ИКОНОМИЧЕСКИ ИЗСЛЕДВАНИЯ
ECONOMIC STUDIES

Volume 29 (4), 2020

Stoycho Dulevski[1]

SCIENTIFIC AND APPLIED CHALLENGES IN THE CONCEPT "FIXED ESTABLISHMENT" IN THE MODERN TAX SYSTEMS

This paper presents a research on the concept of the "fixed establishment" (FE) regarding the European and the Bulgarian tax practice. The term determines the place of supply of services in the field of indirect taxation which reflects the fair taxation. The aim of this study is to examine the key features of the FE both from practical and theoretical aspect and to draw a conclusion on the future of the concept. The comparison between the European and the domestic legislation outlines the significance of the FE and provides a more detailed survey on its legal nature.
JEL: K2; K33; K34

1. Introduction

FE plays an important role in the VAT (Value Added Tax) taxation of supply of services. At European level, it is defined in Art. 11 of the Regulation (Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value-added tax). The CJEU (Court of Justice of the European Union) has also repeatedly examined its legal nature in numerous decisions. In the Bulgarian tax legislation, the FE's definition is outlined in the VATA (Value Added Tax Act).

In the current study, the author examines the specific features of the FE both from theoretical and practical, from European and national, from economic and legal perspective. At European level, there are separate studies on this issue (Feria, 2016; Pistone, 1999; Spies, 2017). The Bulgarian tax doctrine, however, lacks a comprehensive study of the concept both theoretically and practically. The current tax trends internationally modify the FE for the practical needs and develop the tax doctrine.

The analysis begins with a comparison between the FE and the PE (permanent establishment). Then several CJEU's (Court of Justice of the European Union) cases on this issue will be examined as well as the Bulgarian practice both from NRA's (National Revenue Agency) and SAC's (Supreme Administrative Court) point of view. The current paper ends with a conclusion of the results and some ideas regarding the future of the concept.

[1] *Assist. Prof. Stoycho Dulevski Phd., University of National and World Economy, Bulgaria.*

2. Comparative analysis of the terms "fixed establishment" and „permanent establishment"

By the examination of FE's concept, it is necessary to make a comparison with other concepts such as PE that look similar and may lead to practical difficulties. FE and PE are key terms in the international and domestic tax law with different purposes and tax effects.

"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" (Art. 11, para 1 and 2 of the Regulation).

Pursuant to Art. 5, para 1 of the OECD-MC (OECD Model Tax Convention on Income and Capital, Condensed Version 2017) "Permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on".[2]

The following similarities may be found in the wording of the abovementioned definitions. The first necessary condition for their constitution is their objective existence on a specific geographical location. Second, the term "business" is included in both definitions, proceeding from the economic purposes and the objectives pursued by outlining the two concepts. Third, the existence of a separate independent entity, to whom both terms remain in a fixed relationship/ certain degree of dependency (economic and/or legal), is essential. Fourth, not every place/establishment may fall within the scope of the two definitions – a sufficient degree of permanence or wholly or partly conduction of business is required. This permanence shall be both temporally (for a certain period of time) and spatially (on a certain place). The relevant tax rates in the state where the PE and the FE are located are applicable also for their taxation. Their existence leads to compulsory administrative duties such as registration for tax purposes, submission of tax returns, payment of the tax due and others.

After the examination of the similarities between the two concepts, their differences are outlined as well. The FE and the PE are two significant international definitions, which existence is conditioned by different objectives pursued. The FE is applicable in the field of indirect taxation, whereas the PE is connected with the direct taxation. The FE determines the place of supply of services. The PE, on the other hand, indicates the taxation of the business profits of the enterprise in the source state.

Art. 5, para 1 of the OECD-MC is the basic rule regarding the PE's constitution. It is specifically determined in the Commentary (Commentary on OECD Model Tax Convention on Income and Capital) that the PE may be constituted without human resources, even through e-commerce such as computer equipment (para 122-131). The FE's definition, however, explicitly contains both the existence of human and technical resources as a prerequisite. Perhaps for the purposes of the dynamic commercial relationships, it is appropriate to reconsider the concept in this direction, paying attention also to the introduction of the virtual PE regarding the significant economic presence.

[2] The PE's basic rule under the OECD-MC will be examined in this paper.

Art. 5, para 2 of the OECD-MC lists through a non-exhaustive catalogue the possible forms of PE. They may also be applicable for the FE, but only if they lead to a taxable supply, to a generated turnover.

The building site, the construction or the installation project as possible forms of PE are separated in Art. 5, para 3 of the OECD-MC. The text explicitly introduces the 12-month threshold for PE's constitution. Such a time criterion does not exist in the FE's concept. Moreover, by the real estate's existence, the VAT is usually charged depending on the property's location. There is no time limit for the FE's constitution if the necessary requirements are met.

Art. 5, para 4 of the OECD-MC examines the cases of PE's non-constitution - those with auxiliary or preparatory character. The FE's concept does not contain such text. Of significance is not only the activity's treatment as a core or auxiliary/preparatory one, but if the supply is performed and its nature. For example, the following scenarios are possible. A warehouse without human presence but performing a core activity of the enterprise trough modern equipment may constitute PE, but it may not be a FE because of the lack of human presence. A warehouse may be operated by workers and machines, but it may not generate turnover and thus may not lead again to FE. Conversely, even if a FE is formed, if the activity is auxiliary or preparatory, a PE may not be constituted. As an argument that an auxiliary may be part of the independent economic activity is the case C-268/83 Rompelman (para 22). The above examined issues evidence for the variety of scenarios that may be encountered in practice and may have different impact in the field of direct and indirect taxation.

Art. 5, para 5 and para 6 of the OECD-MC introduce the figure of the dependent and the independent agent. In the first scenario, a PE may be constituted, whereas in the second – no. Both cases, however, are inapplicable for the FE because the merely performance of the agents may not lead its constitution.

Despite the outlined differences between the two concepts, their overlapping is often in practice. However, they are possible cases where the constitution of FE/PE does not automatically lead to the presence of PE/FE. Therefore, the individual examination of every single case is compulsory.

After the comparison between the PE and the FE from an international perspective, attention will also be paid to the Bulgarian legislation. The FE's definition under VATA begins with a non-exhaustive catalogue of possible forms in § 1, p. 10 of the SP (Supplementary provisions) of the VATA.[3] Most of them are also part of the PE's definition in § 1, p. 5, l. "a" of the SP of TSSPC (Tax and Social Security Procedure Code).[4] They are also identical to Art. 5, para 2 of the OECD-MC. Similar examples of PE

[3] "Fixed establishment" shall be a representative office, a branch, an office, a bureau, a studio, a plant, a workshop (factory), a retail shop, a wholesale storage facility, an after-sales service establishment, an assembly project, a construction site, a mine, quarry, prospecting drill, oil or gas well, a water spring or any other place of extraction of natural resources, a fixed place (whether owned, rented, or allocated for use) or a fixed base wherethrough a person carries out economic activity within the territory of a country, whether wholly or partly.

[4] "Permanent establishment" shall be:

and FE would have led to the initial conclusion that the two concepts are with nearly identical nature and purpose. Another similarity may be found out in the methods of usage on their constitution. They may be owned by the taxpayer, may be rented or be used on other grounds. The third common feature is that the two concepts are in direct connection with the performance of wholly or partly business (from PE's perspective), respectively economical (from FE's perspective) activity. However, there is no clear criterion of what is meant by "partial" activity and whether it should meet a certain threshold to be defined as such.

Despite the similarities between the two concepts, most of which because of the usage of identical expressions, there are also a number of differences. First, attention will be paid on the structural layout of the concepts.

While the PE is introduced in the TSSPC and CITA (Corporate Income Tax Act) and PITA (Personal Income Tax Act) refer thereto, the FE is defined in the VATA. Therefore, the legislator clearly and unequivocally outlines their scope – PE in the field of direct taxation and FE – in indirect taxation. The PE's Bulgarian definition, separated in § 1, p. 5, l. "a" SP of the TSSPC, follows basically the texts of Art. 5, para 1, para 2 and para 3 of the OECD-MC. On the other hand, the FE's term does not directly correspond to the text set out in the Regulation. In this regard, the entry into force of the VATA and the Regulation are the reason for the different wording. The new VATA is effective in Bulgaria as of 2007 whereas the Regulation was adopted in 2011.

The following differences regarding the nature of both concepts may be summarised as follows. First, regarding the representative office in the Bulgarian PE's definition, an explicit condition is its registration under the Bulgarian law. This is in contrast with the representative office from the Bulgarian FE's definition where there is no such requirement. However, the Bulgarian VAT registration is also compulsory for the FE despite the lack of explicit text in the provision. Second, the place of management as an example of PE is not covered by the FE's definition. Such a legislative decision is determined by the specifics under VATA and the supplier's place of economic activity which reflects the place of supply of services. Third, the FE contains also a fixed base as a possible example of its constitution, which is not included in the PE's definition. There are no explicit criteria regarding the status of this fixed base. Only the necessity for its geographical location is outlined. On the one hand, it is similar to one of the PE's features. On the other, the opportunity for a broad interpretation of the possible hypotheses therefor is provided. This may also be interpreted as a kind of proof that the catalogue of FE's hypotheses is non-exhaustive. Moreover, in some cases despite their explicit inclusion in the definition they do not lead automatically to the FE's constitution.

(a) a fixed place (whether owned, rented or used on other grounds) wherethrough a non-resident carries on business inside the country, wholly or partly, such as: a place of management; a branch; a representative office registered in the country; an office; a bureau; a studio; a plant; a workshop (factory); a retail shop; a wholesale storage facility; an after-sales service establishment; an installation project; a building site; a mine; a quarry; a prospecting drill; an oil or gas well; a water spring or any other place of extraction of natural resources;

Although at first glance, the two concepts seem similar, several differences regarding their purpose and scope may be found out. Therefore, the FE and the PE may not be defined as synonyms, although the constitution of the one leads to the constitution of the other very often in the practice. The almost identical Bulgarian definitions of both terms may also increase the risk of their uniformity. Therefore, a detailed examination is required.

3. Practice of the Court of Justice of the European Union

The case Berkholz (C-168/84) was the first one examining the FE's concept. The effective place of management of the German company "Abe-Werbung Alfred Berkholz" (Berkholz) was in Hamburg, Germany. Its main activity consisted of the installation of gaming machines and their usage. Some of them were situated on the board of two ships owned by Deustche Bundesbahn. Their usual route were Puttgarden, the German Island of Fehmarn and Rødbyhavn, Denmark. The maintenance of the gaming machines was carried out regularly by employees of Berkholz despite the lack of own premises. Regarding the factual background, questions about the taxation of these services raised, one of which was the existence of FE on the boards of the ships.

After the analysis of the AG's (Advocate General) Opinion Mancini and the CJEU's judgement, they were several key aspects. From the beginning of its arguments, the AG carefully analysed the term 'fixed establishment' and in particular what was meant by the term "fixed". He correctly concluded that immanent feature is the lasting nature of the activity, which may not be temporary or short term (p. 2255 of the AG's opinion). However, no timeframe was outlined for the FE's constitution (such as the specified in the Commentary 6-month threshold regarding Art. 5, para 1 of the OECD-MC). It should be noted that due to the variety of possible scenarios, it is difficult to fix a certain time framework (practically PE may be constituted even if the time threshold is not fulfilled). Moreover, this was the first case in such a complex issue and setting a specific time limit would have a significant impact on subsequent practice and would hardly cover all possible hypotheses. Therefore, this should not be considered as a disadvantage.

Intriguing was the Mancini's view on the FE's legal nature. In order to have a FE, a certain degree of organisation, structure of the place was required (p. 2255). The existence of staff was also necessary, who trough technical means, might perform the activity. Thus, it might be concluded that both criteria (technical and human resources) were essential for the FE's constitution.

The CJEU examined Art. 9, para 1 of the SVD (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value-added tax: uniform basis of assessment) as an applicable criterion for the current case. FE is one of the possible alternatives (but not the only one) when there is a permanency of human and technical resources on a certain place. As the staff's presence was rather incidental (only by the need of repair/accident), it did not satisfy the permanence of the place and therefore might not constitute FE.

It may be concluded that in this case, the CJEU interpreted strictly the FE's provision and precluded the possibility of a broad interpretation. Such an approach does not seem surprising. On the one hand, this is the first decision on the FE's concept and one rather unusual and revolutionary ruling would lead to many discussions on its legal nature. On the other, the analysed case was reflected from the current reality (the 80s of the last century) when such activities were performed mainly with staff support. At this time, it was difficult to determine the impact of the fully automated activities which today are an important issue regarding taxpayer's fair taxation.

A similar conclusion was reached in another CJEU's judgement – Faaborg-Gelting Linien A/S (Case C-231/94 (Faaborg-Gelting Linien A/S v. Finanzamt Flensburg). Faaborg-Gelting Linien was a Danish company that provided meal and drink to passengers on a ferry in ports in Germany and Denmark. A question regarding the activity's nature – supply of goods or supply of services, was raised and consequently how it would affect the VAT charge. Another issue was the FE's constitution on the ferry's board. Both AG's Opinion (para 5 and 11) and CJEU's judgement (para 14, 15 and 18) confirmed that in this case there was a supply of service referring to the Berkholz case. The requirement for human and technical resources with some degree of permanence for the FE's constitution was crucial. Therefore, the absence of one of the two criteria might not lead to FE.

It may be concluded that in both cases, the same approach was applicable that gave preference to the place of establishment of the supplier. This also reflected to the VAT charge in that state as well. Such an approach is more a precaution against the possible non-charge of VAT due to the different rules in the different tax systems of the states that would create a dispute about the proper tax treatment.

A landmark decision regarding the FE's concept is DFDS (Case C-260/95 (Commissioners of Customs and Excise v. DFDS A/S). The Danish company DFDS A/S owned 100 % of the capital of the British company DFDS Ltd. The latter was a tour operator within the UK. The two companies concluded an agency agreement. According thereto, the parent company was involved in the supervision and control of the provided by the subsidiary tours. The latter, after approval from the parent company, concluded contracts and promoted the brand. The subsidiary was not allowed to work for other companies without the prior approval of the Danish company.

In order to assess whether the Danish company had a FE at its disposal in the UK through its subsidiary, the AG La Pergola referred to the number of CJEU's judgements (para 16, 23, 27, 30). On the one hand, he examined the Berkholz case as the fundamental one on this issue. On the other, he took into account the judgements concerning the legal status of the tour operator and the agent (Cases C-163/91 Van Ginkel; C-266/93 Bundeskartellamt v Volkswagen and VAG Leasing; C-311/85 Vereinigung Vlaamse Reisbureaus).

According to La Pergola the key point by resolving the difference was the dependence of the British company to the Danish. In its conclusion, the AG examined the subordination of the subsidiary on two levels (para 22). The 100 % shareholding was an indisputable sign of the dependence to the parent company. The contractual clauses also provided similar arguments in this regard. According to the AG, from an economic perspective, DFDS Ltd was an auxiliary part of the Danish company in UK (para 24).

Once after the estimation of the dependency, La Pergola considered that were sufficient arguments for the FE's constitution (para 27). The British company had over 100 employees at its disposal for an indefinite period of time also using technical resources.

The CJEU's judgement followed La Pergola's comments confirming the dependence of the British company to the Danish parent company (para 23, 26). The main approaches for FE's constitution were observed as well as an analysis of the contractual relationships that showed the existence of subordination (para 17, 23, 24).

DFDS case is intriguing for several reasons. For the first time a separate legal entity, which was the subsidiary, was defined as a FE. This shows the diverse nature of the concept and that there are no restrictions in the legal form of its constitution if it meets the necessary conditions. The relationship between the two associated enterprises was also detailed explored and how this reflected in the service's performance.

The CJEU's judgement, however, raises some questions. For example, it is not explicitly clear whether the two criteria observed by the AG shall be applied cumulatively and is there any hierarchical level. In this case, the subsidiary's activity was entirely dependent on the parent company. It is uncertain whether the AG's position may change if the subsidiary acts on behalf of several companies, as well as by other significant changes of the contractual terms. Someone may also argue that such an approach may lead to unequal treatment and to a violation of freedom of establishment regarding the multinational companies following the similar model.

Relatively soon after the DFDS's judgement, the CJEU ruled on another case regarding the FE's concept (Case C-190/95 (ARO Lease BV v. Inspecteur van de Belastingdienst Grote Ondernemingen te Amsterdam). The Dutch company Aro Lease BV concluded vehicle leasing contracts. It had clients from the Netherlands and Belgium that concluded these contracts by Belgium intermediaries/dealers. The latter received a commission for the services provided. A Belgian customer chose a vehicle from the Belgian dealer and the latter offered it according to the agreed payment. The intermediary's activity did not directly reflect to the final performance.

If at the end of the leasing period the vehicle was not sold immediately to the customers, it remained a certain time in Belgium in the dealers' premises. Aro Lease BV had no office at its disposal in Belgium and used the dealer's premises at its own risk and expense. The latter did not have any additional right to influence the customer's choice for the contract's conclusion. The vehicles were registered in Belgium and the customers paid any tolls and other related to the maintenance costs due.

Regarding the current factual background, the inquiry was whether the leasing of vehicles might constitute a FE for Aro Lease BV in Belgium.

The AG Fennelly's arguments were based on the leasing's nature. For this purpose, he analysed the similar aspects comparing the cases Hamann (Case C–51/88 Hamann v. Finanzamt Hamburg- Eimsbüttel) and Berkholz (para 21 and 29). After the exploration of the FE's key features, he was on the opinion that both criteria missed in the current situation (para 30). Indeed, the existence of agents who assisted with the vehicles' supply was a sign of human presence. However, they were not employees of the Dutch company

but were only engaged in separate and independent transactions. According to Fennelly and after the careful analysis of Berkholz, their functions did not fall within the scope of the requirement of "human resources". An argument was the different location of agents in Belgium which might not constitute one single FE (para 31). In addition, they also performed preliminary preparatory and subsequent services.

On the other hand, the conclusion of the contracts was in the Netherlands. For this purpose, the company used human and technical resources (para 31). According to Fennelly Aro Lease BV did not have a FE at its disposal in Belgium and therefore the place of supply of services was in the Netherlands because of the company's establishment.

The CJEU was on the same view regarding the FE's non-constitution. Their Belgium registration was irrelevant (para 21). The option that the vehicle remained on the dealer's premise was with a subsequent nature after the agreed licensed period.

The same approach was followed in another case with identical factual background, on which Fennelly was again the AG (Case C-390/96 Lease Plan Luxembourg SA v. Belgian State). The Luxembourg company Lease Plan provided vehicle leasing services to Luxembourg clients. The latter might provide them to their employees in Belgium using the services of Belgian garage operators. Both the AG's Opinion (para 16) and the CJEU's judgement (para 21) referred to Aro Lease case (C-190/95) because of its identical factual background. This was the reason for the lack of detailed arguments. The CJEU strictly observed the approach followed in the previous case as the applicable one (para 24 and 25). The understanding of the FE's non-constitution regarding the leasing contracts was confirmed once again.

In another case the CJEU confirmed the FE's existence (Case C-452/03 ((1) RAL (Channel Islands) Ltd, 2) RAL Ltd, 3) RAL Services Ltd, 4) RAL Machines Ltd v. Commissioners of Customs and Excise). RAL Ltd, RAL Services Ltd and RAL Machines Ltd were companies established and incorporated under the UK legislation, whereas RAL Channel Islands (CI) – in Guernsey. The four companies were subsidiaries of the British RAL Holdings Limited. The first of them owned gaming machines in the UK using its own staff at owned premises. After a subsequent restructuring on group level, RAL granted their license to CI, giving the opportunity to use the gaming machines on the UK's premises. The CI's main activity was the provision of their public use to the clients by subcontracting the RAL Services Ltd. All of the CI's employees were situated in Guernsey and were engaged mainly with accounting and monitoring tasks. The CI pretended not to pay the VAT in the UK as the services provided were outside the EU in the Guernsey's office. One of the issues raised was the clarification of the FE's concept.

In his Opinion the AG Maduro analysed detailed this issue taking into account the four landmark decisions Berkholz, Faaborg-Gelting Linien, ARO Lease and DFDS (para 21, 23, 28, 29, 30, 42). Besides the FE's question, he drew attention to another global risk – the companies' attempts to move their business outside the EU trough such restructurings, while at the same time providing service to consumers within the EU territory (para 64).

With respect to FE Maduro examined several key points. He analysed the legal nature of the term paying attention to Berkholz and Faaborg-Gelting Linien, also paying attention

that the services provided in those decisions are on the ferry's board. In conclusion, he argued that the lack of staff in relation to the activity provided led to FE's non-constitution in the examined judgements (para 40). Since it came to use of slot machines, the judgements ARO Lease and DFDS were also applicable. The different nature of the activities, however, required a different approach for the facts' examination. Therefore, Maduro focused on the availability of technical and human resources in the current case (para 45).

The slot machines were characterised by a degree of permanence at the premises. A fixed working hour was outlined for this purpose when the clients might use them. In this respect, the requirement for technical resources was fulfilled. In terms of human resources, the existence of staff that maintained the slot machines and served the clients was evidence of their presence. Therefore, this aspect, that was missing in Berkholz, was available here. However, by observation of the two other judgements, there was no FE despite the existence of human resources. Based on the nature of the activities and the restructuring itself, according to Maduro it was not necessary that CI had its own employees at the premises (para 49).

In this case, a distinction between the resources might be made: those that were under the direct dependence of the supplier and therefore might be determined as his own, and those that stayed in causal connection with the latter, but they were under "indirect" dependence. The symbiosis of both satisfied the requirement for human and technical resources. According to Maduro only the resources that were of direct significance for the supply and affected the client's choice to use the slot machines, should be under direct control (para 52). Moreover, by careful examination of the hired employees' work, it might be concluded that their activities were rather supporting and auxiliary. Indeed, they contributed to the service's provision, but their nature was not determined by their work. Proof of this was that the employees had no direct role in the conclusion of CI's contracts with the clients and might not influence the decision of the latter whether to use the slot machines or not (para 55). Maduro also considered that the requirement for technical and human resources was met and logically CI constituted FE. Despite all these arguments, the CJEU applied the special rule under Art. 9, para 2, l. "c" of the SVD regarding the recreational activities, thereby excluding the application of Art. 9, para 1 and the FE.

In Planzer case (C-73/06 (Planzer Luxembourg Sàrl v. Bundeszentralamt für Steuern) the seat of Planzer Luxembourg Sàrl was situated in Luxembourg. His only partner was located in a third country – Switzerland. In this connection, the question arises whether the company had a FE in Switzerland because of the partner's location. The CJEU referred to cases Berkholz, DFDS, Aro Lease and Lease Plan to provide solid arguments (para 43, 54, 55). The view was shared that the auxiliary and preparatory activities might not satisfy the FE's criteria (para 56). Of importance for the company's business was the place where the decisions were taken, where the meetings of the board of the directors were held. This means that the place of establishment of the sole proprietor or the banking transactions that did not have any significant importance for the company were irrelevant for the FE's constitution (para 56). Therefore, it was important where the main decisions on the company's management were taken and where they performed their central administrative functions (para 63).

Another case that indirectly examined the FE is Le Crédit Lyonnais (C-388/11 Le Crédit Lyonnais v. Ministre du Budget, des Comptes publics et de la Réforme de l'État). Le Crédit Lyonnais (LCL) was a French bank that had branches both in the Member States and third countries. After a tax audit LCL raised a number of questions regarding the realised from its branches revenues and how this reflected to the VAT refund under the SVD. An inquiry regarding the treatment of the branches from third countries was also posed.

In his Opinion, the AG Villalón analysed in details the current factual background without explicitly to share some thoughts on the FE's concept. Based, however, on its legal form, the branch was part of a legal entity which was dependent from the parent company and might be its FE. Therefore, the taxation should be performed at the branch's location, which determined the reason for the VAT refund in this Member State. Moreover, the SVD outlined the realised of the branch turnover to be attributed to the parent company's establishment in the other state (para 74). Following such an approach the same regime should be applicable also for the branches located in third countries (para 82).

The CJEU shared the same view paying attention to the FE's concept and its relevant treatment (para 33 and 34). The VAT should be charged depending on its geographical location. The equal treatment for the branches in third countries was confirmed by the Court as well (para 44). Although the FE's legal nature was not detailed outlined and its key features were not examined, the case Le Crédit Lyonnais is vital for several reasons. First, the typical FE's example – the branch, was observed. Second, an opinion was expressed regarding the branches in third countries to be treated equally as the EU branches, although they do not fall within the scope of the SVD.

In 2011 the CJEU ruled another judgement related to the FE to two joined cases (C-318/11 and C-319/11 Daimler AG, Widex A/S v. Skatteverket). In the first case, Daimler had a PE in Germany and a subsidiary in Sweden. The company carried out winter testing of cars in Sweden without having permanent staff at its disposal. The employees and the equipment arrived in Sweden only by main activity's performance. Daimler did not perform any VAT taxable activities in Sweden. Their aim was to guarantee the sale of cars in Germany.

In the second case, C-319/11 Widex had a PE in Denmark engaged in research activities. There were nor sales, neither marketing activities performed. The employees' wages were paid by the head office in Denmark. Widex also had a Swedish subsidiary, which sold the goods to the PE as a distributor. The goods and services acquired by the PE were focused solely to the research activities.

The CJEU analysed the expression "fixed establishment from which business transactions are effected", as well as the possibility that PE is FE at the same time. According to the Court, it was crucial to determine whether the supplies were taxable or not. Therefore, "'transactions' used in the phrase 'from which business transactions are effected' can affect only output transactions" (para 36). In this case, the absence or presence of FE was not a valid criterion for a subsequent VAT refund (para 43). In summary, the CJEU concluded that due to the nature of the activities of the two cases, they did not result to taxable supplies and thus they did not fall within the definition of "fixed establishment from which business transactions are effected" (para 44).

It may be concluded from the CJEU's position that the PE's existence did not automatically lead also to the FE's constitution. The key factor was the nature of the activities, which respectively reflected to the VAT refund.

One of the most interesting cases in this matter is Welmory (C-605/12 (Welmory sp. z o.o. v. Dyrektor Izby Skarbowej w Gdańsku). Welmory LTD was a Cypriot company which organised "sales by auction on an online sales platform". It concluded agreements with a Polish company. The latter sold the offered goods using Polish domain which is maintained by the Cypriot company in Polish. The used for the activity equipment was owned by Welmory and the hired staff had not labour relationship with the Cypriot company. The inquiry was about the proper tax treatment of the service provided and whether there was a FE for Welmory LTD in Poland.

This case is significant for several reasons. Attention was paid to the FE in the e-commerce – something very actual and challenging from a tax perspective. This was also the first case regarding the place of supply after the reform of those provisions in Directive 2008/8. Last but not least, in this case, the service was performed not "by/through" the FE, but "to" it. Because of the year of the CJEU's judgement – 2014, Art. 11 of the Regulation was in force.

In her Opinion AG Kokott pointed out that the present case was about the recipient of the service under Art. 44, second sentence of the VAT Directive, whereas in the CJEU's doctrine Art. 9, para 1 of the SVD was examined regarding the provider (para 37). It was also stated, that Art. 11, para 1 of the Regulation specified the receipt of the services for own needs as an intrinsic feature within the scope of the provision (para 42). After the overview of the concept's development, it was once again outlined what the requirements for FE's constitution (para 45) were.

An important issue of her opinion was that "it is not necessary for the taxable person to have at his disposal there human resources, which are employed by him, or to have technical resources which he owns" (para 48). This also applied to the technical resources provided by Welmory (para 50 and 56). Thus, the scope of the concept was broadened. Its aim was to limit possible abuse when companies deliberately use foreign resources. The author considered that such an approach is objective and practical conditioned. He also agrees with Kokott's subsequent position that the use of the resources for the needs of the Cypriot company should be controlled by it. In other words, their use for short periods or the lack of disposition thereto would not constitute FE.

Another intriguing AG's point was that „Moreover, from a factual point of view it is doubtful whether as a rule, every structure which, in terms of its human and technical resources, is able to use services for its own needs would not indeed at least have the possibility of supplying services itself" (para 43).

The FE's existence for the Cypriot company was confirmed by the CJEU. The Court shared the view that the practice for Art. 9, para 1 of the SVD was also applicable for Art. 44 of the VAT Directive. Once again, the secondary nature as an alternative by risk for unequal tax treatment for the services was taken into account (para 53). Its main features were outlined regarding the current factual background (para 60).

Why does the author consider that this case is one of the most vital and up to date on the FE's concept? As already stated above, this case was about the FE's constitution of the recipient of the service in connection with the new rules on the place of supply pursuant to Art. 44 of the VAT directive as of 2010. It should be noted that based on the principle mutatis mutandis followed by the CJEU, the interpretation of Art. 9, para 1 of the SVD should also be applied for Art. 44 of the VAT directive. Last but not least, given the current trends in relation to the e-commerce it may fulfil the requirements for FE in certain cases. The explicit reference of the necessary technical resources in the CJEU's judgement confirmed the understanding for the possible lack of human resources but the possible FE's existence. The online trade provides new business opportunities, which should introduce revolutionary and innovative taxation rules. Although the CJEU did not explicitly address this issue, Kokott drew attention to the control of the used resources. However, the control's degree was not explicitly outlined. For example, it may be argued whether there is a sufficient control, if the resources are available at certain times on certain days. The author shares the view that if the period is extended (not short term), it fulfils the requirement for control. This will depend on the individual examination of every single case because of the specificity and diversity of activities.

The CJEU's case law examined the key features of the concept that are relevant for its constitution. It is a welcoming idea not only to follow the relevant doctrine (referring to the specific judgements), but to analyse how it would reflect to every single case (based on the factual background). Recent cases developed the concept and modified it according to the practical needs.

4. Some institutional solutions in the Bulgarian practice

The introduction of the FE's concept in the Bulgarian VATA is logically determined by its purpose. The term appears in many provisions in the VATA. For example, FE is included of the new Art. 15a – the regime of warehousing of goods to request, in force as of 01.01.2020. It is also an integral part of Art. 21 regarding the place of supply of services. FE is a key factor by determination of the turnover for a partial tax credit under Art. 73, para 3, p. 3 and para 4, p. 2. Another relevant provision of therewith is Art. 96, para 7, p. 2 regarding the taxable turnover for compulsory VAT registration. The definition itself is outlined in § 1, p. 10 of the SP. They are another relevant provisions on the FE's concept as well. It may be concluded that its implication in a number of texts confirms its significant role in the field of indirect taxation.

FE also appears in the RAVATA (Regulations of Application of the Value Added Tax Act) in Art. 119, para 5, as wells as in the application forms for registration for application of special regime outside the EU for VAT charge on supply of telecommunication services, radio and television broadcasting services or services provided electronically with recipients non-taxable persons and VAT return for the application of special regime in the EU pursuant to Art 159b, para 4 VATA.

FE is part of the text of Art. 2, para 1, p. 1 of the Ordinance No H-10 (Ordinance № H-10 on the refund of paid valued added tax to foreigner entities that are not established on the

community territory) outlining which individuals are foreign and may reimburse the VAT under this Ordinance. Similarly, Art. 2, p. 1 of the Ordinance No H-9 (Ordinance No H-9 of 16 December 2009, On the refund of value added tax to taxable persons, not established in the member state of refund, but established in another member state of the Community) contains the same requirement.

To sum up, FE plays an important role regarding the supply of services in the Bulgarian domestic legislation. Unlike the PE, which is conceptually outlined in the TSSPC and CITA and PITA refer thereto, the FE is defined only in the VATA.

4.1. Practice of the Bulgarian National Revenue Agency

The FE's concept was analysed in several guidance issued by the NRA. One of the most common cases in practice is regarding the proper treatment of the representative office and the possibility to constitute FE. In this particular case, a foreign company that did not perform independent economic activity in Bulgaria concluded labour contract with its representative office whose activity was limited to advertisement and analyses (Guidance No 53-00-266 from 2013). By examination of the factual background, the NRA distinguished the figure of the representative office under Art. 24, para 2 of the EIA (Encouragement of Investment Act) and the representative office under VATA. In the first case, the office was not allowed to perform an economic activity. NRA followed the approach of the established international case law (cases C-168/84; C-190/95; C-231/94 and C-260/95) outlining the main FE's features. Correctly, the tax authorities were on the opinion that if the representative office is not a FE, it does not perform an independent economic activity. Opposingly, despite the prohibition under Art. 24, para 2 of the EIA FE would be constituted, if the office exercised such activity.

Another NRA's guidance regarding the representative office of a foreign entity from a third country, focused on several possible hypotheses (Guidance No M-24-36-83 from 31.01.2017). The representation office was registered voluntarily pursuant to Art. 100, para 1 of the VATA. From this moment on it exercised its right for VAT credit for the supplies of goods and services received. A consultancy contract, that was concluded several months after the VAT registration, was the ground for its performed independent economic activity.

Referring to the CJEU's judgement Lennartz C-97/90, the tax authorities considered that the future intention for the performance of taxable supplies and the costs incurred therewith determined the representative office as a taxable person with the possibility for VAT credit, if this right was not "exercised improperly or fraudulently".

The following hypotheses on the possibility of FE's constitution were drawn out. If the representative office fulfils the FE's requirements, it falls within the scope of that definition. It is intriguing that NRA applied a broader interpretation regarding the independent economic activity. For example, the mere intention for its performance might be construed as a FE. At the same time, there was no explicit definition of what is "intention". The author is on the view that it should objectively and unambiguously show the possibility of subsequent taxable supply. Conversely, the unrealised subjective intention did not satisfy the FE's requirements. As already stated above, beyond the scope remained

the illegal and fraudulent activities. The NRA also followed the international doctrine that the Bulgarian VAT number does not automatically lead to FE.

The possibility of FE's constitution suggests another two hypotheses on the place of supply of services. If the representative office falls within the FE's definition, but the provided goods and services are not directly related to its independent economic activity, but to the foreign entity, the recipient is the latter. Therefore, the place of supply of services would be in the other state applying Art. 21, para 2, the first sentence of the VATA. If it is determined that the recipient is the FE, the place of supply of services would be in Bulgaria.

If the representative office does not meet the FE's definition, for example, it does not carry out an independent economic activity or it is not characterised by a sufficient degree of permanence, the recipient will be the foreign entity and thus the place of supply of services will be in the other state.

The author admires this NRA's approach because of its detailed examination of all possible scenarios.

Another NRA's guidance analysed both the availability of PE and FE (No 26-Г-48/09 from 02.03.2010). A Spanish company performed reconstruction, repairing and installation activities for shops in different Bulgarian cities with a duration from 8 to 12 weeks. Some of them were carried out by two Spanish companies acting as subcontractors. The NRA qualified the activities as construction and therefore explored the special PE's provision. Since the minimum 12-months threshold was not met, neither there was a geographical coherence between the shops, the tax authorities correctly concluded the PE's non-constitution. Regarding the FE, similarly to the above-examined guidance, they paid attention to the CJEU's relevant practice (cases C-168/84, C-190/95, C-210/04). Because of the lack of human and technical resources, there was also no FE. It may be concluded from this guidance that the non-constitution of PE may not lead automatically to the absence of FE as well. For this purpose, NRA did a separate, additional analysis, proceeding from the specifics of the two concepts.

The NRA also expressed a position on the accredited representative providing supply from services in Bulgaria (No 26-Т-115 from 13.12.2010). Pursuant to Art. 131, para 1 of the VATA he represented the FE of the foreign entity. The tax authorities distinguished different hypotheses about the place of supply depending on the status of the recipient of the service. When the recipient is a taxable person in Bulgaria, the place of supply of service is in Bulgaria. The CJEU's practice was also examined (cases C 168/84; C 190/95; C 231/94; C 260/95). If the recipient is a taxable person from another Member State and has no FE in Bulgaria, the place of supply is the location of the recipient's establishment. If the recipient is a taxable person from third country, the place of supply is again the location of the recipient's establishment. If the recipient is an individual performing independent economic activity and has no FE, the place of supply is his permanent address or usually resides.

The VAT treatment of the branch was examined in another NRA's guidance (No 26-Е-32 from 01.06.2012). In this case, a branch of the Portuguese company was registered in the CRRNLPA (Commercial Register and Register of Non-Profit Legal Persons Act). Because

of this, the foreign company had a Bulgarian VAT number. Its core activity was (re)construction of substations, which were part of the Bulgarian electricity system, for about 12-month period. The technical resources were used both from own employees and subcontractors. Regarding the human resources, employees were seconded from Portugal and other subsidiary divisions of the foreign company to Bulgaria. One of the question raised was about the FE's concept.

Several issues for the branch's proper tax treatment are intriguing. It is noteworthy that "the availability of commercial registration of the branch itself does not make the same a FE". Also, the branch's registration excluded the possibility that the Portuguese company might be VAT registered again in Bulgaria regarding its economic activity, no matter of its registration form – compulsory or voluntary. The branch's registration created an opportunity, not an obligation for FE's constitution. For example, if the branch performs taxable supplies, Art. 82, para 1 of the VATA is applicable, as "the tax is chargeable by the Portuguese company, identified by a Bulgarian ID number for VAT purposes – the branch one". Conversely, if it does not participate in the provided supplies and the Portuguese company does not carry them out through another FE, the tax will be charged to the recipient pursuant to Art. 82, para 2, p. 2 of the VATA.

Based on the above NRA's guidance, the following conclusions may be drawn. Although the wording of the FE's definition in the Bulgarian VATA differs from the Regulation and is almost identical with the Bulgarian PE's definition according to the TSSPC, the key factors of the FE's constitution follow Art. 11 of the Regulation and the CJEU's doctrine. The NRA strictly applies the international doctrine in its guidance by determination of the concept. Thus, there is no significantly different Bulgarian approach from tax authorities' perspective on that issue. The cases themselves do not also differ with a very specific factual background. It is possible that the future CJEU's cases would also reflect to the Bulgarian NRA's practice.

4.2. Practice of the Bulgarian Supreme Administrative Court

SAC also examined the FE's concept regarding Bulgarian subsidiaries of foreign companies (Judgement No 3410 from 11.03.2014, SAC by adm. c. No 13104/2013). A Slovenian company was the sole owner of a Bulgarian subsidiary. The latter had hypermarkets in Bulgaria at its disposal. The subsidiary received consultancy services from another Bulgarian company. In this connection, the Slovenian company claimed VAT refund under Ordinance No H-9. Its understanding was that the place of supply of services was not in Bulgaria. The tax authorities considered that such an approach was incorrect because of the subsidiary's existence in Bulgaria, which was a FE under VATA's definition and Art. 11 of the Regulation in conjunction with Art. 44 of the VAT Directive. Thus, the Ordinance was inapplicable. To support such understanding, NRA found arguments in the CJEU's cases C-260/95, C-244/08 and joined cases C-318/11 and C-319/11. For the latter two cases the expression "fixed establishment from which business transactions are effected" was analysed considering that the subsidiary fulfilled this criterion.

Another SAC's judgement examined again the VAT refund procedure – whether it should be under the Ordinance No H-9 because of the foreign status of the entity or its branch was a FE and the relevant VATA provisions were applicable. (Judgement No 3571 from 29.03.2016, SAC by adm. c. No 3794/2015). A Hungarian company had a Bulgarian branch and the Bulgarian VAT number was the same for both because of their identical personality. The branch performed supplies related to the office maintenance, hotel accommodation of the staff and others. NRA took into account the CJEU's joint cases C-318/11 and C-319/11 and considered that the branch did not perform an independent economic activity and thus it was not a FE. Therefore, the VAT refund should be reimbursed under the Ordinance No H-9.

The opposite view shared SAC and confirmed the findings of the Bulgarian Administrative Court of the first instance. Pursuant to § 1, p. 10 of the SP of the VATA the branch was within the scope of the FE's definition. The Bulgarian Administrative Court of first instance correctly applied the CJEU's judgement on case C-244/08 regarding the cost allocation. The branch performed taxable supplies in Bulgaria as a recipient, which might be construed as a proof of its independent economic activity. Moreover, the costs were borne by the branch itself and not by the Hungarian company. That is why, the branch had the right for VAT refund under VATA. Inapplicable for the current case were the quoted by the NRA joined cases C-318/11 and C-319/11 because of the different factual background.

In another case, SAC examined the performed by the PE activity that was at the same time a FE of a German company (Judgement No 2885 from 27.02.2014, SAC by adm. c. No 394/2013). SAC confirmed the NRA's understanding that the FE issued invoices with its Bulgarian VAT number proving its participation in the supplies of goods and services in Bulgaria. If the branch was against this argument, it should present evidence for the opposite hypothesis. This approach followed the wording of Art. 53, § 2, para 2 of the Regulation.

The lack of independent economic activity, respectively of performed taxable supplies, did not lead to FE's constitution in another SAC's case (Judgement No 5770 from 03.05.2018, SAC by adm. c. No 61/2018). A UK company performed clinical trials trough its Bulgarian branch. The branch claimed for VAT refund because it performed supplies only to its parent company for the relevant period. Proof of this were the issued invoices. Despite the existence of premises (office) and human resources (employees), there was no economic activity for the branch for third parties. Finally, it was found out that the transactions performed were internal turnover that did not satisfy the FE's requirements (cases C-7/13, C-318/11 and C-319/11).

The legal dispute in another decision was whether the representative office's registration was a sufficient criterion to constitute a FE (Judgement No 2210 from 17.02.2014, SAC by adm. c. No 13227/2013). SAC followed again the CJEU's practice (cases C-168/84, C-190/95, C-231/94) and the understanding that the registration itself did not automatically lead to FE. Despite the existence of a certain duration of the activity, the absence of taxable supplies was the key factor for its non-constitution.

Both the practice of SAC and NRA followed the applicable CJEU's case law. There is no significant difference between the international doctrine and the Bulgarian perspective. The

welcoming idea is that the domestic legislation examines both the constitution of PE and FE separately and how this reflects to the fair taxation.

Conclusion

The last chapter of this paper is the conclusion summarising the findings and sharing some ideas of the concept's future. At the international level, the CJEU follows its case law doctrine on this issue. The FE's requirements are examined detailed in every single case. More recent judgements follow the newest tendencies combining the traditional perception of the concept and the actual business needs. Nowadays, an open question in practice is the so-called "virtual FE", which in author's opinion will lead to further comments in near future. Another inquiry therewith is whether it is possible to outline its key features, or it depends on every single case. The author is on the view that a combined, comprehensive approach would lead to rational results. On the one hand, it is necessary to introduce some basic criteria (similarly to the virtual PE). On the other, the case studies will further refine the concept and will outline the future trends.

From Bulgarian perspective, both NRA and SAC follow the international doctrine applying the relevant CJEU's judgements for their argumentation. The welcoming idea is that the Bulgarian tax practice distinguishes between the PE and the FE by examination of each separate case. In most of them, the constitution of the PE/FE also lead to existence to FE/PE.

The author believes that the FE was, is and will be a significant tax issue both from a theoretical and practical perspective. The arguments, therefore, are the variety of cases, its practical importance regarding the place of the supply of services and the future dynamic trade. Moreover, the comparison between the FE and the PE will always be discussable regarding the fair tax treatment. That's why further researches examining the FE's dynamic legal nature may develop the concept.

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List of abbreviations

AG	Advocate General
CJEU, the Court	Court of Justice of the European Union
CITA	Corporate Income Tax Act
Commentary	Commentary of the OECD Model Tax Convention on Income and Capital
CRRNLPA	Commercial Register and Register of Non-Profit Legal Persons Act
EIA	Encouragement of Investment Act
EU	European Union
FE	Fixed Establishment
NRA	National Revenue Agency
OECD-MC	OECD Model Tax Convention on Income and Capital, Condensed Version 2017
Ordinance No H-9	Ordinance No H-9 of 16 December 2009 on the refund of value-added tax to taxable persons, not established in the member state of refund, but established in another member state of the Community
Ordinance No H-10	Ordinance No H-10 on the refund of paid valued added tax to foreigner entities that are not established on the community territory
PE	Permanent Establishment
PITA	Personal Income Tax Act
RAVATA	Regulations for Application of the Value Added Tax Act
Regulation	Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value-added tax
SAC	Supreme Administrative Court of Republic of Bulgaria
SP	Supplementary Provisions
SVD	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of a value-added tax: uniform basis of assessment
TSSPC	Tax and Social Security Procedure Code
VAT	Value Added Tax
VATA	Value Added Tax Act
VD	VAT Directive, Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax