Branch Reporters
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Summary and conclusions

Belgium takes a very pragmatic approach to permanent establishments (PEs) by adhering to the interpretation provided in the OECD commentary. The Belgian tax authorities (BTA) are of the opinion that this strategy is the best one for avoiding either double taxation or double non-taxation. The jurisprudence is generally scarce, except in the area of building sites where the PE is also most visible. Although some mechanisms exist to systematically track potential PEs on the basis of VAT registrations, little action is taken in general by the BTA. The Ruling Commission plays a role in issuing rulings on the existence of PEs, but it should be encouraged to publish somewhat more detailed information on the legal reasoning behind the rulings. We would like to underline the fact that the BTA has not taken clear positions regarding the new form of business and new technologies that have a potential impact on the existence of PEs. The OECD positions on the matter do indeed leave scope for interpretation, and additional guidelines from the BTA would be welcome. We are referring here to situations relating to (a) headquarters of multinational companies or of parts of them and their relation with affiliate companies; (b) international commerce and the regionalization/globalization of business and more particularly all types of "networked" businesses; and (c) e-commerce in the broad sense between officials and independent parties. Clear guidance on these topics would improve the perception of the tax climate in a transit economy.

1. Introduction

This report provides an overview of the Belgian interpretation of the definition of PE in double tax conventions (DTCs). Belgium currently has 87 DTCs in force. OECD-based treaties have been concluded with all European countries and almost all OECD countries. A minority of treaties are based on the UN model. The BTA proposed a Belgian model treaty in 2008 that set forth the prin-

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ciples that Belgian negotiators should follow and this is very similar to the OECD model.[1] The BTA has formulated few observations on the OECD model and has not formulated any on the PE article.

An important reference for this report is, besides case law, parliamentary questions and doctrinal contributions, the official administrative commentary on DTCs (Com.DTC) representing the BTA's official standpoint. However, since the Com.DTC was last updated in 1996, the BTA has taken the position of using the OECD commentary as reflecting its position on DTC interpretation. Indeed, in a public intervention at a 2005 IFA seminar of the Belgian branch, the BTA has expressly stated its policy of complying with the interpretation of, and changes to, the OECD commentary, even though the Com.DTC had provided different interpretative positions in the past. The BTA's view is that the interpretation adopted in the OECD commentary represents the position of a majority of member states. Complying with this majority interpretation constitutes the best way to avoid double taxation as well as double non-taxation.[2]

The BTA had previously issued in 2003 an extensive circular letter on the 2001 DTC concluded with the Netherlands[3] and in 2004 a circular letter on the interpretation of DTCs.[4] The guidance developed therein is in conformity with the interpretation principles established by the OECD and the 1969 Vienna Convention on the Law of Treaties.[5] The BTA's position is further illustrated by the protocol to article 3 paragraph 2 of the Belgian model which provides that the OECD commentary is binding on the tax authorities of the two contracting states, save for the exceptions mentioned in the provision.

Based on the above, it is fair to conclude that all PE interpretation guidance provided by the OECD is critical to the Belgian interpretation of the PE concept, even though the Com.DTC remains an essential interpretation source.

This report will follow the structure of article 5 of the OECD model to comment on the Belgian interpretation of the treaty definition of PE. As a rule, provisions of particular bilateral DTCs are not analysed.

2. Concept of Belgian establishment

Belgian domestic tax law relies on the notion of Belgian establishment (BE) for taxation in Belgium of foreign companies. The BE concept only applies if Belgium has the right to tax pursuant to a DTC or there is no DTC applicable. Although similar to the PE concept, the notion of BE is somewhat broader than the concept of PE of the OECD model.[6] Any presence that qualifies as a PE under

1 Model treaty for public comments on www.fisconet.fgov.be/nl/docs/Standaardmodel/draft%20june%202007.pdf.

2 M. Devillet, "Les nouveaux commentaires OCDE sur les conventions fiscales de la double imposition et leurs conséquences en Belgique", *IFA Seminar of the Belgian Branch*, 6 December 2005, p. 2.

3 Administrative circular, no. AAF/2002/0097 (AAF 5/2003), 14 March 2003.

4 Administrative circular, no. AAF/2004/0053 (AAF 5/2004), 16 January 2004.

5 Belgium adopted the Vienna Convention in 1992.

6 The BTA provides for a commentary on BE in its commentary on the ITC.

the OECD model is deemed a BE, while the reverse is not necessarily true. The BE concept defined in article 229 of the Belgian Income Tax Code (ITC) differs from the PE concept as follows:

- the domestic definition only applies to BEs of non-resident companies and not to foreign establishments of Belgian companies;
- the ITC contains a broader list of positive cases including an "agency", a "warehouse" and an "inventory";
- a construction site or installation project lasting for an uninterrupted period of 30 days will constitute a BE while the usual period of time is 12 months for a PE;
- article 229 ITC does not provide for an exemption of preparatory or auxiliary activities;
- dependent agents constitute a BE even if they are not entitled to conclude contracts in the name of the enterprise;
- each partner or member in a Belgian or foreign partnership with a presence in Belgium through which taxable income is earned is deemed to have a BE;
- the ITC also includes some specific BE exceptions subject to reciprocity.[7]

It should be noted that according to the BTA a BE can be subject even without a PE to some administrative duties in execution of the ITC: to file a non-resident tax return and to answer a request for information. There could also be cases where a BE had to withhold payroll taxes even in the absence of a PE.[8] This position is challenged by recent doctrine.[9]

3. The basic definition of a PE

According to article 5, paragraph 1 OECD model, a resident of one state has a basic rule PE in another state if three cumulative conditions are met:

- a place of business at his disposal in that other state;
- the place of business must be fixed; and
- the business must be carried on through that place.

3.1. Place of business

The wording that is used by the BTA to define a place of business in the Com.DTC is similar to that used in the OECD commentary: the notion place of business includes premises, a facility or an installation used exclusively or not for the activities of the company. A place of business can also exist when no premises are available or needed to carry on the business, and the enterprise only has a determined space at its disposal.[10]

7 Art. 231, para. 1(3) ITC.

8 Circular no. AAF/96/258 (AAF 17/2003), 24 July 2003, remark V.

9 L. Denys, "The concept of PE revisited and other reflections behind", *Bulletin for International Taxation*, 2008, p. 444; K. Mortée, in *Het Nieuwe Belgisch-Nederlands belastingverdrag*, ed. B. Peeters, Larcier, pp. 61 *et seq*., no. 5.12.

10 Com.DTC, no. 5/103.

The Com.DTC states in accordance with the OECD commentary[11] that it is not required for an enterprise to hold any formal or implied legal right with regard to the place of business in order to carry on its business through it. It is indeed sufficient that the company *de facto* uses the place of business and that this use cannot be unilaterally altered by a third party. Therefore, it is generally accepted that such a place can also be located at the premises of another company. The Com.DTC also mentions a market or a customs warehouse as possible places of business if they meet the permanence test.[12]

Applications of the above can be found in the following Court decisions:

- French taxpayers who were regularly present at several trade fairs in Belgium were deemed in two briefly motivated decisions to have a basic rule PE in Belgium;[13]
- a German transport company was deemed to have a basic rule PE when it employed five people full-time in an office put at its disposal "more or less permanently" at the premises of its client in Belgium.[14] According to doctrine, this decision must be interpreted in the sense that the office in question does not always have to be the same, as long as it is located at the Belgian company's premises;[15]
- a site cabin on a foreign construction site pertaining to a German company delivering maintenance services does not constitute a basic rule PE under article 5(1) if there is nothing other than heavy equipment or storage facilities (used solely for storage purposes) on the site. In this case the Court identified a construction PE because the German company performed some maintenance and assembly activities for more than nine months;[16]
- an Italian engineering company was contracted by a Belgian resident to study and supervise the construction of a chemical factory in Belgium.[17] The engineering company had non-exclusive access to the cabins and the keys thereof remained in the possession of the Belgian company. The BTA claimed, applying the principle laid down in the Com.DTC[18] that the Italian company had a basic rule PE in Belgium and did not base its claim on the construction PE clause. The Italian taxpayer was found by the Court not to have a basic rule PE in Belgium as (a) it did not have a PE in Belgium prior to signing the agreement and (b) the cabins were useful or necessary for the execution of its duties resulting from a specific and limitative service agreement. The fact that these cabins could be considered durable infrastructure in the form of site offices was not decisive for the Court. The offices were, according to the Court, only the consequence of the intellectual rather than manual nature of the work and not of the circumstance that the company established itself in a durable fashion. The OECD applied the

11 OECD commentary, art. 5, para. 4.
12 Com.DTC, no. 5/103.
13 Brussels, 30 October 1998, AFT 1999, 218; see also Tribunal of Ghent, 15 May 2008, *Fiscale Koerier* 2008, 560.
14 Brussels, 30 June 1994, AFT 1995, p. 102.
15 T. Wustenberghs, "De vaste inrichting op de helling", no. 50.
16 Brussels, 24 March 1987, FJF 1988, no. 88/134.
17 Brussels, 4 February 1992, AFT 1992, p. 284.
18 Com.DTC, no. 5/220.

same principle as the BTA but amended its commentary in 2003, declaring that supervision services performed by a subcontractor fell under the construction clause.

Another application of OECD principles is the Minister of Finance's reply to a parliamentary question asking whether servers and websites can constitute a PE. The Minister explicitly stated that Belgium adhered to the position adopted by the OECD on the matter.[19] The recent 2001 DTC with the Netherlands has no particular clause on e-commerce.

3.2. Place of business must be fixed

The second requirement for a basic rule PE includes two elements, a geographical and a temporal one.

3.2.1. Location test

The Com.DTC states that the place of business needs to be connected to a geographical point, although machinery does not need to be materially attached to the ground.[20] This basic "location test" is found in very similar words in the OECD commentary.[21]

The OECD commentary further refines the location test: "in light of the nature of the business, a particular location within which the activities are moved may be identified as constituting a coherent whole commercially and geographically with respect to that business",[22] thus constituting a fixed place of business. The practical impact of this in Belgium seems to be limited to building and construction works and itinerant performers and artists. In the case of a service PE the delimitation of the fixed place may be less relevant as the contracting terms can be expected to be the decisive factor.

An application of the location test can be found in a recent ruling of the Belgian Ruling Commission. The Commission held that a Dutch resident organizing and coordinating typing courses of 12 lessons of two hours each in a Belgian school or in another rented location would constitute a PE.[23] The fact that the place was subject to change was not considered a location barrier to the PE. The Dutch resident would do all his coordination work in the Netherlands and the classes would be taught by Belgian residents on a freelance basis.[24]

19 Parliamentary question no. 1123, 23 January 2001.

20 Com.DTC, no. 5/104.

21 OECD commentary, art. 5, no. 5.

22 OECD commentary, art. 5, no. 5.1.

23 Ruling Commission Decision no. 500,274, 27 April 2006.

24 This decision has been strongly criticized by the doctrine for not applying correctly the third basic rule PE condition (T. Wustenberghs, "DBV België-Nederland: vaste inrichting: een ruime interpretatie?", *Fisc. Int.*, 2007, 278, pp. 5–8). The classes would not be taught by people executing a labour contract. As freelance teachers, they would only carry on their own business in a subcontract relationship, which implies that they would not represent the applicant. Moreover, all the commercial activities related to the undertaking would be conducted abroad. It is therefore unfortunate that the Ruling Commission did not address the relationship between the applicant and the freelance teachers.

3.2.2. Duration test

To satisfy the duration test, the place of business needs to have some degree of permanence.[25] In describing what degree of permanence is required the Com.DTC states that the place must not be of a merely temporary nature. The installation can be for a very short period, depending on the nature of the business or because of unforeseen circumstances. Short periods are also relevant if the business is carried on in a recurrent fashion.

The Com.DTC states that there are two decisive criteria when judging whether the duration requirement is fulfilled.[26] The first is the intention of the foreign taxpayer. The initial intention of the taxpayer to have a presence for a durable period in the source state suffices for the temporal requirement to be fulfilled, even if the stay is eventually shortened due to (exceptional) circumstances. The second element, the actual duration, should be considered based on the facts. If the foreign taxpayer's presence in the source state lasted longer than initially intended, his presence could retrospectively trigger a basic rule PE depending on the actual length of his stay.

Neither the BTA nor the Belgian courts offer much guidance as regards the duration test. In fact, Belgium has not determined a minimal duration period in the vast majority of its DTCs. However, the scarce case law on this topic traditionally uses a threshold that approximates to a period of 12 months.[27] In a reply to a parliamentary question, the Minister of Finance stated that the minimum period of six months mentioned in the OECD commentary only had an indicative value, and that the question of whether a place of business with less than six months of activity qualified as a PE would depend on the nature of the activity.[28]

A PE will start to exist as soon as the activity starts being prepared in the PE, not as of when the PE itself starts being built or furnished. It ends when operations of the PE are actually stopped, including the closing activities. The sale of the PE or the letting thereof will often end the existence of the PE.[29]

The Com.DTC states that no duration test is required to determine whether organizers of theatrical performances, public entertainment and other kinds of shows have a basic rule PE located in buildings, tents, vehicles, etc.[30]

In the absence of an unequivocal rule, the duration test is applied on a case-by-case basis. The Court of Appeal of Antwerp ruled that a restaurant run in the Netherlands for seven months at a trade fair constituted a PE, without raising the duration question in its reasoning.[31] In another case, the Court of Appeal of Liège ruled that a taxpayer did not have a PE in Luxembourg in the absence of any other proof than teaching eight days of computer classes at the European Parliament.[32]

25 Com.DTC, no. 5/104; OECD commentary, art. 5, para. 6.
26 Com.DTC, no. 5/104, similar to OECD commentary, art. 5, no. 6.3.
27 Tribunal of Liège, 9 December 2004, *Expat News* 2005, no. 7, p. 20; Tribunal of Brussels, 22 April 2005.
28 Parliamentary question no. 13,329, 29 November 2006.
29 Com.DTC, no. 5/108.
30 Com.DTC, no. 5/231.
31 Antwerp, 6 February 2001, Fisc. (I) 2001, no. 208, p. 7 – the Court unfortunately only refers to actual taxation in the Netherlands.
32 Liège, 24 February 2006; in this case the proof issue is decisive.

In the above-mentioned ruling regarding computer classes organized by a Dutch resident, the Ruling Commission considered that the regularity and the number of classes constituted enough durability for a basic rule PE.

With respect to the earlier two cases regarding the French taxpayers who traded at different marketplaces in Belgium,[33] it should be noted that the French-Belgian DTC provides in its article 4, paragraph 4(h) that a minimal duration of 30 days per calendar year is required for this type of activity. Although both decisions were briefly reasoned as regards the duration test, the court/tribunal applied this 30-day rule in aggregate, as explicitly prescribed by the Com.DTC.[34] The court/tribunal did not require the French taxpayer to spend 30 days in each geographically different marketplace in order to conclude on the existence of a basic rule PE. Belgian and foreign doctrine rather seem to advocate the approach requiring the duration test to be fulfilled by each single place of business.[35]

3.3 The foreign taxpayer's business must be carried on wholly or partly through that place of business

According to the Com.DTC, this condition generally requires the activities to be performed in or via the fixed place of business by the entrepreneur or by persons who are in a paid employment relationship with the enterprise (i.e. employees and other persons receiving instructions from the enterprise). The powers of such personnel in their relationship with third parties are irrelevant (i.e. it is immaterial whether they have authority to conclude binding contracts).[36]

However, it should be noted that a PE does not *per se* need the presence of physical persons. The Com.DTC provides that automated vending machines, gaming machines and other similar machines can constitute a PE if the foreign company that installs them also exploits and maintains them for its own account. If they are leased to third parties by the foreign company, such machines do not normally constitute a PE.[37]

With regard to the leasing of real estate property, machinery, industrial or commercial equipment, computer equipment, intangible property, etc. the Com.DTC is similar to the OECD commentary. A foreign company which leases equipment, immovable property or intangible property to a Belgian resident company will not be deemed to have a PE in Belgium unless it maintains for such leasing activity a fixed place of business in Belgium.[38] The leased equipment, building or intangible property as such will not constitute a PE of the lessor provided the contract is limited to the mere leasing of the equipment, etc.

The Belgian Supreme Court decided that real estate companies can have a BE by the mere leasing of real estate even without maintaining a place of business,

33 Brussels, 30 October 1998, AFT 1999, 218; Tribunal of Ghent, 15 May 2008, *Fiscale Koerier* 2008, 560.

34 Com.DTC, no. 5/232.

35 K. Vogel, *Klaus Vogel on Double Tax Conventions*, London, Kluwer Law International, 1997, art. 5, no. 28; Wustenberghs, "De vaste inrichting op de helling", no. 59; P. Cauwenbergh, note under Brussels, 30 October 1998, AFT 1999, no. 5, p. 221.

36 OECD commentary, art. 5, no. 10.

37 Com.DTC, no. 5/107.

38 Com.DTC, no. 5/106 and OECD commentary, art. 5, para. 8.

because the core business activity consists of acquiring, exploiting, managing and administering real estate. Although that position triggered a lot of debate, we do not expand on it as the relevance thereof is currently of limited practical significance after the amendment of the ITC in 1989.[39] That position of the Supreme Court, however, still has some influence as illustrated by a 2003 decision of the Court of Ghent where the court took a shortcut from BE to PE without much explanation, albeit after the taxpayer – a real estate developer – had admitted he had a PE.[40] The issue of real estate leasing is covered by article 6 of DTCs which deals with immovable property and prevails over articles 5 and 7 of the OECD model in such cases. The situs state always has the right to tax the lease income disregarding the question of PE, and under Belgian domestic law a BE is no longer required to tax foreign real estate owners who lease property located in Belgium directly to enterprises or persons established in Belgium. The existence of a PE is only relevant in some cases for the attribution of head office expenses to the lease under article 7 OECD model.[41]

4. Listed examples of a PE

The second paragraph of article 5 OECD model enumerates a list of places of business. This is not a limiting list and a foreign taxpayer who has one of these places in Belgium will presumably have a PE *juris tantum*. The examples of paragraph 2 should be read in the light of the first paragraph of article 5:[42] all basic rule PE conditions need to be met for the listed examples to qualify as PEs.

The enumeration contained in paragraph 2 is quite self-explanatory and has not triggered much debate or been subject to much litigation. The Com.DTC mentions and comments on practical examples of PEs. We do not comment on all these, and limit ourselves to commenting on the place of management.

The OECD commentary holds that a place of management does not necessarily have to be an office.[43] The Com.DTC states that a place of management does not require the existence of a material establishment. The essential but sufficient element is that management is effectively exercised.[44] The mere fact of having a director taking care of management at a fixed place in Belgium suffices even if the place does not belong to the foreign company. The Com.DTC enunciates that the exercise of a limited management function (i.e. confined to a part of the company) cannot qualify as a preparatory or auxiliary activity when this function includes at least certain aspects of management.[45]

39 Luc Hinnekens, *Buitenlandse Commanditaire en Burgerlijke Vennootschappen met onroerend goed in België, Liber Amicorum Jean-Pierre Laga*, p. 381; Caroline Docclo, "Le réquime fiscal des sociétés immobilières", *Mélanges, John Kirkpatrick*, p. 250.

40 Ghent, 1 April 2003, *Fiscale Koerier* 2003, 576; Supreme Court, 21 May 1982, FJF 1982, p. 275. The Supreme Court later confirmed its decision in 1993: Supreme Court, 25 January 1993, RW 1993–1994, p. 29.

41 Com.DTC, no. 5/238.

42 OECD commentary, art. 5, para. 12.

43 *Ibid*., para. 13.

44 Com.DTC, no. 5/202.

45 Com.DTC, no. 5/324.

The Brussels Court of Appeal was of the view that a place of management is one where responsibility is borne for the enterprise. The mere use of a correspondence address on invoices and other documents does not necessarily imply the existence of a place of management.[46] The tribunal of Mons stated that in order to identify a place of management, the tax administration had to prove that acts of daily management were executed on a regular basis.[47] The latter condition was criticized in the doctrine as being superfluous.[48]

5. Building and construction sites

Belgian administrative guidance states that a construction or an installation project can be considered as a PE in Belgium when the duration of its activities exceeds a certain period.[49] The majority of DTCs concluded by Belgium require a minimum 12-month period.[50] In most DTCs, especially those which include a separate paragraph on building and construction activities, the construction clause should be considered a *lex specialis*. The construction clause covers all building, construction, assembling, demolishing, dredging and excavating projects as well as similar projects.[51] It should be noted that not all DTCs concluded by Belgium include the term "installation project". In a parliamentary question the Minister of Finance has indirectly confirmed that installation projects are also subject to the duration test of the construction clause in the case of a German company that delivered and assembled machinery in Belgium. An installation project by a Swiss company lasting for nine months in 1974 was considered a BE on the basis of article 140(3) ITC. The case predates the 1978 treaty but exposes a constant partner of the BTA later confirmed by the Minister.

Furthermore, the construction clause also covers activities which do not constitute *per se* construction activities but relate to a building or construction project. Maintenance works are normally not a PE, but when combined with other activities the case may be unclear. The Brussels Court of Appeal held that maintenance work on existing industrial facilities could not be assimilated to a construction PE, but considered that when a company executed such works in relation to assembly activities, it could have a construction PE in Belgium.[52]

The Com.DTC provides that the planning and supervision of a building or construction site is included in the term "building site or construction project" if carried out by the building contractor itself. However, if the planning and supervision is performed by another enterprise (e.g. an architect) that does not

46 Brussels, 6 February 1990, FJF 1991, no. 91/2. The case was reversed on different arguments by the Supreme Court on 24 May 1991 but then again confirmed by the Antwerp Court, 1 April 1993.

47 Tribunal of Mons, 6 May 2003, FJF 2003, no. 2003/281.

48 Wustenberghs, "De vaste inrichting op de helling", no. 80.

49 Circular no. AFF/96/258 (AFF 17/2003), 24 July 2003.

50 The duration is six months in DTCs with France and Luxembourg.

51 Com.DTC, no. 5/211.

52 Brussels, 15 September 1995, *De Fiscale Koerier* 1995, p. 602. See also Brussels, 24 March 1987, FJF no. 88/134.

intervene in any way in the execution of the building or construction work, the planning and supervision do not fall within the scope.[53] The Court of Appeal of Mons ruled that even daily planning and supervision activities performed by the principal building contractor did not trigger a PE, regardless of the duration, since the activities were limited to planning and supervision, while the entire construction was performed by appointed subcontractors.[54] The attribution of time spent by a subcontractor to the general contractor seems to require that the latter has himself executed part of the project.[55]

The OECD commentary in 2003 has included on-site planning and supervision in the term "building site or construction or installation projects". The commentary foresees that states wishing to include such activities in the term "building site or construction or installation projects" are free to do so in their bilateral conventions.[56] In the absence of any such changes in the DTCs Belgium has concluded, especially those that were concluded prior to 2003, the question arises whether the BTA and the courts would apply this change in a similar case. One could still argue that planning and supervision activities, if not performed by the building contractor itself, could only constitute a PE under the basic PE rule.[57]

In the case of a Danish company, active in the sector of energy installations in Belgium, the Ruling Commission in 2005 confirmed that on-site planning and supervision activities did not in principle trigger a construction PE as long as they were limited to planning and supervision.[58] The activities also included the purchase of materials, production, installation and supervision by its engineers, but the installation of materials was done by staff members of the client. The company had engaged Belgian subcontractors to fireproof materials and facilities and to clean them chemically. According to the Ruling Commission, these activities went beyond the scope of ordinary on-site planning and supervision. Noteworthy is that the Ruling Commission made use of the Com.DTC to support its decision.

When a foreign company executes construction or installation activities at different locations and at different times, each site needs to be assessed separately in order to decide whether or not the applicable minimum period is exceeded.[59] For example, a foreign company involved in construction works in Belgium for 14 months, performing at two different sites which were unrelated and which each lasted for 7 months, had no PE. Different sites are considered as a single project if they form a coherent whole from a commercial and geographical perspective.[60] The question of whether two different sites can be treated as a coherent whole

53 Com.DTC, no. 5/213.
54 Bergen, 28 April 1976, JDF 1977, p. 155.
55 OECD commentary, art. 5, para. 19. See also Com.DTC no. 5/217 *in fine*.
56 OECD commentary, art. 5, para. 17.
57 See case of Italian engineering company in basic rule PE comments.
58 Ruling Commission Decision, no. 500,063, 7 October 2005.
59 Com.DTC, no. 5/218; circular no. AFF/2002/0097, 14 March 2003; Supreme Court, 24 May 1991, *Bull. Contr.* no. 721; Antwerp, 12 April 1984, FJF 84/144; Liège, 23 April 1986, FJF 86/9, 297.
60 Com.DTC, no. 5/218; circular no. AFF/2002/0097, 14 March 2003; Brussels, 24 March 1987, FJF 88/134; Bergen, 10 October 1978, *Bull. Contr.* 1980, no. 589, p. 2078.

needs to be decided based on the facts of the case. The following guidelines apply:[61]

- building or construction activities that are not intertwined should, in principle, not be combined for assessing whether the minimum duration is exceeded;
- work performed for separate principals should, in principle, be treated as separate projects, unless it constitutes a whole from an economic point of view;
- different projects performed for one principal by virtue of one contract are treated as a whole, unless the different projects are not performed in any relationship to each other; and
- projects performed for one principal by virtue of several contracts are also to be treated as a whole if the activities, although performed at different sites, are part of a more global project and there is no significant interruption of the activities between the sites.

According to the Court of Appeal of Liège,[62] the BTA has rightly decided that projects performed from 1981 to 1989 in execution of three successive contracts with a single principal should be combined to determine whether their execution presented time continuity. The court concluded that there was a PE within the meaning of the Belgian-German convention.

The Supreme Court came to the conclusion that, as the sites were in different locations and were only connected because they were executed by the same employees, they did not constitute a coherent whole and therefore could not be considered as a single site in Belgium for the duration test purpose pursuant to the (old) Belgian-Dutch convention. The fact that the company had a single address in Belgium did not trigger a place of management.[63]

5.1. Starting point of the site

According to the BTA, the starting point is the beginning of preparatory activities carried out on site by the contractor.[64] The Ruling Commission decided that the phase of consultation, design and implementation of the project as well as the production phase should not be taken into account in determining the duration of the project if these preparatory operations were not executed in Belgium.[65] To determine the starting point in practice, the doctrine has suggested the criterion of the arrival on the site of the first worker, or the first materials.[66] However, it is important to note that events such as the conclusion of the contract between the parties, the opening of a bank account, etc. must be disregarded for the 12-month test.

61 Circular letter of 28 March 1989. See also the Protocol to the Belgian-Dutch DTC, no. 6 and circular no. AFF/2002/0097, 14 March 2003.
62 Liège, 30 April 1997, *Courrier Fiscal*, 97/404.
63 Supreme Court, 24 May 1991, *Bull. Contr.* no. 721.
64 Com.DTC, no. 5/217.
65 Ruling Commission Decision, no. 500,063, 7 October 2005.
66 P.G.H. Albert, "Vaste inrichting", TFR 1995, p. 229.

5.2. End of the site

A construction project continues to exist until the work is completed, i.e. until the contractor definitely leaves the site.[67] Regular test runs connected with the construction project itself (e.g. because there is a contractual obligation to render these services) will defer termination. Training of personnel and after-sales reparations are in general not to be included in construction works. Normally, proof of termination can be the departure of construction workers.

A German company installed on behalf of a Belgian principal "refrigerated cells" on a Belgian site. According to the applicable DTC, a construction or an installation site is a PE if the work lasts for more than nine months. The BTA argued that as there was no dated document for the acceptance of refrigerated cells the date of the final invoice paid had to be taken into account for the computation of the duration. The tribunal of Ghent rejected this view, stating that the crucial date was the one on which the contractor completed the projects and left the site.[68] The tribunal also decided that any repair works should not be taken into account for the calculation of the duration of the initial construction activity.

5.3. Temporary interruptions

According to the Com.DTC, seasonal or temporary interruptions (due to bad weather, shortage of material or workforce) will be included for the calculation of the 12-month test. A suspension of the duration is only possible if the interruptions are a consequence of events constitutive of *force majeure* cases or, at the very least, show an unusual or an exceptional character in the relevant sector.[69] Acceptable interruptions are those requested by the principal in case of financial difficulties or in case of unavailability of the construction site.

In the refrigerated cells case the tribunal held that interruptions during five months due to financial difficulties of the principal or to the unavailability of the site should not be taken into account to determine the fiscal duration of the works.[70]

The Ruling Commission has also agreed not to take into account an interruption requested by the principal. However, the Commission insisted that there should be no employees present on site during the interruption and also suggested that the same interpretation should apply to the subcontractor.[71]

The Court of Appeal of Ghent decided, in a case where a Dutch company pretended to perform construction and renovation work in a Belgian factory in two separate phases with a two-month interruption, that the interruption was not adequately proven and that the Belgian customer had confirmed activities on site during the interruption period. The work was included under the same contract and had to be identified as one project.[72]

67 Com.DTC, no. 5/217.
68 Tribunal of Ghent, 17 October 2007, *Fisc. Int.*, no. 293, p. 6.
69 Com.DTC, no. 5/217.
70 Tribunal of Ghent, 17 October 2007, *Fisc. Int.*, no. 293, p. 6.
71 Ruling Commission Decision, no. 300,184, 4 February 2004.
72 Ghent, 20 March 2001, *Fisc. Int.*, no. 209, p. 2.

6. The exception for "preparatory or auxiliary" activities

Article 5, paragraph 4 contains a non-exhaustive list of business activities which are considered not to constitute a PE ("negative list"). This is laid down explicitly in sub-paragraph (e). The common feature of all activities falling under the scope of the negative list is that they are preparatory or auxiliary activities; these activities may contribute to the productivity of the enterprise as a whole but they are so remote from the actual realization of profits that it is difficult to allocate any profit thereto.[73]

6.1. General conditions

In general, an activity can only qualify as preparatory or auxiliary if the following conditions are met.

6.1.1 Intra-muros *character*

The preparatory or auxiliary activity should be performed exclusively for the head office (or its branches) of which the fixed place of business is a part. In other words, a fixed place of business which renders services not only to its own head office but also to other (group) companies cannot benefit from the application of the negative PE provision. This is e.g. the case if the costs of the fixed place of business are not entirely borne by the foreign head office but are (or should from an arm's length perspective be) directly or indirectly recharged to other companies benefiting from these services.[74]

6.1.2. No commercial or core business activities

A Belgian fixed place of business performing activities that are similar to the main activities of the foreign head office can never constitute a negative PE. If, for example, R&D or market research is the core activity of an enterprise, the same activities performed through the fixed place of business cannot qualify as "preparatory or auxiliary".[75] What constitutes the company's core business activity is judged on a case-by-case basis. In this context, reference can be made to a decision of the Court of Appeal of Ghent.[76] In this case, a Swiss company active in the purchase and sale of diamonds bought most of its merchandise in Belgium. The company had a workshop mainly responsible for quality control. The BTA argued that the Belgian workshop exercised the core business of the Swiss company and therefore constituted a taxable PE. The Court waived this argumentation. It considered that under article 5, paragraph 4(d) of the Belgium–Switzerland DTC, there was no PE where the establishment only purchased

73 Com.DTC, no. 5/301.
74 Com.DTC, no. 5/305.
75 Com.DTC, no. 5/326.
76 Ghent, 30 November 2004, *Courrier Fiscal*, 2005, Liv. 5, p. 278.

merchandise, irrespective of the nature of the purchases and the role effectively assumed by the establishment in the light of the purchasing activity. The Court further stated that the exceptions provided in paragraph 4 had to be broadly interpreted since they had been specifically introduced in order to promote international trade. According to the Com.DTC the fixed place of business may not in any way intervene in the quest, negotiation, acceptance or execution of orders (e.g. sales and service contracts). It may also not have contacts with the customers of the enterprise (or of the group).[77] The Commission, however, nuanced to a certain extent this general statement within the Com.DTC by deciding that the seeking of potential clients, the establishing of a first contact with them, the preparation of negotiations and the coordination of the signing of a contract were all preparatory activities which did not lead to a PE.[78]

6.2. Case-by-case assessment

The question of whether certain activities have a preparatory or auxiliary character necessitates a case-by-case examination as to whether or not the activities of the fixed place are an essential or significant part of the activities of the entire enterprise.[79]

Some useful guidance can be found in the Com.DTC, the decisions of the Ruling Commission and in case law.

According to the Com.DTC,[80] there is no PE in Belgium where an office is used for advertising, information gathering or scientific research. The same is true for non-commercial activities often performed by so-called coordinating offices, such as:

- coordination of methods, programmes and policies regarding budgets, accounting, commercialization, advertising and public relations, financing and credit, etc.;
- studies with respect to organization, standardization, formation of personnel, monetary and economic regulations, foreign currency markets and financing, etc.;
- advice with regard to organization, legal issues, sales techniques and participation in trade and industrial fairs; or
- maintaining contacts with national authorities, international organizations, central banks and financial institutions, etc.

According to the Ruling Commission the packaging of goods returned by a distribution centre does not create a PE issue since it forms an integral part of the function of storage and distribution and cannot be regarded as a transformation of goods.[81]

The Court of Appeal of Brussels had to decide in 2001 on a case concerning a Spanish bank with a representation office in Belgium, of which the "official" purpose was to provide financial information to Spanish clients residing in Belgium

77 Com.DTC, no. 5/324.
78 Ruling Commission Decision, no. 700,286, 4 December 2007.
79 Com.DTC, no. 5/323.
80 Com.DTC, no. 5/324.
81 Ruling Commission Decision, no. 600,409, 12 December 2006.

and to advertise. In reality, the activities performed in the Belgian office were quite similar to those of the head office. Indeed, a collaboration agreement between the Spanish bank and a Belgian bank facilitated the performance by the Belgian representation office of a complete cycle of banking services which were not consistent with the ordinary goal and operation of a representation office but were part of a strategy to attract new clients and fund-raising conducted to further productivity. Therefore, the Court concluded on the non-applicability of the provision in respect of preparatory or auxiliary activities.[82]

6.3. Combination of exempt activities

As a rule there is no PE as long as the fixed place performs (a combination of) operations which are all covered by article 5, paragraph 4. However, the entire activity of the fixed place of business, resulting from the combination of these operations, needs to preserve a preparatory or auxiliary character compared to the principal activity of the enterprise and cannot e.g. qualify as a (quasi-) full business cycle.[83] Consequently, if a fixed place of business is used for both exempt and core business activities (e.g. a storage facility delivering and selling goods), the overall activity cannot qualify as preparatory or auxiliary. In this case, the fixed place is a PE for both categories of activity.[84]

7. The agency PE

Article 5, paragraph 5 of the OECD model provides that an enterprise has a PE in another state (source state or PE state) if:

- a person qualifies as an agent, not being independent in the sense of article 5, paragraph 6;
- this person has and habitually exercises in that state the authority to conclude contracts in the name (and on behalf) of the enterprise;
- the person's activities are not limited to those mentioned in article 5, paragraph 4.

7.1. Agent

An agent is a person who performs business operations (sales, purchasing, etc.) in the name and on behalf of another enterprise. This means that a person performing sales activities on his own behalf (i.e. a buy–sell entity) cannot qualify as an agent in the sense of article 5, paragraph 5, unless he is requalified as a (dependent) agent based on sham doctrine or article 344, paragraph 1 BITC (general anti-abuse provision).

82 Brussels, 2 May 2001, FJF 2001, no. 10, p. 817.
83 Com.DTC, no. 5/303; Ruling Commission Decision, no. 600,445, 6 March 2007, no. 36; Ruling Commission Decision, no. 700,286, 4 December 2007, no. 70.
84 Com.DTC, no. 5/302.

The requirement that contracts should be concluded "in the name of" refers to the civil law concept of "direct representation". Because the agent acts in the name and for the account of the principal, the latter is deemed to have contracted himself. The intermediary "disappears" from the transaction and the principal is directly bound to the other party to the contract.[85] Consequently, both the commercial agent (independent) and the business representative (employee) can, in principle, give rise to a PE.[86]

The question whether a commissionaire contract triggers an agency PE is at first sight more controversial. The BTA considers that only agents who have a contractual right to act in the name of their principal can trigger an agency PE.[87] Following this reasoning, a commissionaire is excluded from the scope of article 5, paragraph 5 OECD model, since, as a rule, it will only conclude contracts in its own name and thus does not create a legal link between the principal and the party contracting with him (indirect representation).[88] Consequently, a commissionaire does not meet the requirements of article 5, paragraph 5, unless it is requalified as a dependent agent based on sham doctrine or article 344, paragraph 1 BITC.

7.2. Dependent versus independent

Article 5, paragraph 5 is only applicable to agents who are legally and economically dependent on the enterprise for which they perform transactions. The (in)dependent character of the agent should not only be based on the qualification that the parties gave to their contract.[89] It requires a factual analysis, taking into account *inter alia* the following elements: (a) the level of entrepreneurial risks assumed by agent in running his business; (b) the level of detail of instructions from the principal; (c) the number of principals for which the agent operates; (d) the level of freedom of the agent in selecting the necessary equipment and running his day-to-day business; (e) the level of control of the agent's books by the principal.

The Com.DTC defines independent agents in very general terms as those who deal with customers in their own name, at their own risk and without any intervention of the foreign principal such as brokers, commissionaires, customs commissionaires, etc.[90] We believe that the commentary is too narrow in this respect, since it only qualifies intermediaries acting in their own name as independent agents. The independent agent status should also encompass intermediaries who can conclude contracts in the name and for the account of the foreign principal, while being legally and economically independent.[91]

85 Wustenberghs, "De vaste inrichting op de helling", nos. 153–158.
86 T. Wustenberghs, "La structure du commissionnaire remise en cause", *Fisc. Int.*, no. 286, 2007, p. 3.
87 Com.DTC, no. 5/402 *in fine* and no. 5/502.
88 Supreme Court, 25 October 1963, *Pas.* 1964, I, 204; Supreme Court, 22 October 1976, *Pas.* 1977, I, 229; Brussels, 8 April 1981, *RW* 1981–1982, 494.
89 Com.DTC, no. 5/401.
90 Com.DTC, no. 5/502.
91 Ruling Commission Decision, no. 700,286, 4 December 2007.

7.3. Authority to conclude contracts with respect to non-exempt activities

In order to identify an agency PE in Belgium, the intermediary must be able to bind the foreign company, regardless of whether the agent is a resident of, or has a habitual abode in the state in which it operates. The question of whether the intermediary can bind the foreign company is often addressed from a legalistic perspective (e.g. the signature and/or conclusion of contracts in the name of the enterprise).[92] On the other hand, the economy of the contract should also be examined (substance over form approach). A foreign principal who is *de facto* bound by the activities of the intermediary can indeed also trigger an agency PE in Belgium. This is e.g. the case if the Belgian intermediary can negotiate all the essential elements of the contract so that the signing of the contract by the foreign principal is a mere formality ("rubberstamping").[93] This does not mean that every intermediary who intervenes in the negotiation of contracts creates an agency PE. On the contrary, the BTA recently confirmed that the fact that employees of a resident group company attended or participated in the negotiation of a contract was not in itself sufficient to consider that the resident group company was empowered to conclude contracts in the name of the foreign company. However, the BTA emphasized that passive or active participation in negotiations could constitute a relevant criterion to determine the functions performed by a dependent agent for the account of an enterprise.[94]

There is no detailed official guidance on the meaning of the terms "habitually exercises", such as mentioned in article 5, paragraph 5. The Com.DTC merely states that the agent should regularly act as such, i.e. repeatedly and not only occasionally.[95] It should be noted that there is no threshold requirement as to the frequency or the number of contracts that should be concluded through the agent. The frequency largely depends on, and varies, from business sector to business sector.

7.4. Article 5, paragraph 6

Article 5, paragraph 6 of the OECD model provides that a broker, a general commission agent or any other agent of an independent status shall not constitute a PE of the foreign principal, provided that such persons are acting in the ordinary course of their business.

Article 5, paragraph 6 is a negative provision that constitutes an exception to the general rule of article 5, paragraph 5. As already mentioned, an agency PE can only exist if, and to the extent that, all conditions of article 5, paragraph 5 are met. As such paragraph 6 does not allow the existence of a PE to be concluded.[96] Indeed, paragraph 6 only aims at excluding from the scope of paragraph 5 agents

92 Com.DTC, no. 5/402. Ruling Commission Decisions, no. 700,286, 4 December 2007, and no. 300,331, 17 May 2004.
93 Wustenberghs, "La structure du commissionnaire remise en cause", *op. cit.*, p. 2.
94 Devillet, *op. cit.*, p. 3.
95 Com.DTC, no. 5/403.
96 Wustenberghs, "De vaste inrichting op de helling", no. 177.

who are both economically and legally independent,[97] and act in the normal course of their business, even if they generally conclude contracts legally binding the principal.

The BTA examines whether an agent is "acting in the ordinary course of its business" in accordance with the guidance set forth in the OECD commentary.[98] This examination requires a comparison of the activities of an agent with business activities customarily carried out within the agent's trade as a broker, commission agent or other independent agent rather than with the other business activities carried out by the agent. Consequently, it is possible that similar activities may or may not lead to a PE according to the trade or the industry in which the agent performs his activities.

The Com.DTC gives some examples of operations typically falling outside the ordinary course of an agent's business:

- the execution of a full business cycle on behalf of the principal (purchase of raw materials, manufacturing and sales);
- the performance of some operations such as transformation, conversion into marketable products, and the finishing of goods for the account of the principal to the exception of the mere packaging for further shipping;
- the fact of being contractually bound by an employment contract and remunerated on the ground of a fixed salary and/or of being under control of the principal (prohibition on selling products to competitors, assertive control of the accounts, etc.).[99]

7.5. Particular agents

7.5.1. Partnerships

The question of whether a partnership falls under the agency concept is hard to answer.

On the one hand, legal differences between the agency and partnership notions lead to the conclusion that a Belgian partner cannot constitute a PE for its foreign partners. These differences relate to the facts that:

- as a consequence of the civil concept of direct representation, agents do not participate in the contractual relationship between the principal and the other contracting party. On the other hand, partners in a partnership remain in the contractual relationship with the other contracting party;
- agents are remunerated by means of commission while partners in a partnership share the profits of the partnership according to the value of their own share in the partnership;
- agents have a limited liability while partners in a partnership have a joint liability with the other partners.[100]

On the other hand, if it is shown that the foreign partners are trading in Belgium through a resident office or through agents with a regularly exercised authority to

[97] For a definition of agent and of (in)dependence see above section 7.1.
[98] OECD commentary, art. 5(6), 2005 update, nos. 38(7) and 38(8).
[99] Com.DTC, nos. 5/503 and 5/504.
[100] Wustenberghs, "De vaste inrichting op de helling", nos. 676–678.

bind the foreign partners because of the trading activities or the office of the Belgian partners, the rationale for the existence of a PE could be deemed satisfied.

The Brussels Court of Appeal held in 1998 that a Belgian company which was a partner of a US partnership had an agency PE in the USA because (a) the US partnership was not a legal person and (b) because the Belgian company was bound by the agreements concluded by the managing partner of the general partnership.[101]

The reporters want to caution against too unrestrained an application of the *a priori* partnership PE status. The BTA seems to adopt the position that the partnership's PE, i.e. the general partner's office or any other place of business, should be prima facie considered to be the PE of each partner of the partnership. Such an attribution of the partnership's PE only seems possible if the partnership is engaged in an entrepreneurial activity through a fixed place of business attributable to the foreign partner(s) or by reason of the general partner acting as an agent of the foreign partner(s).

7.6. Insurance agents

Insurance agents should fall within the scope of article 5, paragraphs 5 and 6 of the OECD model.[102] Therefore, if it appears that an (independent or dependent) insurance agent can bind the foreign company (even if he only has that capacity in fact, i.e. if he uses blank documents that he delivers to clients) and that he regularly acts as such by concluding contracts in the name and for the account of the insurance company, that agent will constitute a PE of the foreign company.[103]

The commentary further states that the independence of the insurance agent does not affect the PE assessment because, in such a case, the agent will be considered to act outside the ordinary course of his business and fall thereby within the scope of the general definition of article 5, paragraph 5.[104] In our opinion, the commentary here does not respect the hierarchy of paragraphs 5 and 6 of article 5 OECD model. Indeed, as mentioned above, it is not because an intermediary cannot qualify as an independent agent under paragraph 6 that he automatically constitutes a PE of the principal. In order to constitute an agency PE, the agent must meet all the requirements of paragraph 5.

The BTA also considers as a PE a Belgian insurance broker, whether an individual or a company, who has been appointed by a foreign insurance company and who is competent to accomplish in his own name and for his own account operations such as the acceptance, the signature and the delivery of insurance contracts.[105]

However, numerous conventions concluded by Belgium contain special provisions that either confirm the principle set forth above or introduce additional

101 Brussels, 30 April 1998, *Fisc. Koer.*, 1998, p. 316.

102 According to the Com.DTC (no. 5/505), this should even be the case if the convention concerned contains a specific provision in this respect.

103 Com.DTC, no. 5/05.

104 *Ibid*.

105 *Ibid*.

criteria in order to determine the existence of a PE insurance agent. Some of those provisions are similar to the provision of the UN model. In certain DTCs,[106] a foreign insurance company will be deemed to have a PE in Belgium if it receives premiums in the country where it insures risks through an agent located in the country and where the agent cannot be considered as an independent agent within the meaning of paragraph 6.[107]

8. Service PE

The OECD very recently published the 2008 update to the model tax convention. The new OECD commentary allows states to include in their DTCs a service PE provision. According to this provision a PE of an enterprise of a contracting state performing services in the other contracting state shall be deemed to exist where the services, not being of a preparatory or auxiliary nature, are performed:

- through an individual who is present in that other state for a period or periods exceeding in the aggregate 183 days in any 12-month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other state through that individual; or
- for a period or periods exceeding in the aggregate 183 days in any 12-month period, and these services are performed for the same project or for connected projects through one or more individuals who are present and performing such services in that other state.

Since the BTA follows the OECD commentary, it can be expected that wherever such a provision is included in a DTC, the interpretation and guidance provided in the new commentary will become authoritative. However, the new commentary cannot be referred to for the application of DTCs that do not contain a service PE provision. Under those DTCs, the rendering of services can only give rise to a PE pursuant to the conditions of article 5, paragraph 1 or paragraph 5 OECD model.

9. Application of the PE definition in the case of related companies

A PE is not constituted solely by the fact that one company controls another, or is controlled by another company. Pursuant to article 5, paragraph 7 the legal independence of related companies is recognized until the opposite is proved. A subsidiary can only constitute a PE for its parent company, or vice versa, under the conditions set forth in article 5, paragraph 1 or paragraph 5. This is in principle the position of the BTA.

[106] Austria, Brazil, South Korea, Ivory Coast, Denmark, Finland, France, Indonesia, Ireland, Israel, Philippines, UK, Sweden, Thailand and Tunisia.

[107] Com.DTC, no. 5/08.