The concept of fixed establishment for VAT purposes

The international taxation concept of fixed establishment plays an increasingly important role in connection with indirect taxes such as VAT. As the discussion on this concept gains prominence, particularly due to the magnitude of international trade, the need to develop this concept beyond direct taxation purposes is proving to be essential.

In terms of the EU VAT regime, the approach to the fixed establishment concept is relatively recent, as the definition of permanent establishment for VAT purposes, issued within the EU and compulsorily applicable in all Member States, dates from 2011.

Although the definition has some points of contact with the concept adopted by the OECD for income tax purposes, the concept used for VAT purposes has some particularities whose scope of application is still under discussion.

For these purposes, the definition provided in Article 11(1) of Council Implementing Regulation (EU) No 282/2011 is as follows:

“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, 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”.

The mentioned definition enshrines the case law developed by the CJEU in the prior years, namely in the Berkholz, DFDS, FCE Bank and Welmory cases1.

It follows from both this definition and the case law that the decisive criterion in respect of the presence of a fixed establishment for the purposes of VAT is the fact that an entity with its head office in a particular Member State has a structure in another Member State (directly or through a third party acting as a mere auxiliary) equipped with human and technical resources to provide and receive services, in an autonomous manner, and with a sufficient degree of permanence.

Notwithstanding the fact that there has already been a considerable development of case law on this topic, as well as the establishment of a legal definition, which is directly applicable in all Member States, there is still some disagreement as to the application of the concept.

The recent Titanium case2 regards a situation in which a company has an immovable asset, which is let in a Member State, and where the owner of that property does not have his or her own staff to perform services relating to the letting in that Member State.

The court decided, in accordance with previous case law, that: “The concept of ‘fixed establishment’, in accordance with the Court’s settled case-law, 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 (judgment of 28 June 2007, Planzer Luxembourg, C-73/06, EU:C:2007:397, paragraph 54 and the case-law cited). In particular, a structure without its own staff cannot fall within the scope of the concept of a ‘fixed establishment’ (see, to that effect, judgment of 17 July 1997, ARO Lease, C-190/95, EU:C:1997:374, paragraph 19)”.

As such, the court maintains the understanding that, in order for there to be a fixed establishment for VAT purposes, the structure must have its own technical and human resources. Therefore, the fact that a foreign company has hired a service provider does not influence the consideration of the existence of a fixed establishment.

In this context, with the expansion of e-commerce, new structures have appeared that allow online transactions to be carried out without the need for fixed facilities with technical and human resources permanently available.

If we are dealing with e-commerce, the application of the current concept of fixed establishment to this type of trade may be much more complex. In essence, the characteristics of e-commerce are dematerialization, disintermediation, and extreme mobility. However, the concept adopted for VAT purposes is closely related to the existence of physical facilities, associated with the existence of human and technical resources, with a degree of permanence.

Within the EU, the need to change the rules for VAT taxation on certain transactions, particularly

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1 C-168/84, C-260/95, C-210/04 and C-605/12, respectively.
2 Case C931/19, June 2021.
those involving the supply of services in the e-commerce sector, has been gaining momentum.

Nonetheless, it appears that the concept of fixed establishment has not evolved to include the new realities of international trade. It is still uncertain what lies ahead regarding the development and application of this concept. The option of readjusting the concept of fixed establishment, namely dropping the requirement to have human resources on standby should not be discarded, since there are already structures capable of providing services without any direct human intervention.

In conclusion, despite the progress that has been made in the EU on adapting VAT schemes to international trade, namely electronic trade, we believe that it will become more and more relevant to revisit the definition of the fundamental concept of fixed establishment.

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