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Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) and Dennis Weber (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Loyens & Loeff) · Thursday, October 5th, 2023

Highlights & Insights on European Taxation

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Introduction

To appreciate the merits and understand the issues of this judgment, a brief historical overview of the 'fixed establishment' (hereinafter: 'FE') concept is necessary.

The 'FE' first appeared as a proxy with reference to the right to tax services in the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1–40) (hereinafter: 'the Sixth Directive'), which became effective on 1 January 1979. No definition, guidance or explanation was provided.

The same two words were carried over to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (hereinafter: 'the VAT Directive'), again without any supporting definition or guidance.

It was therefore left to the Court of Justice of the European Union (hereinafter: 'CJ') to interpret the term. The CJ's first attempt came in 1985 in *Berkholz* (CJ 4 July 1985, C-168/84 *Gunter Berkholz*, ECLI:EU:C:1985:299), seven years after it first appeared in the VAT legislation. The second case came 11 years after that, in 1996. And over the subsequent decades, the CJ was gradually developing the conceptual framework surrounding the FE.

It was not until 2011 when a definition appeared in black and white in Article 11 of 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 (recast) (OJ 2011 L 077, p. 1) ('Implementing Regulation' or 'IR'). In essence, this definition was inspired by the one provided by the CJ in *Planzer* (CJ 28 June 2007, C-73/06 *Planzer Luxembourg Sàrl*, ECLI:EU:C:2007:397).

With the explosion of the supply of services across the globe, coupled with technological innovation and social changes, the FE concept is more important now than it has ever been. As a result of the rise in the supply of cross-border services, the significance of the FE concept also appreciated, in determining the reference point for taxation, as services become a key focus of tax authorities.

Yet, the CJ will only address the questions referred to it, and seldom ventures beyond this scope. To make matters worse, many FE-related questions referred to by the national courts are simply bad questions, perhaps due to a lack of understanding from the national courts and the national authorities. The definition still needs more substantive guidance and commentary. It is not, in my opinion, the role of the CJ to deliver the definitive clarity that businesses need with regard to the FE concept. Yet the European (hereinafter: 'EU') Commission, unfortunately, appears to have no appetite to draft a commentary with the help of the Member States.

And so, we look to the CJ for further insights and clarifications and patiently await the next preliminary request FE case to be registered. In the meantime, businesses still deal with tax authorities' ensuing confusion (or aggressiveness) in the area of the FE.

The case

The *Cabot* case highlights problems still faced in the year 2022 (when the request to the CJ was made by the Belgian national court), 43 years following the introduction of the FE concept in EU law. I highlight below three interesting issues arising from the *Cabot* case.

The questions referred

The cour d'appel de Liège (Court of Appeal, Liège, Belgium) raises three questions. The first two questions effectively ask whether Cabot Switzerland GmbH (hereinafter: 'Cabot CH') has a deemed FE in Belgium, being the human and technical resources of its related Belgian company, Cabot Plastics, on account of their both belonging to the same group and that they had entered into an exclusive service agreement, whereby the Belgian company provided tolling and other support services to the Swiss company. The third question, in essence, is the same as the first two, with the added twist that here the Belgian national court asks if it plays a role that the services provided by the Belgian company contribute to the completion of sales concluded by the Swiss company to Belgian customers.

The first point to make is that all three questions lack the fundamental understanding that, if the Belgian company is indeed the FE of the Swiss company, that would consequently denote that the service provider and the customer are one and the same, meaning that it is providing services to itself, and therefore, no VAT could possibly apply in any case. Unfortunately, this point was lost in all stages that preceded the proceedings in the cour d'appel de Liège, including the proceedings in the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), and in all previous objections and discussions between Cabot Plastics and the Belgian tax authorities. This lack of clarity over how the FE works as a concept should not exist.

Thankfully, the CJ definitively addresses this point when it states in paragraph 41 of the judgment that that the same resources cannot be used to both provide and receive the same services. The CJ made the same point a year earlier in its judgment in *Berlin Chemie* (CJ 7 April 2022, C-333/20 *Berlin Chemie A. Menarini*, ECLI:EU:C:2022:291, paragraph 54) where the Romanian tax authorities attempted to make a similar correlation between two related entities, where one provided services exclusively to the other. The same point arises, but is not addressed by the CJ, in the case of *Welmory* (CJ 16 October 2014, C-605/12 *Welmory sp. z o.o.*, ECLI:EU:C:2014:2298).

Existence of the FE merely as a result of belonging to the same group

In a previous case, the Polish tax authorities had attempted to associate the human and technical

resources of one entity as being the FE of another simply because of the shareholding structure in place (see CJ 7 May 2020, C-547/18 *Dong Yang Electronics*, ECLI:EU:C:2020:350). This precise point was also the essence of the first question submitted to the CJ by the Romanian national court in the case of *Berlin Chemie*. The CJ, in paragraph 36 of the *Cabot* judgment, clarifies that: 'the classification as a "fixed establishment", which must be assessed in the light of the economic and commercial reality, cannot depend solely on the legal status of the entity concerned, and the fact that a company has a subsidiary in a Member State does not, in itself, mean that it also has its fixed establishment there'.

In both the *Berlin Chemie* and the *Cabot* judgments, the CJ clarifies that the FE cannot be deemed to exist simply because of a related party association, even in light of an exclusivity arrangement. One must examine the actual de facto control over the actions of the human resources or over the functioning of the technical resources. In paragraph 35 of the *Cabot* judgment, the CJ clarifies that: '[a]lthough it is not a requirement for a taxable person itself to own the human or technical resources in another Member State, it is, however, necessary for that taxable person to have the right to dispose of those human and technical resources in the same way as if they were its own (…).' Similar wording is used by the CJ in paragraph 41 of the *Berlin Chemie* judgment. Hopefully, tax authorities across the EU will take note of this position.

The FE and the sale of goods

The third question submitted by the cour d'appel de Liège was whether the FE could exist because the services received assisted the sale of goods that the Swiss company was making in Belgium. The CJ clarified that those services and the sales of goods constitute distinct transactions, which are subject to different schemes of VAT (paragraph 40). The FE is a concept relating solely to services and no association can exist when it comes to the sale of goods, for which the VAT Directive has very different proxies for taxation in the place of supply rules. The European Commission made this precise point in the VAT Committee Working Paper 857 (VAT Committee, Working Paper 857, 6 May 2015 – taxud.c.1(2015)2177802.) i.e., that carrying out transactions consisting in supplies of goods cannot by themselves create a fixed establishment.

In *Cabot* the CJ clarified that the FE does not automatically arise simply because services may promote the sale of goods. In paragraph 43 it states that: '[i]t follows that the fact that the service provider also provides the recipient of those services with the abovementioned ancillary services, thereby facilitating the business of that recipient, such as the sale of goods resulting from the tolling, has no bearing on the question of the existence of a fixed establishment of that recipient.' This appears to me to be a fundamental misunderstanding emanating from a confusion between the FE concept and that of the permanent establishment which is a direct tax concept. These are two different concepts and serve different purposes.

Conclusion

Hopefully, the EU Commission will appreciate the pressing need for a commentary concerning the FE concept to be issued.

Alexis Tsielepis

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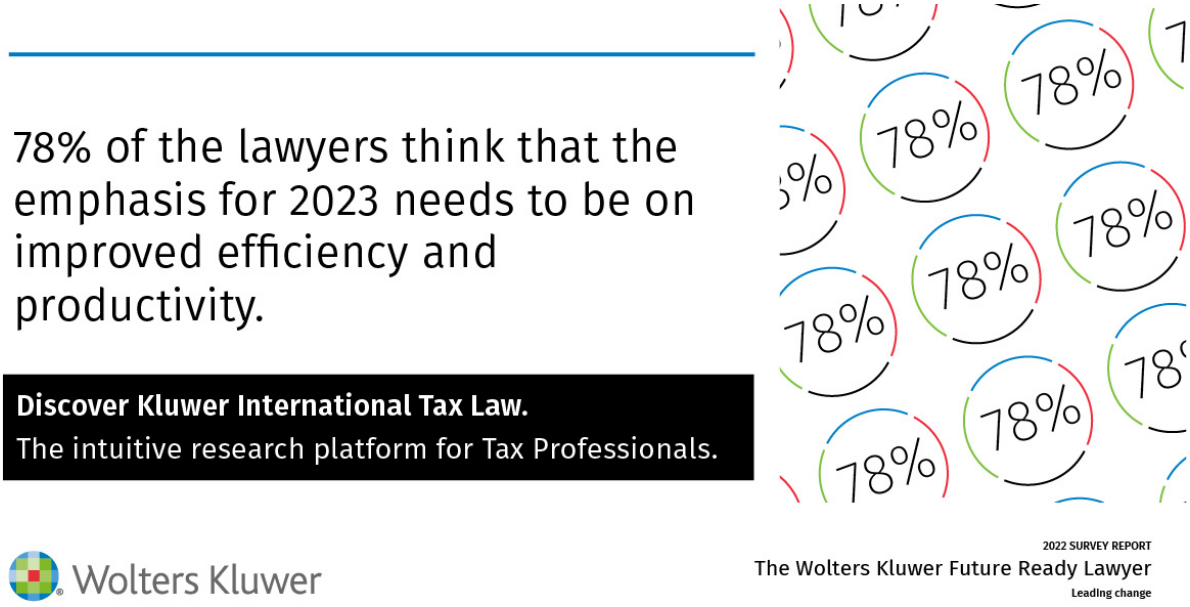

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