PERMANENT ESTABLISHMENT AND FIXED ESTABLISHMENT IN THE CONTEXT OF THE SUBSIDIARY AND THE DIGITAL ECONOMY

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Abstract: The purpose of this paper is to present some challenges regarding the concepts "permanent establishment" (PE) and "fixed establishment" (FE) in the context of the subsidiary and the digital economy. These issues are some of the most discussed topics in the field of international and European tax law, which determines their relevance and growing research and practical interest.

Keywords: permanent establishment, fixed establishment, digital economy, subsidiary.

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Introduction

The challenges regarding the PE's and FE's legal nature are both as old and well-known and still remain up-to-date and without a definite answer.

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

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

This is not the case with the digital PE/FE. The idea of a digital PE is mainly based on the Proposal for a COUNCIL DIRECTIVE laying down the rules related to corporate taxation of a significant digital presence COM/2018/0147 (Proposal) in relation to the Action Plan 1 Base Erosion and Profit Shifting (BEPS) Project. Some countries have already taken such measures worldwide and the future seems increasingly uncertain for the traditional approach under Art. 5, para 1 OECD-MC that requires permanence at a specific geographical location for specific time.

The idea of a digital FE is still not so popular and widely discussed in the scientific community and has a very rare practical manifestation. As a summary, it can be pointed out that in most cases, little can be said about its constitution at this stage.

I. On the possibility of a PE's non-constitution

Art. 5, para 7 OECD-MC, Art. 5, para 8 United Nations Model Double Taxation Convention between Developed and Developing Countries (UN-MC) and Art. 5, para 7 United States Model Income Tax Convention (USA-MC) contain a similar provision on a subsidiary's tax treatment from a PE's perspective.[1] Upon careful reading and at first glance, it can be noted that in this case we cannot talk about the PE's constitution.

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

As seen from Art. 5, para 7 OECD-MC, the term "control" plays a crucial role. It is not conceptually outlined in the OECD-MC, so it is for every

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

state to design it according its internal understanding. For example, Bulgarian tax law outlines what is "control" in § 1, item 4 of the Additional Provisions of the Tax and Social Security Procedure Code (TSSPC). It is usually associated with a percentage of the right to vote and/or the company's participation. Sometimes, that is typical also of the Bulgarian tax perspective, the list of examples of its manifestations is non-exhaustive. According to Reimer and Rust, control shall not be exercised to talk about its existence (Reimer, Rust, 2015).

Art. 5, para 7 OECD-MC introduces two hypotheses about the possibility for a company to fall within the scope of the provision in question – through a PE or otherwise. Several things are noteworthy in this regard. First, here, unlike Art. 5, para 1 OECD-MC, the term "company" and not an "enterprise" is used. Such legislative technique regarding PEs is used only in Art. 5, para 8 OECD-MC, where the term "company" appears again. Both have their own definition in Art. 3 OECD-MC.[2] OECD-Commentary (Commentary), as an interpretive tool, is rather general and concise in this regard. Relying thereon, it can be concluded that the term "company" has a narrower scope and applies to strictly defined provisions, including the two above-mentioned.

The term "enterprise", on the other hand, is designed via the domestic law, and covers numerous manifestations, including independent activities. Moreover, it is not necessary to be conceptually introduced by Double Tax Treaties' (DTT) conclusion.[3]

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

Despite the use of "shall" for a PE's non-constitution in the provision in question, para 116 and 117 to Art. 5 of the Commentary examine cases regarding its possible existence. They can be defined as exception of the exception. For this purpose, reference is made to the previous paragraphs of Art. 5 OECD-MC. Commentary also contains exception to the exception of the exception – para 118. In this case, the emphasis is on the implication of the

[2] Art. 3, para 1, l. 'b' OECD-MC: the term 'company' means any body corporate or any entity that is treated as a body corporate for tax purposes

Art. 3, para 1, l. 'c' OECD-MC: the term 'enterprise' applies to carrying on of any business.

[3] OECD-Commentary, para 4 of Art. 3

terms “at the disposal” and “own personnel” which determines the need for careful individual analysis.

To sum up, Commentary contains only four paragraphs regarding Art. 5, para 7 OECD-MC, but half of them speak precisely about the PE’s possible constitution. OECD does not focus in detail on the elements contained in the interpretation of the provision in question, but pays attention to the practical aspects. Such an approach is both logically conditioned and carries a number of risks. The examined hypotheses show that, in fact, the provision is not as definite as it seems at first glance. Indeed, the variety of cases can lead to different tax treatment and an absolutization of Art. 5, para 7 OECD-MC as always non-constituting a PE is a convenient way for abuse of law. Therefore, the application of this exception presupposes the in-depth concept’s knowledge and in particular the traditional views followed in Art. 5, para 1 OECD-MC.

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

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

Secondment of employees to the parent company’s subsidiary does not constitute a PE in case Samsung Electronics Company Ltd.[4] In the present case, the head office was resident of South Korea and had two subsidiaries in India. India’s competent authorities considered that pursuant to Art. 5, para 2, l. ‘a’ DTT India -South Korea there was a PE’s existence for the parent company due to its place of management in India. They were also on the position that the Indian subsidiary acted as a dependent agent under Art. 5, para 5 DTT and the seconded South Korean employees met the requirements for service in a PE. In this regard, it was necessary to specify their exact function and their economic employer. Proceeding from the nature of their activities, it was concluded that they are rather auxiliary under Art. 5, para 4 DTT. They were also connected with the subsidiary’s business.

The following conclusions can be drawn from this judgement. The mere fact for a subsidiary’s presence does not preclude the possibility for a PE’s constitution. In this case, three options are examined. Two elements are crucial – what exactly is the activity performed by the seconded employees and for whom. Even if their formal employer is the South Korean company, it matters

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

who the economic employer is. Although appropriate arguments have been found that this is the subsidiary, the auxiliary nature of the activity is the reason for a PE's non-constitution, even if the opposite hypothesis exists.

The opposite conclusion was reached – for a PE's constitution due to the presence of a dependent agent, in case Daikin Industries Ltd., Gurgaon vs Acit Delhi Income Tax Appellate Tribunal (ITAT). [5] In the present case, a Japanese company had an Indian subsidiary. It performed both direct sales to Indian customers and to the subsidiary. In this regard, a parent company paid a commission for marketing services offered to the customers by the subsidiary. India's authorities applied the concept of dependent agent according to DTT Japan – India. Arguments therefor were that the subsidiary negotiates with the customers, including the amount of prices.

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

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

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

These two Indian judgements in question address the two opposite perspectives on the scope of Art. 5, para 7 OECD-MC.[6] Although they do not seem so complicated to provide proper tax treatment (in the first case the activities performed are auxiliary, while in the second there is insufficient

[5] Daikin Industries Ltd., Gurgaon vs Acit, New Delhi on 28 May, 2018

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

evidence), the following conclusion can be drawn. Upon their examination, the actual economic situation is taken into account. The possibility of a PE's constitution on all relevant paragraphs of Art. 5 OECD-MC is also analysed. This means that not only the traditional Art. 5, para 1 OECD-MC is examined, but all possible scenarios under this concept.

II. Digital PE- real illusion or complicated confusion?

Nowadays, one of the most controversial issues regarding PEs is their digitalization. This discussion is not new, but it always provokes different comments, many suggestions and almost no definite solutions.

In order to consider the possible digital PE's introduction, a number of queries should be answered. To begin with, before giving certain position, a comparison between a normal and digital economy should be made and in particular whether they really differ so much. The answer is somewhere in the middle. What they have in common is their ultimate goal – doing business in order to generate profit. Differences may be found in the methods therefor, as well as the means used.

The digital economy is not new a development, but more serious debate on tax challenges has relatively recently begun (OECD, Addressing Tax Challenges of the Digital Economy). OECD-Commentary also pays special attention to e-commerce in par. 122-131 to Art. 5 OECD-MC, but it affects a minimal part of the possible cases. This directly corresponds with the subsequent question whether all possible scenarios can be covered due to the dynamic nature of this type of activity.

The fact is, however, that the digital economy has become the preferred option due to the easy and fast way to interact, especially because of the current COVID situation. In this regard, an avalanche of questions is arising from a tax perspective. Some of them are related to the fair tax treatment, others – to the possible abuse. I share the view that the introduction of new digital taxes is a kind of tool for the survival of the states (Dourado, 2018). Thus, it is logically conditioned to pay attention to the possibility of a digital PE's constitution.

A number of authors have already explored the possibility of its introduction. The positions on this issue are diverse. Some admire such solutions as reflecting the modern needs. Others absolutely reject them as a belated and short-sighted change that cannot lead to a final decision. However, the truth is somewhere in the middle. Regardless of whether they are belated or short-sighted, a change is necessary, as these activities are common in our daily lives and their tax treatment cannot be postponed permanently.

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

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

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

What is intriguing is whether the normal PE's perception is ready to perceive such significantly different phenomenon. Even if we talk about following the modern trends, it seems that the focus has shifted to the introduction of a new PE's concept that will "merge" with the old one and complement it.

Another interesting point is whether the Proposal contradicts the primary EU law. The question of the legitimacy of digital taxes has already been discussed (Mason, Parada, 2020). Although the subject of the present study differs therefrom, some remarks should be made because of their possible indirect application. The paper in question draws the attention to the risk of discrimination in relation to the categories of companies or sectors that should pay digital taxes. If we think through this prism, we should consider the inequality between the national economies of the Member States with regard to the introduced thresholds for digital PEs. An example is the comparison between Luxembourg and Germany.

The proposal does not mention that this threshold can be changed in relation to other factors. However, if it is permissible, other challenges would

arise, such as how it should be calculated, what the minimums and maximums are, whether it can be changed annually.

Another point regarding the quantitative threshold is whether it can be circumvented in order not to constitute a significant digital presence. The answer is affirmative, insofar as this is typical for other tax concepts, as well as due to the precisely preset numbers. All this shows that such an approach may lead to numerous risks.

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

Another issue would be when one state has a digital PE definition, but the other does not. DTT between Bulgaria and Saudi Arabia is such an example. In this case, the most appropriate option seems the initiation of a mutual agreement procedure (Antonov, 2021). This shows that the introduction of digital PEs in some states does not seem to be the final solution. Its absence in the OECD-MC cannot guarantee fair tax treatment unless it has been agreed in advance. Even if the procedure in question is applied, it takes considerable amount of time and can lead to new issues that will further complicate the already challenging matter.

If a digital PE's idea is not adopted, the question of what is the tax treatment of digital economy is still relevant and extremely debatable. However, similar hypotheses are outlined in the Commentary, this topic has been the subject of long discussions by theorists and practitioners and this type of economy plays a significant role in our daily lives.

Other challenges may arise in this regard. Is a PE really so old and archaic that it has undergone such a significant metamorphosis? If the answer is affirmative, is this step too belated, as these "new" trends dated from 10-20 years? If the answer is negative, then why should different criteria and ideas be mixed? For example, is it not more appropriate to introduce a stand-alone provision regarding the digital economy with its own typical features to be designed over the years? I believe that this seems to be the better option, which will not contradict traditional PE's perceptions, and will follow the OECD's trends (Dulevski, 2020).

It can be summarized that a digital PE is neither a myth nor a reality, but a long-awaited "salvation" with an unexpected end. Whatever measures OECD

takes, they are unlikely to lead to the long-awaited end result and will still outline the path to be taken.

III. The subsidiary as an FE – a question or an exclusion: just a modern perspective confusion

Two CJEU cases are particularly important when analyzing whether a subsidiary may constitute an FE. The first one is C-260/95 DFDS that has a specific subject, considering the regime of tour operators. The other specific therefor is the judgement's year, when there was no FE's definition.

In the opinion, La Pergola followed the criteria outlined in the Berkholz case[7] (para 16).[8] Advocate General (AG) considered the company in question as a dependent agent of the parent company. It was an auxiliary body and respectively should have been treated as an FE (para 22, 24). Proof of its subordination was the agreements between the two entities, including the lack of risk-taking by the subsidiary (para 23). There were also other arguments regarding the FE's constitution (para 26, 27).

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

CJEU reached the same conclusions as AG's opinion regarding the FE's constitution in its judgement (para 23, 26, 29). It introduced additional elements to the concept's legal nature. These were the requisite minimum size (para 27) and number of employees (para 28). From the first it can be concluded that certain minimum requirements should be met. They were not specifically

[7] This case can be defined as fundamental for the concept. Because of the goals pursued in this paper, it is not subject of analysis.

[8] The paragraphs in brackets used correspond to the examined opinion/judgement.

mentioned, perhaps due to the idea that each case is different. Regarding human resources, CJEU used the plural form. A literal reading can lead to the understanding that the presence of one employee is not sufficient. It should be noted that they should be employed by the company.

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

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

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

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

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

Kokott's opinion is well structured, with an in-depth analysis of both the FE's legal nature and its exceptions. She followed the view that the legal form is a crucial criterion, which is vital to determining the FE's non/constitution.

However, it seems that this approach is debatable because of the economic risks. It should be clarified that if the final goal is a deliberate tax avoidance, the exception on abuse of law applies. This can sometimes be difficult to prove.

CJEU's judgement went in a different direction. If Kokott emphasized on the legal form, CJEU drew attention to the "economic and commercial realities" (para 31). Therefore, it cannot be stated categorically that the subsidiary does not form an FE (para 30). Moreover, DFDS gives an affirmative answer to this question (para 32).

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

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

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

IV. Digital FEs: a possible reality in our physical world?

When we are talking about a digital PE, it is inevitable to analyse the consequences from VAT's perspective through an FE's prism. Nowadays, it seems futuristic because of the mandatory cumulative requirements – human

and technical resources, according to Art. 11 Regulation 282/2011. The answer, therefore, is obvious. However, does CJEU share this view?
An FE in relation with e-commerce is analysed in C-605/12 Welmory. In this case, human and technical resources, that are not owned by the company, were used. AG Kokott began her arguments with the relevant practice (para 32-36). She argued that "it is not necessary for the taxable person to have at his disposal their human resources who are employed by him, or to have technical resources which he owns" (para 48-50, 56). „Therefore, employment and lease contracts are required in particular in relation to the human and technical resources which put the latter at the taxable person's disposal as if they were his own and which therefore cannot be terminated at short notice, either" (para. 51, 65). In this way, the FE's scope is extended, but again to certain limits. The usage of other equipment should be "in a way that is comparable to having its own resources" (para 65). Kokott, however, did not shed any detailed light to the digital specifics of e-commerce. On the contrary, she mentioned several times in her opinion the cumulative preconditions of "human and technical resources".

CJEU also set out these requirements in its judgement (para 60, 65). It also illustrated additional examples in terms of technical aspects – computer equipment, server and software. Human intervention is required despite their digital nature. Although a new criterion prevails from digital economy's perspective, the question of what is meant by "appropriate structure" remains open (De la Feria, 2016, 2021).

The case itself raises a number of issues, but also brings new guidelines regarding the FE's development. For example, clarity is given on the management of human and technical resources, which should not always be the head office's property and does not always lead to the FE's constitution. Control exercised by the taxable person is vital (Merkx, Jovanovic, 2015).

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

The most recent case is C-931/19 Titanium. There is no AG opinion and the judgement itself is relatively short. CJEU did not deviate from the traditional view and considered that the lack of human resources leads to the FE's non-constitution (para 45, 46). It referred to its practice without any detailed examination. However, there are some debatable moments. The arguments shared from the Austrian party for the applicable German case law, according

to which an FE can be constituted without human resources, have not been taken into account and more carefully analyzed.

In this respect, the German domestic practice on this issue is intriguing and should be observed. A positive approach therewith is that the difference between an FE and a PE is outlined.[9] The German court observed the national doctrine through the prism of both concepts.[10] This can again be defined as a welcoming approach and as proof that an FE's/PE's existence does not always lead to the FE's/PE's constitution. Following CJEU's practice, the requirement for the existence of an appropriate degree of structure of human and technical resources was introduced.[11] In this regard, it was analyzed to what extent the hiring of staff from a third party is an obstacle for the FE's constitution.[12] It was concluded that this is not a deterrent. Welmory case can be a valid argument, where this evaluation is left to the national court.

The permanence of human and technical resources was analyzed in another judgement of the German Federal Court.[13] Reference was made to Welmory regarding the use of foreign staff again.[14] The presence of the necessary prerequisites logically determined the FE's constitution.

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

What is more intriguing in this case is that this judgement does not sound convincing and as a final solution on this issue. For example, it is likely to be limited to hypotheses of real estate rental. Para 45 thereof may also raise the possibility of ambiguity. It is questionable whether, if the person could act independently without any human resources, the result would be similar. Following CJEU's view, the answer should be affirmative. However, in some cases, the use of the term "independent" and its limits may play a decisive role.

Despite its controversy, the Titanium case has its influence from the Member States' domestic perspective. For example, before this judgement, the Spanish doctrine considered leased immovable property as an FE (Deloitte, 2021). After Titanium this position has changed and "there is no VAT fixed establishment when the foreign entity does not have any 'own' personnel resources in the Spanish VAT territory to perform services relating to the

[9] Schleswig-Holsteinisches Finanzgericht 4. Senat, 17.05.2018, para 26
[10] Schleswig-Holsteinisches …, para 33
[11] Schleswig-Holsteinisches …, para 37
[12] Schleswig-Holsteinisches …, para 54
[13] Urteil vom 29. April 2020, XI R 3/18, BFH XI. Senat, para 20, 28
[14] Urteil vom 29. April 2020…, 21, 27

letting". On the one hand, it is common that CJEU case law influences the domestic perceptions of the Member States. On the other hand, however, are "the copy/paste" arguments a solid final solution for all similar cases? Maybe the answer is rather affirmative taking into account the hierarchy of the EU law.

With regard to the digital FE, there is no explicit position that confirms its constitution, while there are no sufficiently specific cases on this current and even revolutionary issue. CJEU's practice follows the traditional view without presentation of additional arguments and without trial to resolve the issue in an unconventional way.

It should be noted that even in this hypothesis there are several issues to be discussed. In this regard, it would be interesting to see how CJEU will treat cases where staff is available only for a certain period of time. On the one hand, it is possible to determine that there are no appropriate human resources due to the lack of sufficient degree of permanence. On the other hand, these activities do not determine the permanent human presence, but its availability is evident. In this respect, CJEU should consider more carefully the possible unequal treatment regarding normal and semi-automatic activities.

It is no longer so futuristic and even it is recommendable to consider what would be the tax treatment of robots from the FE's perspective. In particular, whether they have similar treatment as human resources for FE purposes. At this stage, the answer is rather negative, but it is highly possible it be the subject of further discussions.

Future cases will show whether this approach tends to be redesigned, but nowadays revolutionary views are unlikely to change FE's perceptions. However, this does not provide certainty about the concept, but raises the necessity to rethink it. Although 10 years is not a very long period of time, the FE seems rather unstable, archaic and challenging.

Conclusion

Despite their different goals and influence on direct and indirect taxes, the FE and PE are in certain connection with each other. It is difficult to talk about an identity between them, mainly because of their legal nature. What is more curious is what their future trends are – more distant or rather closer relationship? A contradictory answer can be given.

With regard to the tax treatment of subsidiaries from FE's and PE's perspective, the answer is contradictory for several reasons. First, in principle, we cannot talk about their constitution in these cases. This is evident both from Art. 5, para 7 OECD-MC and Art. 11 Regulation 282/2011. In fact, however, it is possible. A valid argument for such a position is the examples illustrated in

the Commentary, as well as CJEU's practice in relation to the FE. It seems that the latter rather allows the possibility for the subsidiary to constitute an FE, while OECD does so with explicit clarifications – the paragraphs in question from the Commentary. But the examples referred thereto are inexhaustible and relatively generally written, taking into account the other paragraphs of Art. 5 OECD-MC. This is a kind of proof both for the careful study of each case and for the practical challenges in this matter.

Regarding digital PEs and FEs, a contradictory answer can be expressed, too. OECD's and EU's intentions for digital PEs are both a serious test and a challenging step. They can be described as revolutionary, rethinking the traditional postulates of the concept.

CJEU's practice on digital FEs demonstrates rather traditional and conservative views. Only Welmory case can be defined as something more atypical, but also as if forgotten to be observed in details.

Therefore, if the Proposal becomes a reality, it can be expected that each of the will take its own path, which will increase the difference between them. This is especially noticeable from BEPS's perspective (Merkx, 2017).

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

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

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