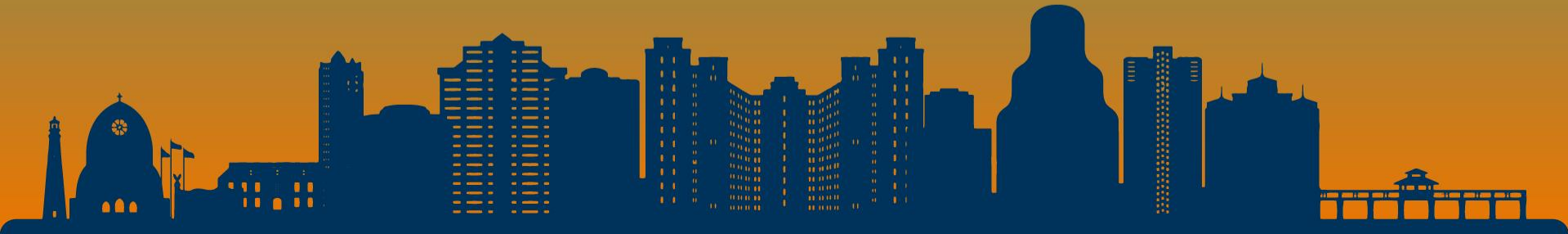


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Today

- Fixed establishment (FE)
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- Conclusion

1. Fixed establishment (FE)

Fixed establishment (FE)

Distinction between:

- An **outbound** fixed establishment
- An **inbound** fixed establishment



1.1. Outbound fixed establishment

Article 11 of the Implementing Regulation (EU) No. 282/2011

- Any “*fixed place of business*” present in Belgium and is characterized by:
 - A sufficient degree of **permanence**.
 - Having a suitable structure in terms of **human and technical resources**.
 - Presumed that such is the case when the establishment is led by a person who can legally bind the company or has representation authority towards clients and suppliers.
 - Being able **to provide the services** which it supplies, on a regular basis.
- Also called an *active fixed establishment*



1.2. Inbound fixed establishment

Article 11 of the Implementing Regulation (EU) No. 282/2011

- Any “*fixed place of business*” present in Belgium and is characterized by:
 - A sufficient degree of **permanence**.
 - Having a suitable structure in terms of **human and technical resources**.
 - Being able **to receive and use the services supplied to it** for its own needs, on a regular basis.
- To which goods and services are provided = effective user-acquirer
- Also called a *passive fixed establishment*



1.3. Consequences FE in Belgium

Supply of services – impact localization

- Directive 2006/112/EC - Article 44

*“**The place of supply of services** by an intermediary acting in the name and on behalf of another person, other than those referred to in Articles 50 and 54 and in Article 56(1), shall be the place where the underlying transaction is supplied in accordance with this Directive.*

*However, where the customer of the services supplied by the intermediary is identified for VAT purposes in a Member State other than that within the territory of which that transaction is carried out, the place of the supply of services by the intermediary shall be deemed to be within **the territory of the Member State which issued the customer with the VAT identification** number under which the service was rendered to him.”*

- The place of supply of a service, supplied to a taxable person acting as such, shall be the place where that taxable person has established his business seat.
- If services are **provided to a fixed establishment** of the taxable person, **the place of supply is where that fixed establishment is located.**

1.3. Consequences FE in Belgium

Supply of goods – impact VAT liability

- Existence of a fixed establishment does not affect localization of the supply of goods; normal VAT rules regarding the supply of goods when FE.
- However, a fixed establishment can **impact the VAT liability** for the supply of goods.
 - In a scenario where a foreign taxable person conducts a local transaction (both purchase and sale in another member state), **reverse charge** mechanism may be applied, requiring the customer to account for VAT.
 - This can only occur if the foreign taxable person **does not have a fixed establishment** in the country where the local transaction is conducted.
 - In such a situation, local reverse charge mechanism is not applicable.

1.3. Consequences FE in Belgium

- For **outbound** fixed establishment:
 - Whether or not to charge VAT instead of a reverse charge;
 - VAT identification in Belgium;
 - Belgian VAT formalities, including the filing of Belgian VAT returns.
- For **inbound** fixed establishment:
 - Correctly VAT billed?
 - VAT identification in Belgium arises only when it receives services from foreign taxable persons.
 - incoming services as outlined in Article 21, § 2, Belgian VAT code

2. Case studies

2.1. Scope of analysis

- ABC Group Benelux B.V is a Dutch tax resident, active in the pharmaceutical industry.
- The company's growth led to its expansion into the Belgian market, necessitating the deployment of local sales representatives.
- **Assessing the presence of a Belgian FE in two situations:**
 - Situation A: operating from a **physical office space**.
 - Situation B: the decision to terminate the lease of the office space and transition to **remote work**.

2.2. Situation A

Outline activities in Belgium

- The Belgium branch of ABC Group Benelux B.V. operated from a **physical office space**.
 - The office is equipped with necessary technological infrastructure to support communication and data management.
- The company has four **Belgian employees** on its payroll who **work in Belgium**.
 - Sales representatives who can legally bind and has representation authority towards clients.
 - Administrative staff managed essential paperwork, including documentation and invoicing.
- The company acquires the goods intra-community from abroad and then **sells them locally** to taxpayers based in Belgium.
- The company does not rent a warehouse in Belgium to store its goods.

Fixed establishment in situation A?

- The Belgian establishment :
 - has a sufficient degree of **permanence**.
 - has a suitable structure in terms of **human and technical resources**.
 - physical office space
 - led by a person who can legally bind the company and has representation authority towards clients and suppliers.
 - can **provide the goods and or services** which it supplies, on a regular basis.
- ABC Group Benelux is **considered to have an outgoing fixed establishment**.



2.3. Situation B

Outline activities in Belgium - Removal of the leased office

- The Belgium branch of ABC Group Benelux B.V. has no longer a physical office space.
 - As a result of the decision to terminate the lease of the office space and transition to remote work.
- The company has four **sales representatives** on its payroll who work in Belgium.
 - Belgian employees transitioned to **remote work** and now **work exclusively from their homes in Belgium**.
- The company acquires the goods intra-community from abroad and then **sells them locally** to taxpayers based in Belgium.
- The company does not rent a warehouse in Belgium to store its goods.

"Does the foreign company qualify as having a fixed establishment for VAT purposes, now that it operates solely from the homes of its employees in Belgium?"

Fixed establishment in situation B?

Outline activities in Belgium - Operating from Employees' Residences in Belgium

Can a home office be considered as a fixed establishment for VAT purposes?

- A home office can qualify as a FE present in Belgium if it is characterized by:
 - A sufficient degree of **permanence**.
 - Having a suitable structure in terms of **human and technical resources**.
 - Being able **to provide / to receive and use the services supplied to it** for its own needs, on a regular basis.

Fixed establishment in situation B?

Outline activities in Belgium - Operating from Employees' Residences in Belgium

The Court of Appeal of Ghent (judgment of 18/10/2016 - case no. 2015/AR/1049) :

- relied on EU Court of Justice case law, establishing that a fixed establishment exists when it demonstrates a certain **permanence** by having sustainable access to **staff and technical resources** necessary for certain services.
- Just because a portion of a company's activities can be carried out at a location such as a home office, it should not automatically be inferred as an FE.
- Whether a **home office constitutes a location at the disposal of the company** depends on the facts and circumstances.
- The legal basis by which the foreign company disposes of the establishment (ownership, lease, free disposal, or any other legal basis) is irrelevant.

Fixed establishment in situation B?

Outline activities in Belgium - Operating from Employees' Residences in Belgium

The Court of Appeal of Ghent (judgment of 18/10/2016 - case no. 2015/AR/1049) :

- The home office can be considered as **accessible to the company** when:
 - **Frequent , near continuous utilization** of the employee's home for **business activities** of the foreign company
 - The employee is **legally obliged** to work from the home office;
 - The employee **factually obliged** to work from home due to **the absence of an office space**.
 - (The employee **cannot stop the use of its home office unilaterally**, for example because the employee cannot perform its activities adequately.)

Fixed establishment in situation B?

Conclusion

- The home office is considered accessible to the company for the following reasons:
 - Consistent utilization for business activities.
 - Evident requirement from the circumstances that the company mandates its use for business operations.
- The company has an **outbound fixed establishment for VAT purposes in Belgium**.
- It is characterized by a sufficient degree of **permanence** and an appropriate structure, in terms of **personnel and technical resources**, to carry out the business activities in question.



3. Conclusion

Outbound/inbound FE

- Characterized by a sufficient degree of **permanence** and an appropriate structure, in terms of **personnel and technical resources**, to **provide/receive and use** services.
- Belgian employee's consistent utilization of a **home office** may lead to the establishment of a fixed establishment.
- Company's policy factually **mandating remote work** due to office space limitations strengthens the case for a fixed establishment.

Outbound/inbound FE

- Does the tax administration in your country suggest that a home office can constitute a FE for VAT-purposes?



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