> In return the parent company paid a gross commission on all fares sold by DFDS Ltd acting in the name and on behalf of DFDS AS and reimbursed marketing and advertising expenses of DFDS Ltd. As AG La Pergola pointed out in his opinion on *DFDS*, in financial matters the discretion enjoyed by the English company is extremely limited.

That structure gave rise to the following consequences:

- DFDS Ltd operated exclusively for DFDS AS, marketing and selling only tours of its parent company;

- all revenue obtained by DFDS Ltd was generated from its services provided for DFDS AS,

- DFDS Ltd did not assume financial risk resulting from its activities for the benefit of a parent company;

- DFDS Ltd was not legally able - without specific consent of its parent company - to enter into any business relation with any other tour operator; and

- DFDS Ltd was not able to independently decide about hiring of its management staff. [28]

That made DFDS Ltd dependent upon its parent to a degree that it lost its requisite independence. Those factors caused, from the functional perspective, DFDS Ltd to act as an auxiliary organ to DFDS AS forming an integral part of DFDS AS undertaking. As AG La Pergola noted, DFDS Ltd

> "has no effective independence from the former [DFDS AS] in the conduct of its business"[29].

In other words DFDS Ltd was not seen by the Court as a fixed establishment of its parent company because it was wholly owned by the latter. It was treated as a fixed establishment because two conditions were met, namely:

1 DFDS Ltd was wholly owned by the parent, therefore the parent company had control over DFDS Ltd, and

2 contractual obligations accepted by it led to the full functional dependence of DFDS Ltd; and

[28] See paras 3, 4, 22 and 23 of AG La Pergola opinion in DFDS.
[29] para 22.

In its jurisprudence on competition law CJEU ruled that a formally independent entity may form an economic unit with the principal. The Court decided in *Suiker Unie*[30] case, where a producer had entered into an agreement with the trade representatives from other Member States to act in the name and for the account of the principal, accepting the principal's instructions, to promote its interests etc. Moreover the principal granted to such an agents exclusivity on specified territories. The CJEU stated

> "If such an agent works for his principal he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking"[31].

The fact that a subsidiary is not acting independently and as a result is to be seen as an auxiliary organ forming an "economic unit" with its parent leads to the conclusion that it may be regarded as a fixed establishment of the parent.

Therefore, it results from the CJEU's jurisprudence that a separate legal entity may become a fixed establishment of another person in a case when it relinquishes the standard attributes of independence and where another person has sufficient legal power to control the management and functions of that entity.

This may be the case of parent subsidiary relationship where a parent clearly has a sufficient legal power to control the management of subsidiary. However that subsidiary may be regarded as a fixed establishment of the parent only if this sufficient legal power to control the management of that subsidiary is effectively used in such a manner that it takes standard attributes of independence (such as decisions regarding entering into contracts with the broad range of the customers/suppliers, hiring of management, setting prices, assuming financial risks of operations etc.) away from the subsidiary.

If such standard business decisions cannot be taken by a subsidiary without consent of its parent and no financial risk resulting from the business relations will be assumed by such subsidiary then its independence may be only formal while in reality such subsidiary acts as an auxiliary organ of its parent not being different from internal unit of the latter. If, in terms of independence, it does not differ from the internal unit of a parent then possibly there is no reason to treat such subsidiary as an entity separate from the parent.

Therefore only in the case where such subsidiary, formally independent entity, acts in reality as the part of the undertaking of its parent not being different from an internal unit (division) of parent, it may be treated as fixed establishment of its parent.

9. RECIPIENT FIXED ESTABLISHMENT

In *Welmory*, the CJEU held that for the purpose of Art. 44 VAT Directive, "a fixed establishment must be characterized 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*."[32] The criteria that the Court has established in

[30] **Joined cases C-40 to 48, 50, 54 to 56, 111, 113 and 114-73**
[31] para 539.
[32] CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, para. 58 (emphasis added).

Welmory correspond with the provision of Art. 11 (1) VAT Implementing Regulation, pursuant to which "for the application of Article 44 of Directive 2006/112/EC, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterized 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*."[33] The Court has indeed explicitly taken Art. 11 (1) VAT Implementing Regulation into account in its findings in *Welmory*, even though the Regulation was not yet in force at the material time[34]. Therefore, the *Welmory* judgement arguably sets a precedent also for the interpretation of Art. 11 (1) VAT Implementing Regulation.

A recipient fixed establishment is sometimes also referred to as 'passive' fixed establishment, suggesting that the receipt and the use of supplies may be passive in nature and not directly related to any output supplies. However, it is unclear whether the wording ("receive and use") refers to any kind of business use of the supplies received, or whether it would support an argument that the human and technical resources must enable the fixed establishment to become actively involved in making taxable supplies vis-à-vis the customers of the business.

Article 11 (1) of the Implementing Regulation does not specify what the 'use' of the supplies by the recipient fixed establishment must be for. By contrast, for the purpose of Art. 45, 56 (2), and 192a VAT Directive, Art. 11 (2) VAT Implementing Regulation clearly states that "a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterized 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.*"[35] If a recipient fixed establishment could be assumed to exist regardless of its ability to carry out output supplies, Art. 11 VAT Implementing Regulation would expose a dualistic concept of fixed establishment, depending on the context in which it is used in the VAT Directive.

In its earlier case law, the Court had always relied on the autonomous provision of services, rather than on the capability to receive and use services, as a prerequisite for the existence of a fixed establishment[36] because there was no equivalent of article 44 VAT Directive. However, in *Welmory* the Court explained that a modification was needed in order to reflect that "in the context of Article 44 of the VAT Directive, the place of supply of services is no longer determined by reference to the taxable person supplying the services but by reference to the taxable person receiving them. The concept of fixed establishment must therefore be determined in relation to the taxable person receiving the services."[37] The Court has not however referred to the words "and use" in article 11 Implementing Regulation, which appears to be an oversight. Accordingly the Court's approach could lead to the view that the introduction of Art. 44 into the VAT Directive as of 2010 has thus made it necessary to distinguish between two types of fixed

[33] Emphasis added.
[34] See CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, para. 46.
[35] Emphasis added.
[36] See, for instance, CJEU 4 July 1985, 168/84, Berkholz, EU:C:1985:299, para. 18; 2 May 1996, C-231/94, Faarborg-Gelting Linien, EU:C:1996:184, para. 17; 17 July 1997, C-190/95, ARO Lease, EU:C:1997:374, paras. 15-16; 7 May 1998, C-390/96, Lease Plan, EU:C:1998:206, para. 24; 28 June 2007, C-73/06, Planzer **Luxembourg**, EU:C:2007:397, para. 54.
[37] CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, para. 57.

establishments: the 'active' fixed establishment of a taxable person which is relied on as a connecting factor because it has supplied, or at least potentially could supply, goods or services, on the one hand; and the recipient or 'passive' fixed establishment of a taxable person that serves as a proxy for the place of supply because it is receiving and using a service for its own needs, on the other hand.

It is unclear, however, how significant the differences between the two categories of a fixed establishment – and therefore also between the definitions of Art. 11 (1) and (2) VAT Implementing Regulation – actually are in the light of the *Welmory* judgement. In her Opinion preceding the Court's decision, Advocate General *Kokott* had mentioned the possibility that beyond the requirement of being capable of receiving and using services, a fixed establishment within the meaning of the second sentence of Article 44 VAT Directive might also have to be capable of performing its own taxable supplies. However, the Advocate General did not find it necessary to analyse this aspect any further, because she considered any such eventual, additional criterion to be fulfilled in the *Welmory* case, anyway[38].

The Court did not explicitly resolve the question, either. However, it has indicated that the 'own needs' for which the services must be 'used' by the customer's establishment must qualify as economic activities. This is clearly stated in the French version of the judgement (French being the working language of the Court):

> "... pour qu'elle soit considérée ... comme disposant d'un établissement stable, au sens de l'article 44 de la directive TVA, la société chypriote doit disposer ... à tout le moins d'une structure caractérisée par un degré suffisant de permanence, apte, en termes de moyens humains et techniques, à lui permettre de recevoir en Pologne les prestations de services qui lui sont fournies par la société polonaise *et de les utiliser aux fins de son activité économique* ... "[39]

The Polish version of the ruling, and many other language versions, are equally clear.[40] It is moreover settled case law that in a VAT context, 'economic activities' are such that fall within the scope of the VAT Directive, i.e. they consist in making taxable supplies of goods and services; and they are to be distinguished from non-economic activities which, in themselves, do not fall within the scope of the VAT Directive[41]. [42]. Moreover, the Court has referred to "its" (i.e. the fixed establishment's) economic activities, thus making it clear that the use of inputs must lead to the provision of output supplies in the same jurisdiction. Against this background, the requirement of a use for the 'own needs" of the fixed establishment could have been meant by the Court to be equivalent to the requirement that the fixed establishment must be capable, in terms of human and technical resources, to use purchased services for the purpose of making its own taxable supplies. This would imply that the recipient fixed establishment must have a structure that is

[38] AG Kokott 15 May 2014, C-605/12, Welmory, EU:C:2014:340, para. 43.
[39] See CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, para. 59.
[40] See CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, paras. 59 and 61: "do celów jej działalności gospodarczej" (Polish); see furthermore, e.g., the German, Italian, and Spanish version of the judgement.
[41] See, for instance, CJEU 13 March 2008, C-437/06, Securenta, EU:C:2008:166, para. 26.
[42] See, for instance, CJEU 13 March 2008, C-437/06, Securenta, EU:C:2008:166, para. 26.

suitable to enable it to interact directly with customers of the business and to carry out essential and substantial elements of the services provided to them.

This would furthermore be in conformity with earlier case law of the Court, on which the Court relied to deduce its definition of the recipient fixed establishment[43]. The Court's case law has furthermore also inspired Art. 11 VAT Implementing Regulation[44].

In its *ARO Lease* judgement, the Court stated that: "… an establishment must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis."[45]

In the *Planzer Luxembourg* judgment, the Court ruled that "a fixed installation used by the undertaking only for preparatory or auxiliary activities, such as recruitment of staff or purchase of the technical means needed for carrying out the undertaking's tasks, does not constitute a fixed establishment."[46]

A restrictive construction of the notion of recipient fixed establishment, would thus offer legal certainty by allowing to rely on clarifications made in earlier case law of the Court.

Moreover, it would also avoid rendering the requirement of "suitable human and technical resources" redundant. If the use of purchased supplies for an establishment that carries out mere preparatory, auxiliary, or – in general – purely internal activities for the business customer would be sufficient to qualify as a use 'for its own needs', the requirement of 'a suitable structure in terms of human and technical resources' now laid down in Art. 11 (1) VAT Implementing Regulation would become meaningless. Since even a bare minimum of human or technical resources occasionally needs services to function properly, any kind of 'structure' would always have to be held as suitable to receive and use services; effectively, the only requirement for a recipient establishment would then be a certain degree of permanent presence of – even negligible – business resources in the respective jurisdiction.

Under a narrow construction of Art. 11 (1) Implementing Regulation, business establishments that act merely as purchasing departments and business establishments that are only entrusted with administrative or technical back office functions therefore should not constitute a fixed establishment for the purposes of Art. 44 VAT Directive and in the meaning of Art. 11 (1) VAT Implementing Regulation. The same applies to representative offices of the business customer if they are only responsible for marketing the businesses own services, accounting, and other out of scope activities, but are not involved in the supply of goods or services in the respective jurisdiction.

Notwithstanding the above findings, some doubt still remains regarding the proper interpretation of the concept of recipient fixed establishment, because the purposive construction often preferred by the Court does not allow any firm conclusions regarding the criterion of own "use" of input supplies by the establishment.

[43] See CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, para. 58.
[44] See recital 14 to the preamble of the VAT Implementing Regulation; see also CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, para. 58.
[45] CJEU 17 July 1997, C-190/95, ARO Lease, EU:C:1997:374, para. 16.
[46] CJEU 28 June 2007, C-73/06, Planzer **Luxembourg**, EU:C:2007:397, para. 56.

The recipient fixed establishment serves as a connecting factor for the determination of the place of supply. The Court has pointed out in earlier case law that in the harmonized system of EU VAT, the place of supply rules seek to avoid conflicts of jurisdiction by allocating, to the extent feasible, the jurisdiction to tax to the Member State of consumption according to the destination principle[47]. In the B2B context of Art. 44 VAT Directive in which the notion of recipient fixed establishment is situated, it must furthermore be taken into account that VAT is a tax on *final* consumption, whereas businesses should, by virtue of the neutrality principle, be relieved entirely of the burden of the VAT payable or paid in the course of all their taxable economic activities. Therefore, the place of supply rule of Art. 44 VAT Directive must be so construed such that there is a certain likelihood that the jurisdiction to tax is allocated to the Member State where *final* consumption will occur[48]. This is particularly relevant in cases where the business customer is not (fully) entitled to an input VAT deduction or refund. However, the place of establishment of the business customer receiving services is no reliable proxy for the place of final consumption if the respective establishment is not capable of carrying out taxable onward supplies. For example, while the existence of a business customer's representative office or a similar structure may indicate the place of subsequent final consumption of a service that is provided to this office, this would not be the case regarding supplies made to a test site such as the one discussed in the *Daimler* case (CJEU 25 October 2012, C-318/11).

As pointed out above (section 3 on legal principles), the criteria relied on to define a fixed establishment should furthermore facilitate the practical application of the VAT system. An extensive interpretation of the concept of recipient fixed establishment, i.e. a low threshold for the "use" of the input supplies, would give mixed results regarding this objective. On the one hand, the supplier would be relieved from the need to know whether or not the establishment of business customer is capable of carrying out taxable supplies itself. By contrast, if this criterion would be inherent to the definition of recipient fixed establishment under a more narrow construction of the term, it could sometimes only be presumed to be fulfilled rather than effectively verified on a transaction by transaction basis, especially based on whether the establishment communicates its own VAT Identification Number to the supplier. On the other hand, a very low threshold for the assumption of a recipient fixed establishment would be liable to impose significant administrative burdens on the business customer. Under the reverse charge method, the recipient of the supply could then have to pay VAT in a jurisdiction where he or she has only a minimum presence and no qualified personnel do deal with VAT reporting obligations. Moreover, if the establishment does not carry out any taxable supplies itself, the ensuing input VAT could only be recovered through the cumbersome refund procedure laid down in Directive 2008/9/EC. For the purposes of the refund procedure, the business customer would be considered not to be established in the Member State of taxation, because Art. 3 of Directive 2008/9/EC clearly requires a fixed establishment 'from which business transactions were effected' as a point of reference[49].

[47] See, for instance, CJEU 3 September 2009, C-37/08, RCI Europe, EU:C:2009:507, para. 39; CJEU 20 February 1997, C-260/95, DFDS, EU:C:1997:77, paras. 22-24.

[48] See also the Opinion of AG Kokott 11 January 2007, C-146/05, Colleé, EU:C:2007:12, para. 19: The destination principle is concerned with final consumption, not with 'business consumption'.

[49] See also CJEU 25 October 2012, C-318/11 and C-319/11, Daimler and Widex, EU:C:2012:666, paras. 36-37 and 43.

Finally, there is one contextual argument that would tend to support a broad reading of the concept of recipient fixed establishment, instead of requiring the capability to carry out taxable supplies itself. Art. 13a (b) Implementing Regulation relies on a definition identical to the one of Art. 11 (1) Implementing Regulation in order to delineate the concept of recipient "establishment" of a non-taxable legal person. However, the latter does not engage into any taxable activities, which means that a "use [of] the services supplied for its own needs" must necessarily refer to the legal person's non-taxable business activities. As a consequence, a narrow construction of the recipient fixed establishment in Art. 11 (1) Implementing Regulation would imply a divergence from the interpretation of the same concept in Art. 13a (b) Implementing Regulation, despite the congruence in the wording of both provisions.

In the light of all of the above, it cannot be decided with sufficient legal certainty whether the concept of recipient fixed establishment laid down in Art. 11 (1) VAT Implementing Directive and apparently endorsed by the Court in the *Welmory* judgement should be construed broadly or narrowly. The better arguments would seem to support a more traditional approach with a relatively high threshold, in line with the Court's settled case law before the introduction of Art. 11 Implementing Regulation. But there are also significant aspects that could support a dualistic concept of fixed establishment in Art. 11 (1) and (2) Implementing Regulation. It would thus be highly desirable if the Commission or the VAT Committee could provide some guidance in this regard, or if a clarification could be introduced into the Implementing Regulation.

10. THE RATIONALITY TEST

In general

In very early judgments the CJEU took a two-step approach in determining if an establishment might be considered a "fixed establishment" relevant for the application of VAT. The first step tested whether an operator had more than one establishment. The second step tested whether attributing economic activity to the operator's principal establishment would not lead to a rational result (the "**Rationality Test**"). In such judgments the CJEU acknowledged that a fixed establishment is an alternative to the place where the operator has established its business and has to be applied to the extent that the reference to the latter place would not give rise to a "rational result" for VAT purposes[50].

The Rationality Test has been constantly mentioned in the jurisprudence of the CJEU concerning fixed establishments. Analysis of that jurisprudence of the CJEU indicates that the Rationality Test:

- does not engage if there is no establishment which can be regarded as a fixed establishment[51];

[50] See case 168/84, *Berkholz*, (para. 17): "*According to article 9(1), the place where the supplier has established his business is a primary point of reference inasmuch as regard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State*".

[51] See C-190/95, *ARO Lease* and C-390/96, *Lease Plan* where fixed establishments were found not to exist.

- is grounded on the general principle that VAT must be charged in the place of consumption taking into consideration the actual economic situation[52];
- is strong enough to essentially pierce the corporate veil of a foreign subsidiary[53];
- should not lead to double taxation since such a result would not be rational[54].

The CJEU has analyzed the Rationality Test in detail only in case C-260/95, *DFDS*[55]. It is also necessary to consider that analysis with opinions of Advocate Generals. To this end, the most comprehensive analysis of the Rationality Test can be found in the opinion of AG Maduro to case C-452/03 *RAL (Channel Island)* which was not decided by the CJEU on the basis of the Rationality Test but on the basis of the character of the services for the purposes of the place of supply rule.

AG Maduro identified the following features of the Rationality Test:

- when the CJEU set out the criterion for determining whether the reference to the place of business led to an irrational result for tax purposes it required a predetermined analysis to be made of the consequences in relation with the scope of VAT common system[56].

- the provisions laid down (by article 9 of the Sixth Directive) must be construed in such a way to ensure legal certainty[57]. The CJEU clarified that article 9 of the Sixth Directive was aimed to introduce a clear, simple and practical criterion (i.e. the main place of business or a FE) for determining the place of supply for supplies of services[58] so that the Rationality Test shall be construed accordingly. The same principle should apply to article 44.

On the basis of the above, AG Maduro concluded that the Rationality Test should be carried out in accordance with the principles enshrined by case C-260/95, *DFDS*[59]. He

[52] See case C-260/95, *DFDS* (para. 22) the result would be not rational if *it takes no account of the actual place of consumption (in the decision "where the tours are marketed which should be considered the place were, whatever the customer's destination, the national authorities have good reason to take into consideration as the most appropriate point of reference"). On this point the decision follows what stated by AG La Pergola (para. 32) which took into consideration the "actual economic situation". See also* Point 32 of the conclusions of AG Mancini in *Berkholz*: "*That is the basic criterion: the VAT system must be applied in a manner as far as possible in harmony with the actual economic situation. I do not consider it logical for the subsidiary criterion, when the possibility of applying it is assessed, to be automatically treated as being subordinate to that of the place where the supplier has established his business.*". The argument has also been developed in the conclusions of AG Maduro in case C-452/03, *RAL (Channel Islands)* para. 44: "*I am of the opinion that here it is necessary to undertake an analysis that is especially responsive to the factual economic and commercial reality of the case*" so that one may argue that the Rationality Test should be construed on the basis of a substantive approach.

[53] See case C-260/95, *DFDS*.

[54] See case C-111/14, *GST*.

[55] See above at footnote 52.

[56] See para. 60 of the conclusions of AG Maduro in *RAL (Channel Island).*

[57] See para. 30 of the conclusions of AG Jacobs in case, C-438/01, *Design Concept.*

[58] See case C-190/95, *Aro Lease* para. 26. The same argument has been mentioned by AG Kokott in her opinion to case C-605/12, *Welmory* (para. 29): "*for the service provider there must be legal certainty as to the existence of a fixed establishment of the recipient of his service. This is because, depending on the existence of such a fixed establishment within the territory of the country, the service provider will or will not be liable for tax*".

[59] *DFDS* is the only case in the jurisprudence of the CJEU where an examination of the rationality of the result for VAT purposes was undertaken. In other cases, that criterion did not have to be applied because the Court did not recognize the existence of a FE.

also argued that the place where an undertaking has established its business is not "rational" if it could lead to a distortion of competition and if it encouraged undertakings to establish their business in one Member State rather than another for the purposes of avoiding taxation[60]. Further, from the analysis of the cases *Berkholz* and *Faaborg-Gelting*, it appears that the Court links the Rationality Test to the aspect that subjection to VAT system is not at risk if the place of business criterion is applied[61].

In other words, according to AG Maduro the Rationality Test should be construed in such a way that the place where the suppliers had decided to establish their place of business is not rational if its application leads to a non-taxation either in the Member State of residence or in any other Member State[62].

The Rationality Test is aimed at safeguarding, on the one hand against non-taxation of services, and on the other hand that the place of supply rules can be applied with certainty by businesses. It may require a purported fixed establishment to be disregarded or found not to exist in the following scenarios, in particular namely: (a) if there exists only a loose nexus between the jurisdiction where the fixed establishment is considered to be located and the place of consumption, such as for instance in case of server fixed establishment; (b) if it is not administratively feasible to determine and verify the location of the fixed establishment at the time when the transaction occurs, such as in case of a mobile structure such as a ship; or (c) if the purported fixed establishment has been involved as part of a VAT avoidance scheme.

In case C-605/12, *Welmory* the Rationality Test was referred to in paragraph 53. In paragraph 54, the Court stated that the test established in the context of article 9 of the Sixth Directive is "also valid in relation to article 44 of the VAT Directive". Thus, the Court has come to the conclusion that despite the change in the wording of the relevant place of supply rule, and notwithstanding the fact that the clarification provided for in Art. 21 of VAT Implementing Regulation 282/2011 does not mention the rationality requirement established in the Court's previous case law, the latter continues to apply.

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60 See para 62, of the conclusions of AG Maduro in *RAL (Channel Island)*: "*the Court considered that to treat the services supplied by a company through undertakings operating on its behalf in one country as being supplied from a different country where the tour operator had established its business would not be rational for tax purposes. In effect 'systematic reliance on the place where the supplier has established his business could in fact lead to distortions of competition, in that it might encourage undertakings trading in one Member State to establish their businesses, in order to avoid taxation, in another Member State which has availed itself of the possibility of maintaining the VAT exemption for the services in question' (see case DFDS, para. 23)*".

61 According to AG Maduro "*if the place where the suppliers had decided to establish their place of business had in those cases been located outside the territory of the Community, the application of that connecting factor would certainly have raised many doubts*" (see para. 62 of the conclusions in *RAL (Channel Island*)).

62 This was indeed the result in case C-260/95, *DFDS*. In this context, it has been observed that "*what at first seemed to be a reluctance by the CJEU [in Berkholz] to refer to secondary establishments […] was merely a mean to avoid businesses escaping the Community's tax jurisdiction by creating national establishments outside Community territory; in the final analysis […] rational results for tax purposes count, if the result is positive taxation rather than exemption*" (B. Terra and J. Kajus, *A guide to the European VAT Directives*, Volume 1, 2012, p. 658).

11. CONCLUSIONS

It would be premature to conclude whether the Implementing Regulation provides

> '… criteria which are as clear and objective as possible…' which "… facilitate the practical application of" the concept of a fixed establishment.

The CJEU's decision in *Welmory* provides some useful guidance, but it also leaves a number of unanswered questions.

The CJEU in *Welmory* adopted its jurisprudence on article 9 Sixth Directive for construing provisions introduced into the VAT Directive by the Implementing Directive. Although that approach is warranted by EU law, Annex 2 to this paper sets out circumstances in which that conclusion may be challenged.

Perhaps greatest uncertainty remains over whether the jurisprudence of article 9 Sixth directive lends itself to the construction of article 44 VAT Directive and article 11 Implementing Directive and when a fixed establishment which is capable of 'receiving and using' supplies may arise. This paper raises questions in relation to what have been termed 'recipient fixed establishments'.

There can be little doubt that each particular case may be fact sensitive. In other words, whether or not there is a fixed establishment in a member state would be determined on the facts of each case. *Welmory* confirms that it would be for the national court to determine each case with guidance provided by the CJEU.

CJEU jurisprudence has established a rationality test which essentially tests a conclusion reached by applying established rules for rationality in the context of the VAT system as a whole. Although the CJEU referred to the rationality test in *Welmory*, that test was not analysed or applied in the context of the VAT system as a whole in that case. As such, the CJEU's decision in *Welmory* does not advance the jurisprudence on the rationality test.

This paper seeks to deal with a series of practical issues which arise in determining whether a fixed establishment exists. It does not seek to be exhaustive in its analysis. The following broad conclusions may be derived from analysis in this paper.

- The permanence test suggests that a single transaction is unlikely to give rise to a fixed establishment save in exceptional circumstances. Operators would benefit from guidance for establishing when a fixed establishment comes into existence where it develops over a period of time.

- Advocate General Kokott in *Welmory* expressed the opinion, also previously expressed, that human and technical resources do not have to be employed or owned by an operator for a fixed establishment to come into existence. The CJEU was silent on the matter. Essentially the test is whether in the case of contracted in resources, they are independent or whether the operator has 'comparable control' over them in the same way as it would have control over employees.

- A separate entity, such as a subsidiary of a parent company would exceptionally give rise to a fixed establishment of the parent. Mere control over the subsidiary or full ownership, on their own, would not be sufficient. Something more by way of evidence that the subsidiary operates as an auxiliary organ of the parent would be required.

As each case is fact sensitive, operators and member states would benefit from having explanatory notes on fixed establishments which can be produced by the European Commission in consultation with member states. In the context of direct taxes and when a permanent establishment may come into existence, commentary supplementing the OECD Model Tax Convention on Income and on Capital and the United Nations Model Double Taxation Convention provide useful guidance to operators and their adviser. Explanatory notes on fixed establishments may adopt a similar approach.

ANNEX 1
Welmory - some additional facts

Procedure

Welmory was initiated by the application for the tax ruling. According to the procedure if an applicant is not satisfied with the ruling it may appeal and if this does not solve his/her doubts he/she may complain to the Regional Administrative Court.

What is important is that the ruling is issued purely on a basis of facts presented by an applicant. Neither the tax office nor the Administrative Court are allowed/obliged to analyse facts and circumstances which were not presented by the applicant.

Therefore a potential abuse of law was not raised as an issue at the beginning of the process. Also the issue of taxable base was not initially raised as an issue.

Only when Supreme Administrative Court decided to refer to the CJ Polish government (no longer bound by the ruling procedure) it presented some arguments regarding potential abuse of law and the taxable base.

Modus operandi

Business activities of Welmory PL were carried on by use of the www.za10groszy.pl website. By this website a user could purchase "BIDs" (BIDs were being sold by Welmory LTD with its registered seat in Cyprus). The BIDs were used for bidding at auctions. By use of the BIDs a user could outbid another user such that the former increased the price for the goods that were the subject of an auction.

When the auction was won the user could purchase the goods with the ultimate price that he declared. It seemed that he paid the price to Welmory PL. After the payment was received, Welmory PL dispatched the goods to the winner. The user received an invoice for the goods purchased. However, it is not possible to receive the invoice for the purchased BIDs.

The BIDs could not be used to pay for the goods won at the auction. They were used only for the bidding purposes. Therefore the price to be paid for the goods could be rather low as the bidder was using the BIDs for which it already paid.

ANNEX 2

RELATIONSHIP BETWEEN THE VAT IMPLEMENTING REGULATION AND THE CJEU'S CASE LAW

The VAT Implementing Regulation, and in particular its Art. 11 regarding the definitions of 'fixed establishment', has its legal basis in Art. 397 of the VAT Directive 2006/112/EC. Pursuant to Art. 397 VAT Directive, "the Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive."
Before the entry into force of the Treaty of Lisbon in December 2009, this authorization to enact implementing measures in a simplified procedure (as compared to amendments of the Directive itself) was covered by the third indent of Article 202 EC Treaty. This former provision stipulated that "to ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty, … confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down… The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself." This provision and the corresponding jurisprudence of the Court were primarily concerned with the horizontal division of legislative and administrative powers, i.e. with the institutional balance, at Union level. The concept of implementation was therefore broadly construed, and included measures of a quasi-legislative nature, with regard to which it was to be decided under what circumstances, and to what extent, they could be enacted in a simplified procedure at Union level by either the Commission or the Council[63].

However, the Treaty of Lisbon has changed the primary Union law perspective of implementing measures, and it now puts greater emphasis on the idea of subsidiary in the vertical relationship between the Union level and Member States[64]. To this effect, Art. 291 TFEU provides

> "1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
> 2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council…
> 4. The word "implementing" shall be inserted in the title of implementing acts."

By contrast, the horizontal issue of the division of quasi-lawmaking powers among Union institutions is now addressed in the provision of Art. 290 (1) TFEU[65]. According to the latter provision, "a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the

[63] For a detailed analysis, see *Haselmann*, Delegation und Durchführung gemäß Art. 290 und 291 AEUV, 2012, pp. 164 et seq, with further references.

[64] As regards the different perspective of the predecessor provision of Art. 202 EC Treaty, see also CJEU 18 January 2005, C-257/01, Commission/Council, EU:C:2005:25, para. 66: "Article 202 EC, third indent, governs … the division of implementing powers as between the Council and the Commission, [but] the provision does not concern the division of powers as between the Community and the Member States."

[65] See also *Craig*, The Role of the European Parliament under the Lisbon Treaty, in Griller/Ziller (eds), *The Lisbon Treaty, 2008, p. 109 (at p. 124).*

delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power." Art. 290 (3) TFEU specifies that "the adjective 'delegated' shall be inserted in the title of delegated acts."

Even though Art. 291 (2) TFEU is thus primarily concerned with keeping implementing measures at Union level within strict limits of subsidiarity in the vertical relationship to the Member States, whereas Art. 290 (1) TFEU is concerned with establishing the limits of simplified procedures for quasi-legislative measures in the horizontal relationship between the EU institutions, the concepts of implementing powers and delegated powers are clearly meant to be mutually exclusive[66]. This can already be inferred from the requirement to designate any measures clearly as either "implementing" act or "delegated" act. The concept of "implementation" therefore has no longer a quasi-legislative meaning, and does no longer cover the amendment or supplementation of the basic legislative act, contrary to the situation under Art. 202, third indent of the EC Treaty. Indeed, the CJEU has made it clear in its Grand Chamber decision C-427/12, *Commission / Parliament and Council*[67], that it is now necessary to distinguish delegated powers within the meaning of Art. 290 (1) TFEU and implementing powers within the meaning of Art. 291 (2) TFEU not only with a view towards the respective adoption procedure, but also regarding their possible scope and content. The Court has held that:

> "36 Before the entry into force of the Treaty of Lisbon, the expression 'implementing powers' in the third indent of Article 202 EC covered the power to implement, at EU level, an EU legislative act or certain EU provisions and also, in certain circumstances, the power to adopt normative acts which supplement or amend certain non-essential elements of a legislative act. The European Convention proposed making a distinction between those two types of power, which is found in Articles I-35 and I-36 of the Draft Treaty establishing a Constitution for Europe. That amendment was ultimately incorporated in the Treaty of Lisbon in Articles 290 TFEU and 291 TFEU…
> 38 When the EU legislature confers, in a legislative act, a delegated power on the Commission pursuant to Article 290(1) TFEU, the Commission is called on to adopt rules which supplement or amend certain non-essential elements of that act.
> 39 By contrast, when the EU legislature confers an implementing power on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States."

Different from a delegated act, an implementing act that is based on Art. 291 (2) TFEU therefore cannot derogate from the provision of the corresponding basic act. Such an implementing act is invalid where it conflicts with the act on the basis of which it was adopted[68]. And even before the entry into force of the Treaty of Lisbon, the Court has consistently held that implementing powers granted under the third indent of Art. 202 EC Treaty authorize the adoption of "all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to it."[69]
The Treaty of Lisbon does not expressly address the question whether implementing powers whose conferral was originally based on Article 202 EC Treaty must now respect

[66] See also Communication from the Commission on the Implementation of Article 290 of the Treaty on the Functioning of the European Union, of 9 December 2009, COM(2009) 673 final, p. 3.
[67] CJEU 18 March 2014, C-427/12, Commission / Parliament and Council, EU:C:2014:170.
[68] See *Lenaerts/Van Nuffel*, European Union Law, Third Edition 2011, para. 17-007.
[69] See, for instance, CJEU 23 October 2007, C-403/05, Parliament / Commission, EU:C:2007:624, para. 51; 1 April 2008, C-14/06 and C-295/06, Parliament and Denmark / Commission, EU:C:2008:176, para. 52; each with further references.

the stricter limits of Art. 291 (2) TFEU. However, as a general rule any Union competence must be exercised in conformity with the version of the Founding Treaties that is in force at the time in which the corresponding legislative or executive powers are exercised, unless expressly specified otherwise in a grandfathering provision. Since December 2009, implementing measures based on Art. 397 VAT Directive therefore must respect the limits of implementing powers of the Union institutions that are now specified in Art. 291 (2) TFEU, in contrast to the broader concept of delegated powers pursuant to Art. 290 (1) TFEU. Consequently, the Commission itself has acknowledged in 2011 that "by its very nature, this [implementing] procedure is limited in scope and may not be used to amend the VAT Directive. Since no power has been delegated to the Commission [within the meaning of Art. 290 TFEU], all substantive changes therefore need to go through the normal legislative procedure, involving unanimous adoption by the Council."[70]

Against this background, the question arises as to whether the Council can lawfully enact, on the basis of Art. 397 VAT-Directive, an implementing measure that in clarifying or defining a legal concept of the VAT-Directive deviates from prior case law of the European Court of Justice, in which the same legal concept was interpreted differently by the Court.

Arguably, this could be the case regarding the definition of the passive 'fixed establishment' in Art. 11 (1) VAT Implementing Regulation 282/2011. Contrary to what the Court has held in its ruling on the *Welmory* case, it is questionable whether it can be "deduced from the Court's [prior] case-law on the point … that a fixed establishment must be characterized 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*"[71] in case of a passive fixed establishment, in conformity with Art. 11 (1) VAT Implementing Regulation. Instead the Court had always interpreted the concept of fixed establishment as a uniform one in the European VAT legislation, regardless of whether it was relied on in relation to a place of supply rule, regarding a reverse charge rule, or in the context of input VAT refund procedure. The Court had consistently held that the notion of fixed establishment "implies a minimum degree of stability derived from the permanent presence of both the human and technical resources *necessary for the provision of given services*... It thus requires a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, *to supply the services in question on an independent basis*."[72] In scholarly literature published before the *Welmory* ruling of the Court, serious doubts have therefore been expressed as to the compatibility of the definition of passive fixed establishment provided for in Art. 11 (1) VAT Implementing Regulation with the Directive's concept of fixed establishment, as interpreted by the Court[73].

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[70] See Commission Staff Working Document, Accompanying document to the Green Paper on the future of VAT – Towards a simpler, more robust and efficient VAT system, of 1 December 2010, SEC(2010) 1455 final, p. 52.

[71] CJEU 16 October 2014, C-605/12, Welmory, EU:C:2014:2298, para. 58 (emphasis added).

[72] See, for instance, CJEU 28 June 2007, C-73/06, Planzer **Luxembourg**, EU:C:2007:397, para. 54 (emphasis added); settled case law.

[73] See *de Wit*, The Fixed Establishment After the VAT Package, in van Arendonk et al. (eds.), VAT in an EU and International Perspective, 2011, p. 23 (at pp. 31 et seq.). See also, in more general terms, *Lejeune/Cortvriend/Accorsi*, IVM 2011, p. 144 (at p. 145): "The Implementing Regulation cannot amend the provisions of the VAT Directive and their interpretation by the Court of Justice of the European Union (ECJ)."

The Court itself has not as yet dealt with the question as to whether and if so, to what extent, implementing measures are allowed to deviate from its prior case law. Therefore, only preliminary conclusions to this point can be drawn here from the nature of the Court's case law, on the one hand, and the role of implementing powers within the new framework established by the Treaty of Lisbon, on the other hand.

It is settled case law of the Court that "the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC [now Art. 267 TFEU], the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force."[74] The Court thereby follows the civil law tradition according to which courts do not normally create 'new' law, but instead merely interpret the existing one, albeit with the possibility of setting precedent[75]. This normative status of the Court's case law implies that a deviation from it in an implementing act is not, in itself, an amendment of the relevant legislation that would be reserved to a delegated act.

Moreover, it is obvious that in general, there exists a margin of interpretation regarding secondary Union law concepts, albeit its degree may vary depending on the level of detail that the legislation provides for. This is not the least evidenced by the fact that the Court itself has repeatedly acknowledged the need to re-examine and also overrule its prior case law due to a different interpretation of the provisions at issue, without however stating that the prior interpretation was erroneous[76]. Indeed, the provision of Art. 291 (2) TFEU itself is based on the premise that Member States may reasonably disagree on how certain rules of secondary Union legislation are to be understood, and that such a situation may give rise to the need for implementing measures to ensure the *harmonized* implementation of Union law[77]. With respect to European VAT legislation in particular, Advocate General *Cosmas* has therefore correctly stated:

> *"*It is worth making the preliminary point that, when the Community legislature laid down the rules on the harmonization of the laws of the Member States relating to taxes, it did not formulate the relevant provisions of the Sixth Directive in a manner that was wholly clear and consistent. Responsibility should not be attributed to the legislature itself, but to the inherent incapacity of the terminology - where synonymous terms are sought in many different languages - to express a constantly changing reality and to stamp legal concepts with a clear inter-State and durable character."[78]

Against this background of a margin of interpretation to be conceded to any institution entrusted with the implementation and application of Union legislation, a departure from settled case law could therefore only be held to automatically constitute a violation of Art. 291 (2) TFEU if one were to assume that the Court's interpretation of EU secondary legislation is always to be regarded as the – only – correct interpretation of the law as it

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74 See, for instance, CJEU 6 March 2007, C-292/04, Meilicke, EU:C:2007:132, para. 34, with further references; *Wyatt and Dashwood's* European Union Law, 6th edition 2011, p. 229.

75 For a detailed analysis, see *Arnull*, The European Union and its Court of Justice, 2006, pp. 622 et seq.

76 See, for instance, CJEU 17 October 1990, C-10/89, HAG II, EU:C:1990:359, para. 10**;** CJEU 24 November 1993, C-267/91 and C-268/91, Keck and Mithouard, **EU:C:1993:905, paras. 14 and 16;** CJEU 30 June 1998, C-394/96, Brown, **EU:C:1998:331,** para. 27.

77 See also Communication from the Commission on the Implementation of Article 290 of the Treaty on the Functioning of the European Union, of 9 December 2009, COM(2009) 673 final, p. 4.

78 Opinion of Advocate General Cosmas 17 November 1998, C-216/97, Gregg and Gregg, EU:C:1998:546, para. 9.

stands, by virtue of the judicial authority of the Court. This would mean that the Court would have to be regarded the ultimate authority of interpretation of secondary Union law not only vis-à-vis the Member States, but also in relation to the other Union institutions in the exercise of any of their competences, including the exercise of implementing powers under Art. 291 (2) TFEU.

However, in the specific context of Art. 291 (2) TFEU such an assumption would render the instrument of implementing act largely meaningless, because the Court would then never be bound by the interpretative provisions of an implementing regulation or by an implementing directive. Under this premise, the Court could instead always set aside any interpretive provision of an implementing act as an unlawful amendment of the basic legislative act, merely on grounds that the Court has come to a different understanding of the interpreted Union law provision. Effectively, the Court would thereby be entitled to replace any implementing provision by its own legal findings as the solely admissible authoritative interpretation of the basic act. Such an assumption would however be contrary to the very notion of (implementing) directives and (implementing) regulations as legally binding acts (see Art. 288 TFEU), and it would thus impair the Union principle of legal certainty. It would also undermine the institutional priorities underlying the provision of Art. 291 (2) TFEU, pursuant to which it is the Commission or, exceptionally, the Council who are primarily called upon to ensure the harmonized implementation of Union legislation in a systematic manner, rather than the Court of Justice who interprets Union law only on an ad hoc basis.

It furthermore cannot be argued that implementing acts need to respect only the already existing case law of the Court, because this would lead to entirely arbitrary results. Where no case law of the Court exists as yet, an implementing act could then specify and define legal concepts of the basic legislative act, and the Court would subsequently be bound by this interpretation. Conversely, where the Court has already interpreted the basic act, the institution that adopts the implementing act would be bound by this interpretation and thus the Court's opinion would prevail. This would be alien to the approach of the Treaty to divide competences not according to the priority principle, but according to objective criteria.

In the light of the foregoing, it would appear to be reasonable to assume that an implementing act can substitute the case law of the Court by a distinct, authoritative interpretation of the Union legislation in issue, which subsequently becomes binding, in principle, also upon the Court. However, it is still for the Court to ensure that the provisions of the implementing act do not overstep the boundaries of rule interpretation and that they do not in reality attain the character of an amendment to the basic legislation, which is prohibited under the new concept of implementing powers enshrined in Art. 291 (2) TFEU, read together with Art. 290 (1) TFEU. The Court may and must therefore exercise judicial scrutiny as to whether the definitions and clarifications of the implementing act stay within a reasonable margin of interpretation of the corresponding legislative act. A balance must thus be sought between the exercise of judicial control regarding the Treaty limits for implementing powers as distinguished from delegated powers, on the one hand, and the need for the Court to respect the prerogative of interpretation that is arguably granted by the Treaty to the Commission or, as the case may be, to the Council through the conferral of implementing powers under Art. 291 (2) TFEU, on the other hand. It is suggested here that this could best be achieved by restricting the

Court's scrutiny to the question as to whether the interpretive provisions of an implementing act are in *clear* contradiction to the wording or stated aim of the provision, or to the relevant principles underlying it. A contradiction to earlier case law of the Court will indicate the need for close scrutiny to this effect, but it will not, in itself, be sufficient to come to such a conclusion.

With a view towards the definition of the passive fixed establishment laid down in Art. 11 (1) VAT Implementing Regulation, the above implies that a possible deviation from earlier case law of the court regarding the defining elements of a fixed establishment would not result in the invalidity of that provision. Instead, it must be examined whether the concept of Art. 11 (1) VAT Implementing Regulation, and its subsequent endorsement in the *Welmory* decision of the Court, respects the relevant principles underlying the use of the fixed establishment as a proxy for the place of consumption, as specified above in (section 3 on legal principles). This has been examined in section 9. In this section, it was concluded that Art. 11 (1) VAT Implementing Regulation can and should be interpreted in such a manner that a conflict with the relevant principles can be avoided. Therefore, the limits of the implementing powers of the Council have been respected.

ANNEX 3

EXAMPLES

Example 1

- A is established outside the EU ("**Country X**"). It employs 3000 employees in Country X.
- A wishes to manufacture products and sell them in the EU.
- A contracts the manufacturing operations to its group company (**M**) established in in an EU member state **(MS1)**. M manufactured the products for A.
- A also engages commissionaires (undisclosed agents) (**S**), also part of its group, to market A's products.
- A purchases raw materials and supplies them to M.
- S arranges sales for A. M arranges delivery of the goods directly to the customer.
- M and S have their own management and operate independently, i.e. they are not controlled by A and essentially trusted by A rather than being controlled through contracts or corporate powers.
- Staff employed by another group entity in MS1 only carry out preparatory or administrative activities, such as accounting, invoicing debt collection.
- A has no employees in MS1.
- A does not own or lease any assets in MS1 or have a warehouse in MS1.
- A has a VAT registration MS1.
- A is not capable of carrying on business in an independent manner in MS1.
- M and S are not dependent agents – they are independent.

The tax authority in MS1 claims that A had a fixed establishment in MS1 on the following key grounds:

- A uses human and technical resources of M and S in MS1.
- A remunerates M with a fee based on actual costs.
- A has a VAT registration in MS1.
- Although M [and S] were independent entities, they are auxiliary organs of A as they acted exclusively for A. They have sufficient human and technical resources in MS1.

Consequently, fees M charged for providing services (manufacturing services) to A would have been subject to VAT in MS1. A claimed that M supplied services to A in Country X, so they were outside the scope of VAT and therefore, not subject to VAT in MS1.

Assessment

There is no FE for the following reasons:

- A does not have technical resources at its own disposal, nor does it have its own employees there or exercise control over contracted in personnel in a comparable manner.
- DFDS exception probably does not apply, because it needs to be applied

restrictively and there is no indication that the group parent exercises full control in day-to-day management or otherwise – contractually – determined all relevant aspects of M's and S's business activities. That would be the case even if A has 100% shareholding in M and S.

- A's registration in MS1 does not alter the position.
- Essentially, A does not have a structure in MS1 to carry on a business there.

Example 2

- F is established in MS1. Its business consists of manufacturing boats.
- In order to expand its business, F engages an independent contractor P to manufacture boats in MS2.
- F has a VAT registration in MS2 because it will sell boats in MS2.
- F purchases components in MS2 and outside MS2 and has them delivered to P in MS2.
- P also purchases some components and a majority are owned by P.
- P sells boats manufactured by P to F in MS2 subject to VAT in MS2 – supply of goods.
- F, under its VAT registration in MS2, sells boats in and outside MS2.
- F purchases some services (transportation, translation etc.) from suppliers in MS2.
- Boats sold to F by P are stored at P's site. F does not have any site or warehouse or employees in MS2.

Assessment

F has no FE in MS2 for the following reasons:

- F does not own technical resources or employ staff in MS 2.
- The use of the staff and structure of contractors could only be sufficient in either one of two possible scenarios: (1) If F had a controlling shareholding in P and the additional criteria of the DFDS precedent were met; or (2) if F exercised a degree of control over the premises and staff of P that is comparable to the control he has over own technical and personal resources.

  In the case at hand, the facts do not support either of the aforementioned two possibilities. In the event of any dispute between F or P and MS2, whether F has comparable control over P's staff and resources would be a question of fact to be determined by the local court in MS2.

Example 3

- A is car manufacturer based in MS1.
- B is established outside MS1.
- B has agreed to act as a general contractor for A in the construction of a substantial and complex car plant (project lasting for more than 2 years).
- C is not established in MS1. C is a sub-contractors of B who carries out the actual construction work.
- C's contract with B lasts for more than 2 years.
- C performs it activities using its own staff located at A's premises in MS1. C is granted full access to the construction site.

Assessment

- B does not have an FE in MS1, because it does not have at its disposal a suitable structure in terms of human and technical resources to enable it to supply, or to receive and use, services. B does not employ any staff in MS1 and does not own premises there. The staff of C cannot be attributed to B, because B has no authority to instruct this personnel, and thus does not exercise a degree of control over it that would be comparable to the control over own employees.

- C has an FE in MS1 as its contract lasts for more than 2 years, indicating permanence, and its staff is located at A's premises in MS1. Moreover, C is granted full access to the construction site and therefore he can dispose of premises which are suitable to carry out his construction services. It is irrelevant that the premises are not owned by C.

Example 4

- E is established in MS1 and carries on a construction business.
- E is engaged on a single project to carry out works in MS2, which will last 6 to 24 months.
- E has a small mobile office in a container on the construction site.
- All necessary material and equipment are kept in the container on the construction site.
- E rents tools and machinery needed from local supplier S or they are provided by E's customer (C). The supplies are B2B.
- E's employee carry out the construction works in MS 2.
- E's employees carry out the engineering work in MS 1.

Assessment

In the case of land related services and installations, even though the place of supply is where the installation and activity is, many member states (E.g. in Spain, Belgium) operate the reverse charge and the supplier (E) does not have to register unless it has an FE, so FE issues arise.
E does potentially have an FE in MS1:

- E has sufficient control over technical resources in order to render supplies on a stable basis, thus it is irrelevant that they have been sub-contracted or rented rather than acquired.
- E relies on own employees, who are physically present in MS2 on a permanent basis, i.e. for the period of construction works carried out in MS2.
- E also has at its disposal premises in MS2 on which E's activities are organized, i.e. the small mobile container on the construction site.

However, the critical criterion for determining whether an FE actually exists is the requirement of permanence. If a 12 month rule for construction sites were to be adopted, if and when E knows that its installation will exceed 12 months at that point (and not retroactively) E acquires an FE. If objective evidence confirms that E did not know, then there would be no retroactive FE, but only when there is change of intention and E

knows the installation will last more than 12 months. If E knows but does not declare that knowledge, it would have exposure to having a retroactive FE from the date it had the requisite knowledge. That would give measure of certainty. Clear rules are needed to enable due compliance.

Example 5

- X is established outside the EU and has developed intellectual property for operating an ATM business in the EU (MS1) and outside the EU.
- X leases sites in MS1 at which ATMs are to be installed.
- X's associated company (established in the EU – in MS2) purchases the ATMs and leases them to X for use in its business.
- X engages third party unconnected contractors to (a) fill up the ATMs with cash and (b) service the machines
- X employs staff outside the EU to travel EU and non-EU states where the ATMs operate to monitor the business operations, e.g. deal with any issues which arise with sites where the ATMs are installed, meet third party contractors engaged to fill the machines and service them.

Issue: is X entitled to argue that X does not have FEs in the member states where it operates ATMs because it does not have human resources in those states?

Assessment

- X does not have an FE
- Although X has technical resources (the ATMs) which enable the business to operate and for X to earn commission from providing ATM services in MS1, X contracts human resources to fill up the machines and service them which enable the ATMs to continue functioning.

The CJEU, in its judgment in Welmory stated

> "60. The fact that a business such as that carried on by the Cypriot company at issue in the main proceedings, consisting in operating a system of electronic auctions which comprises, first, making an auction website available to the Polish company and, secondly, issuing and selling 'bids' to customers in Poland, can be carried on without requiring an effective human and material structure in Polish territory is not determinative. Despite its particular character, such a business requires at least a structure that is appropriate in terms especially of human and technical resources, such as appropriate computer equipment, servers and software."

This indicates that even though the ATM business can be carried on without effective human structure, something more is required, namely "a structure that is appropriate in terms especially of human and technical resources"

In this case the ATMs provide technical resources. But they cannot function without servicing and filling up. Engaging independent contractors to preform those functions does not give the necessary "structure".

Example 6

- A is a cosmetic surgeon and she is employed part-time by a hospital in MS1.
- Upon request and on average 10 days per month, A carries out cosmetic surgery for

two hospitals in MS2 on a freelance basis. The hospitals in MS2 provide the operating theatre, the medical equipment and the clinical staff needed to carry out the cosmetic surgery. Prior to and during the surgery, the staff is instructed by A. Moreover, A has a room at her disposal for the purposes of offering diagnosis, advice, and post-surgery follow-up examinations to her patients. The aforementioned premises are provided to A on an ad-hoc basis and they are also used for other purposes by the hospitals during her absence. Each hospital furthermore provides a storage room to A to be used exclusively for the storage of the case files of her patients.

- A is registered in the register of medical doctors of MS2.

Issue: Does A have a FE in MS2, i.e. an establishment characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable her to provide her services?

Assessment

A has two FEs in MS2. At each hospital, she has at her disposal a structure adequate, in terms of human and technical resources, to render her services on an independent basis. She has a degree of control over the hospital staff for the purpose of carrying out her medical work that is comparable to the control exercised over own employees. Moreover, she has a storage room at her disposal, access to which is fully controlled by her; and she is also granted exclusive physical use of the operating theatre, other rooms, as well as technical equipment, for the time of her presence at each hospital, to the extent needed for her to perform her services. The aforementioned structure also has a sufficient degree of permanence, because A carries out her activities at each hospital on a permanent basis. The fact that she is not physically present there on a continuous basis, but rather only 1-2 days per week on average, does not call this into question (at least) because she uninterruptedly has at her disposal a storage room at each hospital where her case files are stored.

Example 7

- Y's is established in MS1 and P is established outside MS2
- Y's business activity is rendering services for P. Y uses its own human and technical resources in performing those services.
- There is no parent subsidiary relation between Y and P. However, they are both a member of the same capital group.
- Y is obliged to carry out the following activities in MS1 under its contract with P:
  - processing the provided materials;
  - storage of materials and logistic services, consisting in transport of goods to the place of destination;
  - settlement of customs procedures.
- P does not have direct control over Y.
- Y also provides services to other companies in their corporate group.

Issue: does P have an FE in MS1 on the basis that P has sufficient human and technical resources sufficient to carry on activity in MS1?

Assessment

P does not have a FE in MS1, because P does not have at its disposal a suitable structure in terms of human and technical resources in MS1.

P does not have the legal title or even the factual right of disposal of production means and technical resources owned and used by Y to perform its services in MS1. Furthermore, P cannot directly instruct, and thus does not have a sufficient degree of control, over the employees (of Y) that actually carry out the economic activities in MS 1.
Finally, Y is not merely an auxiliary organ of P within the meaning of the DFDS judgement. The services rendered to Pare Y's own business activity organized under its own entrepreneurial responsibility. P does neither control the strategic nor the day-to-day management of Y.

Example 8

- P is a producer of coatings resident in MS1
- P rents a workshop from a facility provider ("**F")** in MS 2.
- P enters into a service contract with car manufacturer ("**C")** in MS2. P undertakes to coat cars provided by C.
- Instead of employing its own staff, P enters into a service contract with a service provider ("**S")** whereby S undertakes to provide S's employees to coat the cars for P for a fixed remuneration per month. The employees have to show up every working day in the workshop, irrespective whether a car is to be coated or not as P may not be able to predict when employees would be required to enable P to fulfil its obligations to C.
- The rental contract (between P and F) as well as both service contracts (between (i) P and C and (ii) P and S) have a minimum duration of one year and can be terminated on one month's notice.

Assessment:

Based on the statement given by Advocate General Kokott in paragraph 52 of her opinion in the "Welmory", the premises rented from F would constitute a fixed establishment of P in Member State B, as the technical resource (workshop rental from F) combined with the human resource (service contract with S, with S's employees working for P) will be permanently present in Member State B. Sufficient permanence would appear to derive from P having premises and control over the employees for at least one year and thereafter indefinitely until termination on one month's notice. P may furthermore exercise direct control over both, human and technical resources, comparable to the control that it would have over own premises and staff.

Variation

C in MS2 produces custom built cars only from time to time as the customer order such cars (so-called "build-to-order"). Accordingly (i) P's contract with F provides that P will have access to the premises on, say ten days' notice at a rent calculated at a daily rate of use; and (ii) P's contract with S provides that P's access to employees will on 5 days prior notice and on the basis of fixed remuneration per car coated. None of contracts have any minimum duration period.

- As a starting point, as P would only have access to the premises and E on giving prescribed notice and for limited duration, that would appear to indicate that P would not have sufficient degree of permanence to acquire a fixed establishment in Member State B.

- If in the first two years, P coats one car every 2 months for C, and only requires employees to be present in the workshop only one day every 2 months, P would have access to premises and E for a total of six days in each year. In that year, it is difficult to see how P could be said to have a fixed establishment in MS2, due to a lack of a permanent "structure" in terms of human and technical resources.

- In year 3 P coats 2 cars every week for C, meaning that employees are present in the workshop for 2 days per week and P requires premises for two days a week, although it would be required to give frequent and perhaps rolling notices to have access to the workshop and employees. Here, the view could reasonably be taken that P has a sufficient structure, in terms of human and technical resources, to carry out its economic activities in MS2 on a permanent basis.

  If a 183-day rule were to be adopted as a permanence test, if and when P knows that its coating activities in MS2 will last for more than 183 days, at that point (and not retroactively) P acquires an FE. If objective evidence confirms that P did not know, then there would be no retroactive FE, but only when there is change of intention.

Example 9

A has headquarters in MS 1 where it employs staff and has premises and technical resources. A supplies services.

A rents an office in MS2. The office is occupied by two employees of A being essentially front of house staff. The two employees do not have authority to act independently. They take orders and transmit them to A's headquarters in MS1. Only when A, at its headquarters, accepts the order does a supply take place.

A requires advertising for its business in MS2. The advertising is arranged by A's staff at the headquarters for A as a whole for marketing in MS1 and MS2. The contract for advertising services is signed by A at its headquarters. The advertising takes various forms but also includes displays at the rented office in MS2.

A authorises the staff in MS2 to enter into certain contracts that the office needs to

operate. For example, if the office needs a computer repaired, the staff in MS2 can engage a local IT technician in MS2

Assessment

The foregoing indicates that there A does not have a fixed establishment in MS2 as regards A activities in MS2.

However, in relation to the purchase of IT repair services, the issue arises whether there may be a recipient fixed establishment. There appears to be a sufficient degree of permanence indicated by the rented space, two employees and technical resources. At first sight, the office in MS2 is able to receive the IT services and "use" them for its own needs. But there is no indication of supplies being made from the office in MS2. Although article 9, which defines a taxable person, refers to economic activity being carried out in "any place", unless it can be shown that A will make supplies in MS2 from the office or receive supplies for which A is accountable for VAT under the reverse charge MS2, A would not be entitled to be registered in MS2 under article 214. In particular, article 214(1) (a) refers to supplies being made 'within the territory', which in this case would have to be MS2. If A is not entitled to be registered in MS2 and if the supplier of IT services were to charge VAT in MS2, A would have difficulty in recovering that VAT which would breach the principle of fiscal neutrality as A would still be incurring the input tax for its overall economic activities which include making supplies in MS1 but not MS2. This example reinforces that contention that for there to be a recipient fixed establishment, use of the inputs must nevertheless be for making supplies from that place, otherwise such place (in this case A's office in MS2) would not give rise to a fixed establishment in MS2. That result is technically the correct result even though alternative procedures, such as recovering input tax through the refund procedure may be available to A. Those alternative procedures create administrative burdens and involve other costs such as cash-flow costs.