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On the Evolving VAT Concept of Fixed Establishment

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The relevance of the concept of fixed establishment (FE) for the EU VAT system can hardly be over-stated. Similarly to the concept of permanent establishment (PE) for income taxes purposes, the term plays a central role in VAT,[1] and is consistently relied upon by the legislator, for both determining the place of supply of services, and establishing the right to deduct input VAT. Yet, despite its significance, the term is far from clear, and in recent years, the debate over its definition and scope, primarily in the context of our global digital economy, has intensified.

This Editorial considers the evolution of the concept of FE in EU VAT and the recent CJEU decision in *Titanium* in the context of the Court's previous case law. It argues that existing inconsistencies are a mere reflection of the difficulties in providing an adequate response to the significant challenges posed by the globalisation and digitalisation of the economy. It further contends that whilst providing an effective and definite response to these challenges will likely require legislative reform, in the meantime the Court has a significant role to play in limiting the distortive impact of those challenges. Until now, its case law has often provided short-term relief to these challenges – even if not necessarily in a consistent and principle-based manner – however, as the recent decision in *Titanium* demonstrates, dealing with them on a longer-term basis will unavoidably require not only making difficult choices, but re-assessing established jurisprudence.

Fixed Establishments in Context

As a general tax on consumption, VAT should be charged when and where consumption occurs. Whilst this principle is usually unproblematic in a national context, in cross-border situations rules are required to determine where consumption has taken place, and thus where transactions are taxable for VAT purposes. Most countries have, therefore, a set of detailed legal proxies to establish VAT liability – known in the EU as place of supply rules – which are not dissimilar in ethos to international allocation rules in income taxes.[2] In essence, they determine which country is entitled to tax each specific transaction, just as international allocation rules determine which country is entitled to tax each specific item of income. Both types of rules aim to avoid situations of double taxation, and of non-taxation.[3]

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[1] As discussed in further detail in R. de la Feria, "Permanent Establishments in Indirect Taxation" in G. Gallo (ed.), *Permanent Establishments* (IBFD, 2016). See also J. Swinkels, "Fixed Establishments and VAT-Saving Schemes" (2006) *International VAT Monitor* 17/6, at 415.

[2] Although this is not the case everywhere, and in GST systems, such as those in force in Australia, New Zealand and South Africa, these rules operate in a different manner. R. Millar, *Echoes of Source and Residence in VAT Jurisdictional Rules*, in M. Lang et al. (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD 2009), at 275; R. Millar, *Cross-Border Services: A Survey of the Issues* & C. Morden, *Fifteen Years of Value Added Tax in South Africa (1991 to 2006)*, in *GST in Retrospect and Prospect* (R. Krever & D. White eds., Thomson Brookers 2007).

[3] R. de la Feria, "Place Where the Supply/Activity Is Effectively Carried Out as an Allocation Rule: VAT v. Direct Taxation", in M. Lang et al. (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD 2009), at 961.

Whilst the general ethos is straightforward, in practice the EU VAT place of supply system is not only complex, but increasingly so.[4] Whilst place of supply rules remained almost unaltered until the introduction of the transitional VAT in 1992,[5] the last two decades have witnessed a significant revamp of those rules. The first wave of amendments came in the early 2000s, dealing largely with specific types of new technology-based services,[6] and since then, changes to place of supply rules have been a consistent feature of the EU VAT system: in 2008, significant amendments came in force in the wake of approval of the so-called VAT package;[7] in 2015, changes were approved to the general place of supply rules, as well as to those specifically applicable to e-commerce;[8] and finally, in 2017, new rules were approved for distance sales, with an aim of addressing digital sales, including those carried out through digital platforms.[9]

As evidenced by the timing and nature of these amendments, the complexity of the current system is the product of a mixture of external pressures, and internal factors. Externally, the emergence of a new global and digital economy, presented a quasi-existential challenge to the EU VAT system, which like our tax systems as a whole, was largely premised on the existence of a territorial and physical element that was now often absent. Faced with these challenges, the EU's initial response was not only slow, but also insufficient: amendments took years to negotiate, and the outcome was often patchy, complex, and purely reactive, lacking in a principle-based approach. This deficient response was likely the result of a mixture of internal causes. Whilst the most significant of these was undoubtedly the legislature procedure set out in the Treaties, requiring unanimous voting, there is a clear sense that institutional biases may also have played a key role. A failure to see the magnitude of the economic changes taking place, and a hope that it would all work out in the end (optimism bias); a resistance to legislative change, for fear that a new system would create more problems than the existing one (*status quo* bias); and a reticence to depart from existing procedures and practices, which had often required significant human and financial investment to put in place (path dependency and loss aversion).[10] Whilst there are key differences, the

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[4] A. Vázquez del Rey, "VAT Connecting Factors: Relevance of the Place of Supply" (2015) *Intertax* 43/5, at 410.

[5] The exception being the amendments introduced in respect of the hiring out of movable tangible property by the Tenth Council Directive 84/386/EEC of 31 July 1984, OJ L208, 03/08/1984, 58.

[6] Namely telecommunication services, Council Directive 1999/59/EC of 17 May 1999, OJ L162, 26/06/1999, 63; radio, television broadcasting, electronically supplied services, Council Directive 2002/38/EC of 7 May 2002, OJ L128, 15/05/2002, 41; and electricity and gas, Council Directive 2003/92/EC of 7 October 2003, OJ L260, 11/10/2003, 8.

[7] Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services, OJ L44, 20/02/2008, 11-22; Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, OJ L44, 20/02/2008, 23-28; Council Regulation (EC) No. 143/2008 of 12 February 2008 amending Regulation (EC) No. 1798/2003 as regards the introduction of administrative cooperation and the exchange of information concerning the rules relating to the place of supply of services, the special schemes and the refund procedure for value added tax, OJ L44, 20/02/2008, 1-6.

[8] R. de la Feria, "Sections 103-106: VAT – Mini-One-Stop-Shop (MOSS)" (2014) *British Tax Review* 5, at 428-433.

[9] Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC, OJ L348, 29/12/2017, 7–22. These latest amendments have come into force in stages, with the latest – and most significant – coming into force on January 1st, 2021, see I. Lejeune and C. Herbain, "Recent developments on EU VAT: VAT Digital Single Market package" (2018) *British Tax Review* 1, 1-6; and M. Papis-Almansa, "VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?" (2019) *ERA Forum* 20, 201-223.

[10] These factors are of course not unique to reform of VAT place of supply rules. On the contrary, even if often unacknowledged, institutional biases are a common feature of tax reform, and policy reform more generally, see R. de la Feria

evolution of the concept of FE in EU VAT law is largely a product of similar dynamics: a rapidly changing economy that challenges the very premise and relevance of the concept, and a hesitant response that is a reflection of both constitutional and institutional constraints.

The key difference between the evolution of the concept of FE in EU VAT system, and the reform of place of supply rules generally, however, is that that evolution has been largely guided by case law, rather than by hard law. Indeed, whilst – as discussed below – a definition of the FE now exists in EU VAT legislation, it has been largely left to the Court to provide guidance as to the scope and application of the FE criterion. As demonstrated in Table 1, it has done so through extensive case law, spanning nearly four decades. Yet, a quick glance at the case numbers also confirms the similarities. After the first landmark decision in *Berkholz*,[11] there was an approximate 10-year period where the Court elaborated on the guidance provided therein; a relatively quiet period followed, when no new cases were referred to the Court. From 2011 onwards, however, that jurisprudence intensifies, with a new stream of cases focussing on the meaning and scope of application of the criterion in the context of global structures and digital structures.

Table 1: Key CJEU Cases on FEs

168/84	*Berkholz*	Place of supply rules
C-231/94	*Faaborg-Gelting Linien*	Place of supply rules
C-190/95	*ARO Lease*	Place of supply rules
C-260/95	*DFDS*	Place of supply rules
C-390/96	*Lease Plan Luxembourg*	Place of supply rules
C-452/03	*RAL*	Place of supply rules
C-210/04	*FCE Bank*	Place of supply rules
C-73/06	*Planzer Luxembourg*	Refund system
C-318/11 and C-319/11	*Daimler* and *Widex*	Refund system
C-323/12	*E.ON Global Commodities*	Refund system
C-605/12	*Welmory*	Place of supply rules
C-419/14	*WebMindLicences*	Place of supply rules
C-547/18	*Dong Yang Electronics*	Place of supply rules
C-931/19	*Titanium*	Place of supply rules

The Concept of Fixed Establishments

Overall, the CJEU case law on FEs has broadly concentrated on three questions, as follows: (1) what can be regarded as an FE?; (2) when are services deemed to be supplied from / to a FE?; and (3) when should the FE criterion be used? Yet, it is the first question that has created the biggest difficulties, and it is on that first question

and M. Walpole, "The Impact of Public Perceptions on General Consumption Taxes" (2020) *British Tax Review* 67/5, 637-669.

[11] Case 168/84, ECLI:EU:C:1985:299.

that the recent *Titanium* focusses upon. This was far from predictable.

Indeed, the relatively quiet jurisprudential period between the early 2000s and 2011 seems to have given, not only EU institutions, but taxpayers and other stakeholders alike, a false sense of security. Of course, the Court's jurisprudence as regards the concept of FE had not gone unchallenged during that period; on the contrary, it had been the target of intense criticisms. It was argued in particular that, (*i*) it created more questions than it resolved and it showed the Court to be result-driven,[12] siding with tax authorities in all but one case, namely *DFDS*,[13] and (*ii*) it was susceptible to manipulation,[14] which was later confirmed in *RAL*.[15] Yet, in 2003, as part of the discussions regarding the reform of place of supply rules, the European Commission expressed the view that the Court's jurisprudence had successfully clarified the meaning of "fixed establishment", and thus additional legislative guidance was unnecessary.[16] The public consultation confirmed that this was also the view of businesses and other stakeholders,[17] and the matter seemed – on the surface, at least – settled.

By the late 2000s, however, it had already become clear that the earlier confidence on the clarity of the concept had been unwarranted. Indeed, a new wave of cases started arriving to the Court concerning the scope and application of the concept in the context of emerging economic realities, and it soon became apparent that new guidance on the question of what constitutes an FE may be necessary. Two main factors arguably contributed to this. On one hand, the changes to the place of supply rules, brought in to adapt to the new economic realities, relied more heavily on the FE criterion, rather paradoxically placing more pressure on the concept.[18] On the other hand, it is undeniable that the new economic realities themselves raised new questions, which increased the level of legal uncertainty surrounding the concept. The response in the first instance was to harmonise the concept of FE in hard law, to ensure uniform application. In 2011, a definition of FE appeared for the first time in EU VAT legislation,[19] applicable only to place of supply rules. Article 11 of the Council Implementing Regulation (EU) 282/2011 reads,[20] as follows:

1. *For the application of Article 44 of Directive 2006/112/EC, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.*
2. *For the application of the following Articles, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a*

[12] B. Terra, *The Place of Supply in European VAT* (Kluwer Law International 1998), at 109-153.
[13] Case C-260/95, ECLI:EU:C:1997:77.
[14] I. Roxan, "Locating the Fixed Establishment in VAT" (1998) *British Tax Review* 6, 608, at 627.
[15] Case C-452/03, ECLI:EU:C:2005:289.
[16] *Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services*, COM(2003) 822 final, 23 December 2003, at 9.
[17] The Commission launched a public consultation on place of supply of services in May 2003. *VAT: The Place of Supply of Services, Consultation Paper*, TAXUD/C3/2357, May 2003. See also S. Cornielje and P. Slegtenhorst, "The Unsettled Business of the Fixed Establishment in EU VAT" (2020) *EC Tax Review* 6, 285-294.
[18] S. Cornielje and P. Slegtenhorst, n. 17 above.
[19] A "remarkable" fact, as noted by H. Stensgaard, "Nexus for Taxpayers in Respect of VAT v. Direct Tax Treaties", in M. Lang et al. (eds), *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD 2009).
[20] Council Implementing Regulation (EU) 282/2011 of 15 March 2011, *OJ L77 23.3.2011, 1*, as amended by Council Implementing Regulation (EU) 2020/1112 of 20 July 2020, *OJ L244, 29.7.2020, 9-10*.

sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies:

[…]

3. *The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.*

The definition was, therefore, an attempt at codifying the Court's jurisprudence up to that point,[21] relying in particular on *Berkholz*, the first – and still regarded as the leading –case on the concept of FE.[22] By then, however, it was clear that the Court's case law was not enough. A new wave of cases on the FE criterion was already underway, not only bringing into focus the challenges that those new economic realities presented to it, but equally exposing the insufficiency of the Court's existing case law to address them. Whilst this new wave arguably started with *Daimler and Widex*,[23] and *E.ON Energy Trading* case,[24] it is only in *Welmory* that the Court had to significantly revise the concept of FE,[25] for the first time appearing to depart from the strict physicality of the concept.[26]

Indeed, having reiterated in that decision that the relevant case law – decided on the basis of previous legislation – still applied *mutatis mutandis*, the Court goes on to assess the concept of FE where the business is, by its nature, virtual. It stated that the fact that if a business could be carried on without requiring an effective human and material structure, then an appropriate structure – such as computer equipment, servers and software – could qualify as an FE. How much of this "appropriate structure" was necessary as a *de minimis* to qualify as an FE remained unclear.[27] The recent Court decision in *Dong-Yang*, although different in substance insofar as it did not concern a virtual business but rather the relevance of legal status for the FE concept, did seem to follow the same approach as *Welmory*. A *de facto* extension of the scope of the concept of FE, in an attempt to acknowledge the "economic and commercial reality" of new global and digital business structures.[28] For those accompanying the Court's case law in this area, the direction of travel was clear, and it felt as though the Court had chosen its path. Then came *Titanium*.[29]

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[21] M. Merkx, "Fixed Establishments and VAT Liabilities under EU VAT: Between Delusion and Reality" (2012) *International VAT Monitor* 23/1, at 22; I. Lejeune, E. Corturiend and D. Accorsi, "Implementing Measures Relating to EU Place of Supply Rules: Are Business Issues Solved and Is Certainty Provided?" (2011) *International VAT Monitor* 22/3, at 144.

[22] P. Pistone, "*Fixed Establishment and Permanent Establishment*" (1999) International VAT Monitor 11/3, at 101.

[23] Joined cases C-318/11 and C-319/11, ECLI:EU:C:2012:666. A case that also demonstrates the challenges faced by the FE criterion, but from the perspective of globalisation, rather digitalisation, see R. de la Feria and A. Carvalho, "Entre *Daimler* e *Welmory*: O Conceito de Estabelecimento Estável Para Efeitos de IVA" (2013) *Revista de Finanças Públicas e Direito Fiscal* 2/6.

[24] Case C-323/12, ECLI:EU:C:2014:53.

[25] Case C-605/12, ECLI:EU:C:2014:2298. For a detailed analysis of the case, see B. Terra, "Internet and the Concept of "Fixed Establishment" of the Recipient of a Supply of Services: Case C-605/12 (*Welmory*)" (2014) *World Journal of VAT/GST Law* 3/3, 210.

[26] In the process, "opening the flood gates", see N. Jovanovic and M. Merkx, "*Welmory*: A Recipe for VAT Avoidance?" (2015) *EC Tax Review* 24(4), 202-209.

[27] R. Mikutiene, "The Preferred Treatment of the Fixed Establishment in European VAT" (2014) *World Journal VAT/GST Law* 3/3, 166.

[28] Case C-547/18, ECLI:EU:C:2020:350, at paragraph 31. The decision in *Dong-Yang* was met with substantial criticism, in particular for giving rise to more questions than it solved, see S. Cornielje and P. Slegtenhorst, n. 17 above.

[29] Case C 931/19, ECLI:EU:C:2021:446.

Table 2 summarises the key CJEU case law as regards the concept of FE.

Table 2: What constitutes an FE?

Berkholz[30]	-	an establishment must be of a certain minimum size - both the human and technical resources necessary for the provision of the services must be permanently present
DFDS[31]	-	a separate legal entity can be regarded as an FE where it acts as a mere auxiliary organ to the parent company, and has the human and technical resources of an FE
ARO Lease[32] and *Lease Plan*[33]	-	it must have an adequate structure, and supply the services on an independent basis
RAL[34]	-	the permanent presence of all possible human and technical resources, possessed by the supplier itself, is not a precondition for concluding that the supplier has an FE (Opinion AG Maduro)
FCE Bank[35]	-	an FE, such as a branch, which is not a separate legal entity, cannot be regarded as a taxable person
Planzer Luxembourg[36]	-	a fictitious presence, such as that of a so-called letter-box or brass-plate company, cannot be described as a place of business for the purposes of VAT refund
E.ON Energy Trading[37]	-	the mere presence of a tax representative does not amount to an FE
Welmory[38]	-	the concept of FE developed for suppliers of services, applies *mutatis mutandis* to acquirers of services - the fact that businesses can be carried on without requiring an effective human and material structure is not determinative for lack of an FE; an appropriate structure, such as computer equipment, servers and software, is sufficient
Dong Yang[39]	-	the concept of FE is not dependent on the legal status of the establishment

In *Titanium*, the Court was essentially asked whether a let property can constitute an FE, where the owner of that property had no (own) human resources in that country. If one had to venture a guess as to how the Court would decide, based on the previous decisions in *Welmory* and *Dong Yang*, it would most likely be that the property could indeed constitute an FE, regardless of the absence of own human resources, where the business is deemed to have an "adequate structure" to supply the services in question. That is not, however, how the Court decided. Invoking previous case law, namely *Planzer Luxembourg* and *ARO Lease*, and without elaborate reasoning, it took

[30] Case 168/84, ECLI:EU:C:1985:299.
[31] Case C-260/95, ECLI:EU:C:1997:77.
[32] Case C-190/95, ECLI:EU:C:1997:374.
[33] Case C-390/96, ECLI:EU:C:1998:206.
[34] Case C-453/03, ECLI:EU:C:2005:741. For an analysis of this case, see R. de la Feria, "'GAME OVER' for Aggressive VAT Planning? *RAL v. Commissioners of Customs & Excise*" (2005) *British Tax Review* 4, 394-401.
[35] Case C-210/04, ECLI:EU:C:2006:196.
[36] Case C-73/06, ECLI:EU:C:2007:397.
[37] Case C-323/12, ECLI:EU:C:2014:53.
[38] Case C-605/12, ECLI:EU:C:2014:2298.
[39] Case C-547/18, ECLI:EU:C:2020:350.

the view that the mere absence of human resources was enough to prevent the existence of an FE:

> "*In accordance with the Court's settled case-law, implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services. It thus requires a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis [...]. In particular, a structure without its own staff cannot fall within the scope of the concept of a 'fixed establishment.*"[40]

The judgment's lack of detailed reasoning prevents clear understanding of its rational, and too many questions linger. Was the departure from the most recent case law, and alignment with older case law, intentional or unintentional? If it was intentional, was it results-driven, as it appeared to have been the case in other cases, such as *DFDS*,[41] and more recently *Daimler*?[42] Or was it a result of institutional dynamics, such as the chamber's composition or path dependency? Perhaps more critically, was it a temporary retreat from recent case law, or a permanent return to older case law? Said in a different way, what is the future for the concept of FE in VAT?

The Future of Fixed Establishments

The presumption of physicality and territoriality upon which the concept of FE was built, has been progressively – and critically, irreversibly – eroded by the globalisation and digitalisation of the economy. The problem is of course not exclusive to VAT. The same presumption has also been traditionally a critical element of the concept of PE for income tax purposes, with ongoing changes in economic realities also sparking discussions on the definition of PE, and the possible acceptance of a digital presence as a virtual PE.[43]

In VAT, the challenges posed by the digital economy to place of supply rules, and particularly to the FE criterion, have been known for some time. As far back as the late 1990s, it was argued that if the CJEU did not drop the human resources element from the FE concept, the tax system would be "slowly committing suicide".[44] In *Welmory* the Court did just that. The key question in that case was whether Court would depart from previous case law, and endorse the possibility of a virtual FE, and whilst it fell short of removing the physicality nexus, it did clearly depart from the *Berkholz* line of case law. That path was of course not without peril – not least the risk of manipulation by taxable persons, and the risk that it would lead to a results-driven approach by tax authorities –[45] but it did acknowledge the changing nature of economic reality. The decision in *Dong Yang* seemed to confirm that *Welmory* was not accidental, and that the Court was now set on that path. *Titanium* puts this assessment into doubt: given

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[40] Case C 931/19, ECLI:EU:C:2021:446, at paragraph 42.
[41] B. Terra, n. 12 above.
[42] R. de la Feria and A. Carvalho, n. 23 above.
[43] J. Schaffner, "The Territorial Link as a Condition to Create a Permanent Establishment" (2013) *Intertax* 41(12), at 638; J. Englisch, "BEPS Action 1: Digital Economy - EU Law Implications" (2015) *British Tax Review* 3, at 280; M. Nagappan and A. Unnikrishnan, "Virtual Permanent Establishments: Indian Law and Practice" (2018) *Intertax* 46(6/7), 520-540; S. Dulevski, "Digital Permanent Establishment" (2020) *Economic Archive* 4, 52-69.
[44] B. Terra, *BTW en het elektronische handelsverkeer, Weekblad fiscaal recht 6301* (1998), at 1049, cited in P. Pistone, n. 22 above.
[45] What has been recently called a "Trumpian approach: 'my Member State first!'", see S. Cornielje and P. Slegtenhorst, n. 17 above.

the option to continue on the path set out in *Welmory* and *Dong Yang*, further extending the concept of FE, or to retreat into a more limited concept, as set out in older case law, the Court opted for the second. This was perhaps the less risky route; however, it is also not only arguably unsustainable, but particularly negative for legal certainty.

From a legal certainty perspective, wavering between two different paths – whether intentionally or not, and regardless of rationale – is the worst of both worlds. It significantly increases the opportunity for different national, or even case-by-case, interpretations, which in turn raises the risks of legal disputes, as well as double taxation. We now must await additional guidance from the Court in pending cases with added anxiety.[46] If the Court follows the same approach as in *Titanium*, then it will add credence to the view that *Welmory* and *Dong Yang* were but a temporary departure from its traditional approach; on the contrary, if the Court goes back to a wider interpretation of the concept of FE, then *Titanium* might come to be seen as a fluke in the otherwise clear path towards a modernisation of the concept of FE.

Tax systems are at crossroads. The assumptions upon which they were largely built, such as territoriality and physicality, are crumbling. In the context of the overall challenges that a globalised and digitalised economy present to our tax systems, EU VAT has been, to a large extent, a success story. Its relatively low political salience – in all aspects of the system, but the tax base –[47] has allowed us to push through various reforms as regards both place of supply rules, and perhaps more critically, enforcement, that are, despite the rocky start, progressively and effectively adapting it to our new global, digital, economy. Yet, this is a work in progress, and the concept of FE is one of the areas where, despite new hard and soft law, there is too much legal uncertainty. It therefore falls upon the Court the role of adapting this area of the EU VAT system, like many others, to the new economic realities. This is of course not an easy task. No path is without risks, and like most areas in tax policy the best approach often entails a judgment call on the likely trade-offs: on balance, this approach is likely to result in a more equitable, less distortive, outcome, than the other. What is critical, however, is consistency. Wavering between two different approaches, without providing a clear rationale – whilst understandable, given the magnitude of the challenges at stake, and the various institutional limitations – is the worst possible outcome. Meeting the challenges of the digital economy requires leadership: different realities require different responses, and in the context of a new reality, the way we have always done things, may not be the best way going forward.

[46] Case C-333/20, *Berlin Chemie A. Menarini*, reference for a preliminary ruling from the Bucharest Court of Appeal.
[47] This point is further developed in R. de la Feria and M. Walpole, n. 10 above.