The Spanish Position on the Concept of a Permanent Establishment: Anticipating BEPS, beyond BEPS or Simply a Wrong Interpretation of Article 5 of the OECD Model?

In this article, the author considers the Spanish position regarding the concept of a permanent establishment and whether the Spanish concept conforms to the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative or is simply an erroneous interpretation of the provisions of article 5 of the OECD Model.

1. Introduction

One of the primary objectives of an International Fiscal Association (IFA) issue of the Bulletin for International Taxation is to provide an overview of main tax issues or special tax features of the country in which the IFA Congress takes place, in the current case in Madrid in September 2016. As the reader may anticipate from the question in the title of this article, there are peculiarities regarding the Spanish interpretation of the concept of a permanent establishment (PE), which are examined in this article. What the article intends to demonstrate is that these peculiarities, strange as they may seem, cannot simply be discarded with a simple answer to the question by saying that “Spain is different”. Rather, the interpretation of the concept of a PE was, and still is, a “defensive” mechanism on the part of Spain to some of the structures that the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative is trying to eliminate.

It is true that this response is unfortunate in the terms that are considered in this article, but it is probably not as unfounded, in substance, although not in form, as it may appear at first sight. It has errors and these must be criticized, but, ultimately, this is yet another reaction with regard to international taxation, probably less aggressive, for example, than the United Kingdom’s diverted profits tax (DPT) or the Turkish electronic place of business PE, or, in the vein of other initiatives, for example, the proposed Indian equalization levy on internet advertising or the new Australian “multinational anti-avoidance law” (MAAL), in that it reflects the sense of dissatisfaction in some countries with the PE threshold in article 5 of the OECD Model. Consequently, the primary objective of this article is to put into perspective the Spanish interpretation of the concept of a PE, which is moving in the direction of the OECD/G20 BEPS initiative and, in many ways, even goes beyond this, to arrive at a more balanced

---

* Professor of Tax Law, University of Cádiz, Spain, Jean Monnet Chair EU Commission. The author can be contacted at adolfo.jimenez@ucad.es. This article is a revised and integrated version of the following two works of the author: A.J. Martín Jiménez, The Spanish Position on the Concept of PE: The Supreme Court Judgment of 18 June 2014, “Complex Operative Settlements” and “Industrial Dependent Agents” as PEs, in Tax Treaty Case law around the Globe 2014 (M. Lang et al. eds., IBFD/Linde 2015). Online Books IBFD and The Spanish Saga on PE Concept: The Dell Decision by the Audiencia Nacional on “Commissionaire” and “Dependent Subsidiaries”, a paper presented at the Conference “Tax Treaty Case Law around the Globe 2015”, organized by the Universities of Tilburg and Vienna, Tilburg (20-21 May 2016).

---


6. For an official explanation of the new Australian provision that is designed to counter the schemes adopted by multinational enterprises (MNEs) to limit their taxable presence in Australian, see the official guide of how the Australian Tax Office (ATO) intends to apply the MAAL, available at www.ato.gov.au/law/view/pdf/psr/leg/2015-002.pdf.

7. OECD Model Tax Convention on Income and on Capital (26 July 2014), Models IBFD.
view of what it is and what it represents with regard to its virtues and flaws.\textsuperscript{8}

As court decisions have their origins in the adjustments made by tax administrations, the position of the Spanish tax administration to the issue is explained first (see section 2.). That position was confirmed by the Spanish Audencia Nacional (National Court, AN)\textsuperscript{9} in Borax (2011)\textsuperscript{10} (see section 3.). Subsequently, Roche (2012) was decided by the Spanish Tribunal Supremo (Supreme Court, TS), in which the TS confirmed the decision of the AN in Borax and added some relevant nuances to previous case law (see section 4.). In between the decisions of the TS in Borax and Roche, the Spanish Tribunal Económico Administrativo Central (Central Economic-Administrative Court, TEAC), which is functionally dependent on the Spanish Ministry of Finance and is not a real court of justice, decided Dell Spain (2012),\textsuperscript{11} whose decision was, in turn, confirmed by the AN in Dell Spain (2015) (see section 5.). The cases involving Dell Spain are interesting, as they, as explained in section 5., adopted the opposite route to the Norwegian Høyesterett (Supreme Court, Ht) in Dell Norway (2011)\textsuperscript{12} with regard to the same structure and the same group.

In order to facilitate the analysis of the cases, the judgements in the different instances are grouped around the ‘name’ of each of the cases. This is because, though an analysis in chronological order would permit the reader to appreciate the interrelation of the judgements, the ‘name’ approach, in the author’s opinion, makes it easier for the reader to understand the cases; the interaction between the different cases is explained in each analysis.

After presenting the cases and their reasoning, the Spanish doctrine towards PEs is considered from a critical perspective and compared with the outcome of Actions 7 and 8 to 10 of the OECD/G20 BEPS initiative (see section 6.). The final answer to the question in the title is, therefore, to be found in the conclusions to this article (see section 7.).

2. The Spanish Tax Administration’s Position on the Artificial Avoidance of PEs: The Concept of “Complex Operative Settlement”

The origins of the position of the Spanish tax administration with regard to artificial avoidance of PEs can, initially, be found in two rulings of the Dirección General de Tributos (General Directorate of Taxes, DGT). In one of these rulings, the DGT answered questions posed by a non-resident Swiss company with subsidiaries in Spain as to whether or not there was a PE in Spain following the

version of a distributor into a commissionaire in respect of one of the subsidiaries, S2, and of a fully fledged manufacturer into a contract or toll manufacturer with limited risk, in respect of another subsidiary, S1.\textsuperscript{13} The DGT’s answer was as follows:

1. Contract manufacturing: there is no PE as long as S2 acts according to the instructions to manufacture given by the foreign parent, which, in turn, keeps the property of the raw materials and finished products used by S2 in the maquila process if S2 only assumes the risks inherent to its activity. However, if the Spanish company assumes other risks or carries on other functions different to those inherent to the maquila process, there may be a PE.

2. Commissionaire: if S1 acts in its own name but on behalf of the foreign parent and receives an arm’s-length remuneration like any other distributor, there would be no PE as long as S1 is independent (it was acting on behalf of several companies of the group) and its activity is not controlled by the Swiss parent. If, however, S1 is no longer independent and its acts are binding for the Swiss company within the meaning of paragraph 32.1 of the Commentary on Article 5 of the OECD Model, there may be a PE.

3. Combination of activities: the Spanish Directorate General for Taxation closed its ruling by saying that “the sum of activities” of both companies (it refers to contract manufactur- ing plus commissionaire) can give rise to a PE if they form a “complex operative settlement” with economic coherence. This will occur when, after a factual and functional analysis of the Spanish situation, it is found that there are functions or risks assumed by S1 and S2 above and beyond those of the contracts signed, by themselves or through the group organization, and even if services are provided by third parties. This is permitted, the DGT ruled, by paragraph 27.1 of the Commentary on Article 5 of the OECD Model.\textsuperscript{14,15}

These two Tax Rulings were published approximately one month after the judgement of the AN in Roche (see section 4.). However, the decision of the AN in Roche was reasoned in terms of dependent agent PEs, i.e. the AN held that the Swiss company had such a PE in Spain. In contrast, the interpretation of the DGT on complex operative settlements was accepted in Borax, which, as explained in section 3., represents a different line of reasoning compared to Roche.

3. Borax

3.1. The facts

In this case, the Spanish subsidiary of a UK company, which previously imported minerals, and processed and sold the materials to third parties, was transformed into a service provider, i.e. a contract-manufacturer, but without any apparent change in its size and functions. The Spanish subsidiary signed two separate contracts with the UK parent, one for warehousing and the provision of services and the other in respect of an agency. Under the first

\textsuperscript{8} For a previous commentary of this case law in English, although defending the perspective of the Spanish tax administration, see N. Carmona Fernández, The Concept of Permanent Establishment in the Courts: Operating Structures Utilizing Commission Subsidiaries, 67 Bull. Intl. Tax. 6 (2013), Journals IBFD.

\textsuperscript{9} The AN is a central court of justice. Appeals against the decisions of the TEAC are decided by the AN. In turn, the TS decides appeals on points of law with regard to the judgements of the AN.

\textsuperscript{10} ES: AN, 9 Feb. 2011, Rec. No. 80/2008 (Borax).

\textsuperscript{11} ES: TEAC, 15 Mar. 2012, Rec. No. 00/2107/2007 (Dell Spain), Tax Treaty Case Law IBFD.


\textsuperscript{14} All quotations of Spanish law and regulations are the author’s unofficial translations.

\textsuperscript{15} Obviously, the DGT did not consider that OECD Model Tax Convention on Income and on Capital: Commentary on Article 5 para. 27.1 (26 July 2014). Models IBFD only applies to a single taxpayer and held that it could cover the situation of a group of companies.
contract, the minerals purchased by the parent would be stored and processed by the subsidiary, which would also provide other relevant services, i.e. unloading, transport, milling, packing and other administrative services that might be required, such as receiving orders, sending invoices to clients and accountancy services. Under the second contract, the Spanish subsidiary would promote sales of the minerals in Spain, but, as the prices and conditions were fixed by the UK parent, the subsidiary would only send orders to the parent, which was not bound to accept them, i.e. the subsidiary could not accept orders in the name of the parent or receive the price paid.

The tax auditors argued that they had detected that, in practice, there was a high degree of overlapping between the activities carried out by the parent and the subsidiary to the extent that it was difficult to differentiate when one or the other was acting. In fact, the parent company imported the products into Spain and stored them in a warehouse where they were placed, after transformation by the subsidiary, at the disposal of, or were sent to clients. The subsidiary also acted as a ‘sales channel’, i.e. sales were channelled through ‘an office’ of the subsidiary.

In this context, the tax auditors presumed that there was a “fixed place of business” under article 5(1) of the Spain-United Kingdom Income and Capital Tax Treaty (1975) in respect of the parent at the premises of the subsidiary, i.e. the warehousing, service and promotion of sales activities could not be considered separately, and, therefore, that there was a PE in Spain, as the activities of the parent were not preparatory or auxiliary and an economic business cycle was completed in Spain.

3.2. The judgement of the AN

In the opinion of the AN, article 5(3) of the Spain-United Kingdom Income and Capital Tax Treaty (1975), which was equivalent to article 5(4) of the OECD Model, did not apply in this case, as the activities carried on by the subsidiary could not be considered in isolation, but had to be regarded as part of a chain that completed an economic cycle in Spain. In this respect, it is important to emphasize that the AN based its decision on article 5(1) of the tax treaty and, therefore, interpreted the concept of a fixed place extensively as covering ‘complex operative settlements’. In other words, the parent company subcontracted the Spanish subsidiary to carry out its activities, which were performed completely in Spain. In such cases, the AN would appear to have presumed that there was a fixed place of business, not because both companies are associated, but, rather, because the activities of the parent were carried out in the premises of the subsidiary, the activities were not of an auxiliary nature and completed a business cycle in Spain. For the AN, the fact that, before 1996, the subsidiary carried out the same activities with the same infrastructure as after that date clearly illustrated that all of the activities took place in Spain.

In order to calculate the tax base attributable to the PE, the AN endorsed the tax auditor’s position that the VAT books and registries could be used. It would, therefore, appear that there was a PE for VAT purposes and, as the “fictitious PE” for direct tax purposes did not maintain accounts in Spain, the auditors estimated the tax base of the PE by reference to the VAT documentation that they had.

3.3. The judgement of the TS

The TS basically concurred with the position of the AN explained in section 3.2., but added several considerations that are not in line with the common understanding of the concept of a PE in respect of the Commentary on Article 5 of the OECD Model. The TS concluded that: (1) the contract between the parent and subsidiary was not a simple warehousing agreement covered by article 5(3)(b) of the Spain-United Kingdom Income Tax Treaty (1975), which was equivalent to article 5(4)(b) of the OECD Model, as the parent sought the transformation of products that was carried out by the subsidiary in the name and on behalf of the parent, which, ultimately, received finished products of a different nature compared to those initially processed; (2) the same argument excluded the contract from the protection of article 5(3)(c) of the tax treaty, which was equivalent to article 5(4)(c) of the OECD Model, i.e. transformation of the raw materials into other products on behalf of the parent excluded the application of this provision, as it would appear that the TS interpreted the activities as not being auxiliary or preparatory; (3) the subsidiary was a dependent agent, i.e. the service agreement excluded any possibility of independence of the subsidiary, which had to abide by the terms of the contract imposed by the parent, i.e. once again the TS, as in Roche, would appear to have wrongfully assimilated a dependent agent and a PE without inquiring as to whether or not the other conditions for a dependent agent to become a PE had been satisfied; and (4) the activities carried out in Spain after the restructuring were the same as those undertaken before and after the restructuring in 1996, as the only change referred to the company that was the owner of the goods, which was the subsidiary before the restructuring and the parent afterwards, i.e. as before a business cycle was completed in Spain.

Basically, it would appear that both the AN and the TS considered the existence of an “established, permanent and complete business structure” as a type of a fixed place of business. In itself, this theory is approximately identical to the “complex operating settlement” doctrine of the DGT: However, the PE dependent agent ghost of Roche (see

18. The Spain-UK Income and Capital Tax Treaty (1975) does not have the equivalent of article 5(4)(f) of the OECD Model (2014).
21. The company also based its appeal on the formal grounds that are not considered in this article.
22. See Carmona Fernández, supra n. 8, at sec. 5.3., in his commentary on the decision of the AN in Borax (2011), supra n. 10.
section 4.) also appeared in the judgement when the TS noted that the subsidiary was not an independent agent. Ultimately, the TS adopted what can be regarded as a substantialist or functional approach to Borax, which mixes the “complex operative settlement theory” of the decision of the AN with the industrial dependent agent of Roche (see section 4.) and is based on the following elements. Regardless of the restructuring, the same activities were carried out in Spain before and after, these were core activities of the parent company, a business cycle was completed in Spain, the subsidiary acted as a dependent agent of the parent, there was confusion as to the functions between the parent and the subsidiary, and all this formed the “complex operative settlement” and/or industrial dependent agent that justified regarding the Spanish subsidiary as a PE of the foreign parent. This theory of a subsidiary as a fixed place of business of the parent, as there was a complex operative settlement, or it was an industrial dependent agent, confirmed the expansive interpretation by the Spanish tax administration and of the AN with regard to article 5 of the OECD Model, and the theory of the TS in Roche, but, applied it with a two-pronged or reinforced approach compared to that adopted in Roche.

In terms of determining the tax base of the Spanish PE, the TS stated that using VAT books and registries as a reference was a valid approach. Consequently, the TS confirmed the judgement of the AN in this regard.

4. Roche

4.1. The facts

The (in)famous judgement of the TS in Roche23 concerns a very similar structure to those considered with regard to Borax (see section 3.), in which a Swiss company (“Swiss Co”) concluded two contracts with a Spanish subsidiary (“Spanish Co”) in the same group. The first contract was, again, a contract of manufacturing, whereby Spanish Co would produce and package the products as indicated by Swiss Co, which would buy all of the products. Spanish Co would receive remuneration in respect of the cost incurred plus a margin of 3.3%. The second contract referred to the designation of Spanish Co as an agent of Swiss Co in Spain to promote the products of the latter, i.e. those produced by Spanish Co and other products dispatched to Spain by Swiss Co, and the leasing of a warehouse owned by Spanish Co, where Swiss Co would deposit the merchandise produced by the Spanish Co and bought by Swiss Co. In this second contract, the prices were set by Swiss Co, which also sent the invoices to the clients, but orders of the product were processed by either Swiss Co or Spanish Co, without the latter having the power to alter the sale conditions. The remuneration of Spanish Co was a margin of 2 per 100 of the sales, plus the costs incurred, and a fixed amount for the leasing of the warehouse. Prior to concluding the two contracts, Spanish Co was a fully fledged manufacturer and distributor, but, following the restructuring, it was a simple service provider, a contract manufacturer and a commissionaire. In part, the position of the Spanish tax administration, confirmed by the TEAC in 2006,24 was very similar to that in Borax, i.e. there was no auxiliary or preparatory activity and a fixed place of business was present in Spain through which a main activity was carried on, but with a very important difference, i.e. Spanish Co was also regarded as a dependent agent PE of Swiss Co. According to the tax administration, the two tests of article 5 of the Spain-Switzerland Income and Capital Tax Treaty (1966)25 for finding a PE were met.

4.2. The judgement of the AN26

The AN held that Spanish Co was a dependent agent of Swiss Co under Article 5(4) of the Income and Capital Tax Treaty (1966), which is equivalent to article 5(5) of the OECD Model, but, as that tax treaty is an old tax treaty, it was based on the OECD Draft (1963).27 It considered that there is a dependent agent PE not only where there is a person with authority to enter into contracts in the name of the foreign principal, but also when, taking into account the nature of its activities, that person “involves the foreign principal in the national market”. Spanish Co not only received the orders of the products sold by Swiss Co, but also promoted their sales. The manufacturing contract reinforced the fact that Swiss Co was somehow present in the Spanish market, as Spanish Co only worked for Swiss Co and was not economically independent. Its activity, the AN continued, was controlled and directed by Swiss Co, as it only assumed the risks inherent to the manufacturing process. In addition, Spanish Co only existed to manufacture the products indicated by Swiss Co and promote these in Spain. Instead of viewing the contracts separately, the AN linked both of them to affirm that the only reason for the existence of Spanish Co was to provide services (manufacturing and promotion) to Swiss Co.

However, the reasoning of the AN rested on an erroneous assumption regarding the threshold for PE agents. The AN took the view that a dependent agent PE could exist where there was no authority to habitually conclude contracts. It assumed a form of “industrial dependent agent”, which could be created without any authority to conclude contracts. This is because the AN held that, as the activities of the agent were not preparatory or auxiliary, they could not be covered by article 5(3) of the Switzerland Income and Capital Tax Treaty (1966), and, therefore, that there was a dependent agent under article 5(4) of the tax treaty, which is equivalent to article 5(5) of the OECD Model. This is erroneous. The identification of a dependent agent does not automatically mean that there is a dependent agent PE in a state under article 5(5) of

the OECD Model if the agent does not habitually sign contracts in the name of the foreign principal, within the meaning of these terms as explained in the Commentary on Article 5 of the OECD Model.28

In terms of attribution of profits, the AN accepted the position of the tax auditors that the margins of the activities of commercialization and manufacturing could be included within the tax base of the PE. Some expenses that could be attributed to the PE were not accepted, as the taxpayer could not prove the amount that should be apportioned to the PE.

4.3. The judgement of the TS29

The TS confirmed the ruling of the AN. In fact, the TS also referred to and confirmed the ruling of the TEAC, according to which Swiss Co had a fixed place of business in Spain, as, although all of the manufacturing activities were carried on by Spanish Co, the former managed and controlled the activities of the latter. Indeed, the TEAC concluded, and the TS confirmed, that Spanish Co was insulated from all the risks inherent to the economic activity taking place in Spain, as all of the human and material resources of the Spanish Co were serving the activities of Swiss Co, and, therefore, the premises of Spanish Co were at the disposal of Swiss Co. Having created the fiction of the “manufacturing PE,” which was linked to the manufacturing contract, the TS also confirmed that not only the profits of the manufacturing activities should be attributed to the PE, but also those of the marketing and commercialization activities in Spain.

It should be noted that that the decision of the TS did not use, as such, the concept of a fixed place of business. First, it confirmed the decision of the AN, which used the concept of an industrial dependent agent to hold that there was a PE. Second, it referred to the decision of the TEAC, which used the concept of a fixed place. The TS appears to have preferred the approach of the AN, but also quoted the TEAC with approval.

Apart from the obvious mistake of the AN and the TS in interpreting the concept of a dependent agent PE,30 the approach to the concept of a PE is not very different in substance from that adopted in Borax, i.e. a substantial activity in Spain, with a subsidiary that only serves the “manufacturing PE,” which was linked to the manufacturing contract. The TS also confirmed that not only the profits of the manufacturing activities should be attributed to the PE, but also those of the marketing and commercialization activities in Spain.

The reasoning is also slightly different from that in Borax, where the “complex operative settlement” was decisive in creating a fixed place PE, although, in practice, it leads to the same result. Lastly, the TS confirmed the calculation of the tax base of the AN.

5. Dell Spain

5.1. Background

Dell Spain represents the opposite extreme to Dell Norway. Whereas the Norwegian Ht concluded that there was no dependent agent PE,34 in Dell Spain, the TEAC35 held that the same group and structure as in Dell Norway, gave rise to a PE. The judgement of the AN in Dell Spain,36 in certain aspects, confirmed the ruling of the TEAC, but deserves some comments and has some interesting features with regard to other PE cases in Spain. Even if Dell Spain is not in line with the orthodox OECD doctrine on the concept of a PE, before or after the OECD/G20 BEPS initiative, it has, to a certain extent, corrected the decision of the TEAC.

5.2. The facts

From the ruling of the TEAC, it appears that the structure adopted by the taxpayer was as follows:

- Dell Ireland was an Irish entity of the Dell Group in charge of commercializing computers in Europe. The products were bought from another Irish entity of the group, but Dell Ireland had no personnel or other material resources.

- The Dell Group had 17 commissionaire subsidiaries in different European countries, Spain among them, which sold Dell products in their own name but on behalf of Dell Ireland. However, until 1995, Dell Spain had distributed and commercialized the products of the group as a fully fledged distributor. After 1995, Dell Spain became a commissionaire. Due to this change, the portfolio of clients was transferred to Dell Ireland, which also assumed all of the risks of inventory, clients and guarantee. Dell Spain also acted as commissionaire for other local products to service the Spanish clients.

- The Spanish market was divided into the following two segments of clients: i.e. (1) large companies and administration, which was serviced by Dell Spain; and (2) homes and small companies, which were serviced by a call centre of Dell Ireland located in

---

29. Roche (2012), supra n. 1.
30. The dependent agent PE presumption, as explained in section 3., is based on the wrong assumption that this type of PE can exist by performing substantial activities, i.e. manufacturing, even if there is no authority to conclude contracts.
32. OECD Model Tax Convention on Income and on Capital: Commentary on Article 5 (15 July 2005), Models IBFD.
33. See the decision of the Italian Corte Suprema di Cassazione (Supreme Court, CC) in IT, CC, 25 May 2002, Case No. 7682 (Philip Morris), Tax Treaty Case Law IBFD. This case was the first of a number of decisions that are substantially identical.
34. Dell Norway (2011), supra n. 12.
35. Dell Spain (2012), supra n. 11.
France, the service in respect of which was provided by the French subsidiary of Dell, and the web page of Dell Ireland.

The tax administration concluded that there was a fixed place of business PE in Spain under article 5(1) of the Ireland-Spain Income Tax Treaty (1994), as Dell Ireland had a "complex operating settlement" in Spain, which meant that more than auxiliary or preparatory activities were carried on within Spanish territory. The reasons for reaching this conclusion were that:

- Dell Ireland had no human or material resources, which basically meant that all its activities in Spain were conducted through other entities.

- The concentration of the activities in Spain formed a complex operating settlement, as the main economic activity of Dell Ireland was carried on by Dell Spain with its own resources, i.e. market control, promotion of sales, marketing, logistics, virtual shops, technical assistance and guarantee, etc.

- There was a high degree of confusion in the activities of Dell Ireland, Dell Spain and Dell France, as there was no clear distinction of when one entity acted in a given segment of clients or contract. The client did not know with whom the contract was concluded until the invoice was received, personnel of Dell Spain and Dell France were used interchangeably for the activities in Spain, payments for activities of both companies went to the same account, etc. This degree of functional confusion meant that sales concluded in Spain by Dell France were attributed to Dell Spain.

- The web page for the Spanish market may have given rise to a virtual PE if it was considered together with all of the other activities carried on by the group in Spain through Dell Spain and Dell France, even if there was no server located in Spain, i.e. the maintenance of the web page was undertaken in Spain, the domain name was owned by the Spanish subsidiary, Dell Spain processed orders made through the web page, etc.

The tax administration also concluded that Dell Spain was a dependent agent PE of Dell Ireland in accordance with article 5(5) of the Ireland-Spain Income Tax Treaty (1994). Despite the fact that Dell Spain acted in its own name, on the part of the tax administration, there was no doubt that Dell Ireland was bound by the contracts concluded by Dell Spain. In reaching this conclusion, a number of factors were taken into account:

- Dell Ireland was the owner of the computers, which were delivered directly from that company to the client.

- According to the contract between Dell Ireland and Dell Spain, it was clear that Dell Spain was a dependent agent of the former. In this regard, it was relevant that Dell Spain was part of the Dell Group, it was bound by its policy and it only acted for a single principal.

- Dell Spain defined the contracts and acted on behalf of Dell Ireland. The high degree of confusion in the activities of both companies proved this.

In addition, the tax administration decided to attribute to the PE in Spain of Dell Ireland the profits of Dell France linked with sales in the Spanish market and, as a result, the commission paid to Dell Spain and Dell France was admitted as deductible expenses for the PE.

5.3. The judgement of the TEAC

The TEAC held that the interpretation of the fixed place of business should not be too rigid, and that it must adapt to the circumstances of the case, to the commercial and geographical coherence of the activity and always take into account the final objective of article 5(1) of the OECD Model and/or the Ireland-Spain Income Tax Treaty (1994). That final objective, the TEAC added, was to decide when there is a degree of penetration of the economic activity of a non-resident taxpayer in a territory that legitimates that country to tax the profits of the taxpayer in a stable and continuous manner. As the premises and human resources of Dell Spain were de facto, in a continuous and stable manner, serving the business needs of Dell Ireland, it had a fixed place PE within the meaning of article 5(1) of the Ireland-Spain Income Tax Treaty (1994). In the opinion of the TEAC, Dell Ireland, in Spain, had a "complex business structure", which was an "operating settlement" with sufficient substance, meaning and stability to be regarded as a PE, it having been demonstrated that the activities were not auxiliary or preparatory in nature.

That part of the decision of the TEAC which refers to the virtual PE is also remarkable. The TEAC attributed relevance to the web pages for the Spanish market, which were maintained and fed by personnel in Spain, even though the server was not located in Spain. It also took notice of the Spanish position, as expressed in the observation to the software paragraphs of the Commentary on Article 5 of the OECD Model, to the effect that Spain did not accept the consequences of those paragraphs, which, in practice, could mean considering that a web page could be a PE, without realizing that this observation had been withdrawn by Spain in 2010. The TEAC finally concluded that, as the activities were significant, the commercialization of Dell products in Spain through the web page must be attributed to the activities of Dell Ireland in Spain.

The TEAC noted that, if the stable organization of Dell in Spain were not to be regarded as a PE, this would be tan-


38. Dell Spain (2012), supra n. 11.

39. The decision explained and listed all the activities that Dell Spain carried out for Dell Ireland.

40. That is the Spanish observation on paragraphs 42.1 to 42.10, at paragraph 45.6 of the OECD Model: Commentary on Article 5 (2005).
tantamount to accepting that an economic activity performed in Spain could disappear by fragmenting the formal title of the different elements needed to carry it on and, therefore, omitting to take into consideration that the essential part of the activity was still carried out in the same territory. The TEAC explicitly rejected the argument that a title was required to affirm that Dell Ireland had the premises of the subsidiary at its disposal and that it was sufficient for that purpose to demonstrate, as the tax administration had, that Dell Ireland operated in Spain through Dell Spain. Consequently, the TEAC presumed that the premises of Dell Spain were “used” by Dell Ireland.

Dell Spain was also regarded as a dependent agent PE of Dell Ireland. The TEAC affirmed that, even if Dell Spain formally acted in its own name, it bound Dell Ireland. The TEAC cited, incorrectly, in support of its reasoning, the Commentary on Article 5(6) of the OECD Model and again, reaffirmed the fact that Dell Spain was a dependent agent PE of Dell Ireland, as it acted under the direction and control of the latter and its activities were not of an auxiliary or preparatory nature. For the TEAC, the fact that Dell Ireland was the only principal of Dell Spain was also an indication that Dell Spain was not independent of Dell Ireland. Here, once again, the TEAC displayed reasoning based on economic dependence that is hardly compatible with article 5(7) of the OECD Model.

In addition, the issue of attribution of benefits was relevant in the case. The taxpayer claimed that only income derived in connection with functions effectively performed in Spain should be attributed to the Spanish PE. In formal agreement with the pleading of the taxpayer, the TEAC noted that expenses incurred outside Spain in connection with the Spanish activity were regarded as deductible by the tax administration. This is not really an answer to what the taxpayer had requested, as, from what the TEAC stated, all of the income from sales less expenses directly connected with those sales was so attributed, which is not really a functional analysis of what was done in Spain or abroad.

Further, the TEAC refused to recognize that the cost of the stock options of the employees in Spain could be attributed to the PE, as this was linked to an obligation of the parent company. The TEAC concluded that all of the stock options of the employees in Spain could be attributed to the PE, as this was linked to an obligation of the parent company. The TEAC presumed that the premises of Dell Spain were “used” by Dell Ireland.

The decision in Dell Spain was later confirmed by the TEAC in Honda (2012), which is substantially similar to Dell Spain. In the same line of case law, a decision of the TEAC in 2014 reaffirmed the doctrine exposed in Dell Spain. Again, in a process of business restructuring in which a full distributor was converted into a commissionaire, the TEAC concluded that there was a PE in Spain of the non-resident company with an essentially similar reasoning to Dell Spain with the nuance that the TEAC uses OECD Transfer Pricing Guidelines as well as the OECD “Reports on Attribution of Benefits to Permanent Establishments” to demonstrate that, in substance, the restructuring only had as a consequence a legal transfer or risks to the non-resident entity whereas, in fact, the same functions continued to be performed in Spain before and after the restructuring. The TEAC especially noted that the distribution network, and the selection of dealerships and their coordination was undertaken in Spain before and after the restructuring. This formed an integrated distribution channel, which was controlled in Spain. Surprisingly, the latter conclusion resulted in the TEAC affirming that the non-resident entity had a PE in Spain, as the structure of the domestic subsidiary was carrying on business functions that corresponded to the non-resident entity and, because of this, there was a PE. The Spanish subsidiary was a dependent agent that factually bound the non-resident entity and the relevant functions were still carried on and controlled in Spain after the restructuring and the premises of the subsidiary was where the activities of the non-resident affiliated company were carried on.

The reasoning is basically the same as the Dell Spain and other cases, but this decision reveals the real rationale behind the decision of the TEAC and the tax administration with its “expansive interpretation” of article 5 of the OECD Model, i.e. both bodies were simply trying to prevent or attack behaviours that attempted to “erode” the Spanish tax base with formal changes rather than with substantial modifications in the structure of the group in terms of location of relevant people functions and effective controls of risks. In this context, what is a surprise is not the substance of the reaction by the tax administration and the conclusions of the TEAC, but, rather, the fact that both used the concept of a PE for that purpose and not the domestic transfer pricing rules, the Spanish general anti-avoidance rule (GAAR) or the doctrine of simulation or the legal reality in substance, if contracts were signed for formal reasons that simply did not reflect the real legal structure that was being used, as the functions and risks were still controlled by the Spanish subsidiary that was formally transferring them, though not in substance, to the non-resident entity of the group.

5.4. The judgement of the AN

For procedural reasons, the judgement of the AN represented a partial victory for the taxpayer, but, from a material perspective, it reiterated, with some nuances, the deci-
sion of the TEAC. It is notable that the AN corrected the erroneous reasoning of the TEAC to the effect that a web page could be regarded a PE. In this respect, the AN, obiter dicta, as the comment was not relevant for the final decision, noted that a web page is a combination of software and electronic data, it is not anything tangible and, therefore, cannot be a fixed place of business, though a server is quite another thing, as the server may have a physical presence and the place where it is hosted could be regarded as a PE. The AN, therefore, corrected the TEAC to confirm that the Commentaries on Article 5 of the OECD Model (2003)\textsuperscript{49} onwards do apply in Spain.

With regard to the concept of a PE in the Ireland-Spain Income Tax Treaty (1994), the AN started by considering whether or not Dell Spain was a dependent agent of Dell Ireland within the meaning of article 5(5). Basically, Dell Ireland had argued on appeal that the case of a commissionaire agreement with indirect representation was incompatible with article 5(5) of the tax treaty. The AN decided that the reference to “in the name of” in that article, which is equivalent to article 5(5) of the OECD Model, could not be interpreted in a strict legal sense, such as in giving rise to a legal bond between the principal and the client. For the AN, it was sufficient that a factual obligation existed for the principal to execute the contracts that the agent had signed in its own name, but on behalf of the principal. The AN used article 253 of the Spanish Commerce Code\textsuperscript{50} to underpin its reasoning since this article explains that “the principal must accept all the consequences of contracts entered by the commission agent after the latter has entered into a contract”. For the AN, the fact that the agent was acting with direct or indirect representation was not relevant as long as there was an obligation by the principal to execute the contract. The AN did not pay attention, and, in fact, did not even cite, article 246 of the Spanish Código de Comercio (Commercial Code, CCo), which establishes that, where an agent contracts in its own name, i.e. “indirect representation”, there is no need to disclose who is the principal and the agent is directly bound with the client as if the contract had been concluded in its own name. The client, the same article goes on to explain, does not have any right of action against the principal or the principal against the client. This article basically means that article 253 of the CCo refers to the relationship between the principal and the agent, but, contrary to what the AN suggested, no legal bond or relationship is created between the client and the principal, even if contracts concluded by the commissionaire with clients may entail some obligations that are legally enforceable between the commissionaire and the principal.

The AN also forgot that the domestic definition of a PE emphasizes the differences between direct and indirect representation. In this context, article 13.1.a) of the Law on Income Tax on Non-Residents (LIRNR)\textsuperscript{51} explains that there is a dependent agent PE if the non resident person acts in Spain through an agent who is authorized to enter into contracts “in the name and on behalf” of the non-resident principal and who habitually exercises such powers. Given the domestic definition of a PE, it is difficult to say, as the AN concluded, that the distinction between direct or indirect representation is irrelevant in giving rise to a PE, as Spanish domestic law also departs from that distinction and concludes that there is a dependent agent PE only where there is direct representation of the non-resident principal. In this context, it should be noted that it contravenes the principle of non-aggravation to regard article 5(5) of the Ireland-Spain Income Tax Treaty (1994) as permitting the conclusion that there is a PE in Spain when the domestic law in the same situation excludes such a PE. This was simply ignored by the AN. Be that as it may, the AN disregarded domestic legislation and the Commentary on Article 5 of the OECD Model and wording of article 5(5) of the OECD Model to conclude that the factual binding nature of the principal towards the commissionaire with regard to contracts concluded in its own name by the latter, i.e. Dell Spain, were sufficient to satisfy the requirements of article 5(5) of the tax treaty.

In addition, the AN supported the conclusion of the tax administration that Dell Spain was a dependent agent of Dell Ireland and, therefore, that article 5(7) of the Ireland-Spain Income Tax Treaty (1994), which is equivalent to article 5(6) of the OECD Model, could not be invoked. The AN noted that the tax administration had demonstrated the following seven points: (1) Dell Spain followed the instructions of Dell Ireland; (2) Dell Ireland had to authorize prices and commissions; (3) Dell Ireland accepted or rejected the orders on delivery; (4) Dell Spain had to periodically inform Dell Ireland regarding this; (5) Dell Ireland could inspect the registries and premises of Dell Spain; (6) Dell Spain required the authorization of Dell Ireland to buy products; and (7) Dell Ireland owned all of the intellectual property rights. However, the taxpayer had not demonstrated its independence and had not proved anything to the contrary. For the AN, the broad powers of supervision and managing that Dell Ireland had over the activities of Dell Spain clearly revealed the dependence of Dell Spain on Dell Ireland. It was true that, with regard to sales of some local products, Dell Spain acted independently, but these sales were a minimal percentage of the turnover of Dell Spain.

Next, the AN considered whether or not there was a fixed place of business of Dell Ireland in Spain. In this regard, Dell Ireland had argued that the premises of Dell Spain were never at its disposal. The AN reasoned, however, that the concept of disposal is not a strictly legal one and that a non-resident entity could make use of a fixed place through another entity that carries on, on its behalf and under its dependency, economic activities that are the core of its corporate purpose. That use of premises through the subsidiary, the AN reasoned, fell within the concept of “disposal” and was supported by the Commentary on

---

\textsuperscript{49} OECD Model Tax Convention on Income and on Capital: Commentaries on Article 5 para. 42.2 (28 Jan. 2003), Models IBFD.

\textsuperscript{50} ES: Código de Comercio (Commercial Code, CCo).

\textsuperscript{51} ES: Ley del Impuesto sobre la Renta de No Residentes (Law on Income Tax on Non-Residents, LIRNR).

© IBFD BULLETIN FOR INTERNATIONAL TAXATION AUGUST 2016 | 465

Exported / Printed on 16 Aug. 2016 by IBFD.
Article 5 of the OECD Model. The OECD Commentary on Article 5, the AN went on, permitted an interpretation such that the premises were not linked with use by personnel of the foreign company, but that it is sufficient that, in those premises, the activities of the non-resident company were carried on.

This reasoning is clearly flawed, even in a lax reading of the Commentary on Article 5 of the OECD Model. First, pertinence of the reference in the decision to paragraph 4.2. OECD Commentary on Article 5 cannot be clearly explained and, more importantly, the meaning the AN attributes to the OECD Commentary on Article 5 is simply wrong. If it is the personnel of another company that were carrying on an activity in a given place, in principle, it was that company that undertook the activities in that place and articles 5(7) of the OECD Model clearly demonstrates this. The AN, however, deduced, using erroneous reasoning and contrary to article 5(1) and (7) of the OECD Model, that the activities of the subsidiary could be attributed to the parent and, in a leap too far, that, therefore, the premises of Dell Spain were at the disposal of Dell Ireland.

The AN noted that the tax administration had provided evidence to the effect that the functions that Dell Ireland carried on in Spain through Dell Spain, i.e. through the personnel of Dell Spain, and in the premises of that company were the following seven activities: (1) marketing, sales and the gaining of new clients; (2) the managing of orders and the control of the reception and distribution of the products; (3) marketing and advertising for all the customers of Dell Ireland in Spain; (4) warehousing and logistic arrangements; (5) setting up services; (6) the control of payments; and (7) the control of solvency and credits. For the AN, these activities were clearly not covered by article 5(4) of the Ireland-Spain Income Tax Treaty (1994). The AN also noted that, despite the fact that Dell Ireland appeared to have proved that, contrary to what the TEAC had stated, it conducted activities in Ireland and had sufficient human resources there to carry on these activities, it had been demonstrated that the activities of Dell Ireland were carried out in Spain "through" Dell Spain. The fact that Dell Ireland carried on its activity in other countries did not exclude the possibility that it also had relevant commercial activities in Spain that were undertaken through Dell Spain, i.e. apart from sales, there were marketing and sale activities, the provision of technical assistance to clients, repairs of computers, etc., and that the activities of both companies were complementary. For these purposes, the location of insolvency risks related to clients in Dell Ireland did not exclude the fact that the collection management processes and the controls with regard to solvency of clients were carried out in Spain.

Last, but not least, the AN noted that the high degree of integration between, and even the confusion of both companies, was inherent in multinational groups and, in itself, did not entail that there could be a PE, but that, in the particular circumstances of the case in question, it could be concluded that the activities of Dell Ireland were carried on in the premises of Dell Spain. Ultimately, the AN cited the judgement of the TS in Borax (see section 3.3.) in support of its reasoning.

Having concluded that there was a PE of Dell Ireland in Spain, the AN resolved the two issues on attribution of profits to the PE. First, it rejected the possibility that the PE could deduct some of the costs connected with stock options that the parent company of the Dell Group had granted to employees in Spain, as those expenses were not directly connected with the activity of the PE. Only the parent company of the Dell Group had assumed an obligation with regard to the workers of Dell Ireland and, under article 7(3) of the Ireland-Spain Income Tax Treaty (1994), only expenses incurred for the purposes of the PE are deductible and this was not the case with the expenses with regard to stock options, as those expenses were not necessary for the purposes of the PE.

Consequently, and second, the AN confirmed the determination of the tax base by the tax administration and the TEAC, which assumed, as a starting point, the sales made in Spain, without really making explicit whether or not that reasoning was in line with a functional analysis. It is also surprising that the AN attributed to Dell Spain the sales made in Spain by the subsidiary of the group in France, it would appear that the AN considered that the intervention of Dell Spain in those contracts was of major importance.

As noted previously in this section, the judgement of the AN is in line with previous rulings and judgements in Spain with regard to the concept of a PE. In this regard, the decision of the AN was not a surprise. However, the following two aspects of the decision of the AN should be emphasized:

(1) In contrast to other previous case law, i.e. in Borax and Roche, in Dell Spain, the AN tried to reconcile the factual interpretation of article 5(5) of the OECD Model with domestic trade law on commission contracts. Again as explained previously in this section, Spanish trade law permits cases of indirect representation in contracts in respect of the commissioner where there is no legal bond between the client and the principal in the contract and the fact that the principal and commissioner are bound by the contracts concluded by the latter is not really proof of any legal relationship between the client and the principal. The origins of this interpretation can be traced back to the position adopted by the Spanish tax administration in the Commentary on Article 5 of the OECD Model (2014). In this context, the Spanish tax administration holds that this made it possible to defend that the factual, and not the legally binding, nature between the client and the principal were sufficient to constitute a dependent agent PE in

52. Para. 4.2 OECD Model: Commentary on Article 5 (2014).
53. Id.
54. The reasoning by the AN on this point is probably also wrong from the perspective of article 7 of the OECD Draft (1963) through to the OECD Model Tax Convention on Income and on Capital art. 7 (July 2008), Models IBFD (2008), which the Spain-Ire. Income Tax Treaty (1994), but this issue is not further explored in this article.
55. Para. 32.1 OECD Model: Commentary on Article 5 (2014).
Spain. However, that sentence in the OECD Commentaries on Article 5 refers to intervention by the agent in the negotiation of the contract and not to commissionaires. As is well known, this is the position adopted by courts in other countries in their decisions, i.e. Zimmer (2010)\textsuperscript{56} in France and Dell Norway in Norway, and, even the OECD, which is not, however, the interpretation supported by the Spanish tax administration and courts.

(2) The decisions in Dell Spain also reveal that the Spanish tax administration and courts apply their theory on the fixed place of business PE according to which the premises of the subsidiary are at the disposal of that foreign company and a fixed place of business PE exists not only in cases of toll-manufacturing together with commissionaire agreements, as in Borax and Roche, but also in a case where there was a plain commissionaire agreement with other activities in Spain that were complementary or linked with the sales undertaken by the commissionaire, i.e. marketing, the managing of payments, the assessment of risks, etc. From another perspective, however, Dell Spain can be regarded as a continuation of Borax or, with certain nuances, of Roche, as, ultimately, what the tax administration appears to have identified, and the AN was also sensitive to this fact, was that Dell Ireland carried on all of its activities in Spain through its Spanish subsidiary, Dell Spain.

6. Spanish Case Law on PEs in Perspective

6.1. "Heterodoxy" in Spanish case law

The conclusions of the Spanish tax administration and courts are not correct in terms of orthodox legal reasoning, i.e. the interpretation of tax treaties, in particular, article 5 of the OECD Model together with the OECD standards as represented by the Commentary to Article 5 of the OECD Model. However, some sympathy can be felt for a position that, ultimately, appears to attack structures where, as derived from the explanation given by the tax administration and courts, there is an evident tax flavour and which were based on the separate legal personality of the different companies of a group and the transferring of risks with legal contracts that did not reflect, as the judge-ment explains, in substance what the companies defended they were doing, as substantial functions were still carried out in Spain after the restructurings and risks appeared to be factually controlled also in Spain. In that situation, if, instead of using a forced legal reasoning, the Spanish tax administration had used the mechanisms that it had at its disposal to attack a structure, where, as it can be derived from the decisions of the courts, legal changes were not in line with real substance, i.e. primarily the domestic GAAR, characterization or the legal substance of the transactions according to article 13 of the Ley General Tributaria (General Tax Law, LGE), or had simply disregarded the restructurings of fully fledged distributors into commissionaires and manufactures into toll-manufactures, the outcome would not have been that uncommon from an international perspective.

Given the lack of diverse interest in the different companies of a group and the confusion of activities between the companies in the cases ad hoc, it would even be possible to say that what the Spanish tax administration and courts did is very natural, even if not in line with article 5 of the OECD Model. In other words, these bodies simply considered that, if a foreign company had a dependent agent in a jurisdiction and that agent undertook a substantial activity and factually controlled risks there, the agent, even if it was a subsidiary, would be a PE, as, ultimately, the premises of the agent were at the disposal of the principal and all of the activities conducted there were carried out "for" the principal. As well known, that view is not endorsed by the OECD, which has always placed too much emphasis on the "legal independence of the companies of a multinational group"; and is erroneous from the perspective of an orthodox reading of article 5 of the OECD Model. This is the main flaw in the Spanish theory. In strict legal terms, what the taxpayers did was in line with the legal standard admitted in article 5 of the OECD Model. If there were elements of artificial avoidance or simulation in the structures, it would have been more correct to use a more orthodox legal reasoning to attack the structures. If the Spanish tax administration had used the domestic GAAR and/or the possibility to characterize transactions according to their real substance to attack the dual structures of contract-manufacturing and commissionaire agreements consid-ered in the cases in question, the outcome would probably have been the same or very similar, but more justifiable and acceptable from an international perspective, as, at the time of the decisions, it was controversial as to whether or not the Spanish transfer pricing legislation permitted not to recognize and/or disregard transactions. And this is a lesson for other countries. If structures regarding PEs are to be attacked,\textsuperscript{57} it is probably more advisable to do so, as the OECD and UN recommend, under the anti-avoidance principles commonly accepted in a jurisdiction or the anti-avoidance clauses or doctrines generally admitted in that country. After all, this is the reaction that the Commentary on Article 5 of the OECD Model and UN Model\textsuperscript{58} admit and the direction that Australia has taken.\textsuperscript{59}

In today’s terms, cases where risk is transferred with contracts without changes in the factual control of risk are a perfect example of when to use the “delineation of the transactions” in the (revised) Chapter 1 of the OECD Transfer Pricing Guidelines proposed by Actions 8–10 of the OECD/G20 BEPS initiative.\textsuperscript{60} As a result, at first sight,  

\textsuperscript{56} See the decision of the French Conseil d’État (Supreme Administrative Court, CE) in Fr. CE, 31 Mar. 2010, Cases Nos. 304713 and 308525 (Zimmer), Tax Treaty Case Law IBFD.

\textsuperscript{57} As the author is not aware of all of the factual and legal details of the cases, there are not enough elements to argue that there was artificiality in those cases.

\textsuperscript{58} UN Model Tax Convention on Income and on Capital: Commentary on Article 5 (1 Jan. 2011), Models IBFD.

\textsuperscript{59} On the advantages and disadvantages of this option, see A.J. Martín Jiménez, Preventing Avoidance of PE Status, in UN Handbook on Selected Issues in Protecting the Tax Base of Developing Countries p. 325 et seq. (A. Tripelkov, H. Tomino & D. Šalka eds., UN 2015).

\textsuperscript{60} OECD, Actions 8–10 Final Report 2015, supra n. 2.
with all its flaws, the Spanish theory of PE would appear to be, in retrospect, very much in line with the final evolution of the OECD/G20 BEPS initiative as is explained in section 6.2.

All of the cases considered in this article referred to single subsidiaries in Spain that concentrated activities in the Spanish market. Would the splitting of such activities among several dependent and independent parties, i.e. one acting as a contract manufacturer, another as a commissionaire and another perhaps being an independent party providing warehousing services, avoid a PE? The conclusions reached by the tax administration (see section 2.) and the judgements of the courts studied do not provide any reason to be optimistic regarding the further fragmentation of activities. However, other cases have supported the fragmentation of some activities in different places of business and/or involving independent agents, which gives an indication that the expansive view of the concept of a PE only applies in certain circumstances. For instance, the TEAC has concluded with regard to a French group that a contract manufacturing Spanish subsidiary that provided some auxiliary administrative services, i.e. warehousing and assistance in the loading and uploading of goods that were distributed to Spanish clients, could not be regarded as a dependent agent PE, as it did not intervene in the commercialization of the product in Spain. It would, however, appear that another company in the same group acted as a distributor, but its situation was not considered in the case and it was regarded as an independent agent.

6.2. Action 7 of the OECD/G20 BEPS initiative regarding Commissionaires and Spanish case law

The OECD/G20 BEPS initiative has clearly targeted the kind of structures that have been the object of attention in the cases considered in sections 3., 4. and 5. This is the case not only in respect of Action 7 of the OECD/G20 BEPS initiative, but also of the final deliverables regarding Actions 8-10, which, as is well known, proposed an update to the OECD Transfer Pricing Guidelines (2010).


63. For a description of the problems of commissioner structures, see, for example, J. Andrus & M. Durst, “Standing on ‘Principal’: Transfer Pricing Structures Using Limited Risk Manufacturers and Distributors”, in PwC, Transfer Pricing Perspectives pp. 56-64 (2006), available at www.pwc.com/us/en/transfer-pricing-strategies/assets/transfer-pricing-perspectives.pdf (accessed 1 Apr. 2016) and A. Martin Jiménez, supra n. 39, where it is defended that the concept of a PE is designed to operate in favour of residence states and, therefore, it is difficult to speak of artificial avoidance of the status of a PE. Ultimately, it is very simple to avoid having a PE in a source state, especially in the context of the digital economy. Commissioner structures, sometimes complemented with toll manufacturing contracts, are the perfect example that demonstrates how easy it is to avoid source state taxation.

The final deliverable on Action 7 of the OECD/G20 BEPS initiative has, inter alia, proposed, though it will have no effect until all of the tax treaties currently in force are modified, to change the concept of a dependent agent PE in article 5(5) and an independent agent in article 5(6) to capture commissionaires. This would have the following two implications.

First, the legal binding nature would not be relevant anymore in the context of article 5(5) of the OECD Model and, where a person habitually concludes contracts or plays a leading role in those contracts and those contracts result in the transfer of property or rights or services provided by a non-resident entity, there would be a dependent agent PE. What would, therefore, be relevant would not be whether there would be a legal bond between a client and the commissionaire, but whether the actions of the commissionaire end up with a factual effect on the principal to sell goods or services to the client. The PE threshold would, therefore, be lowered so that person, i.e. either the principal or the commissionaire, that would be legally bound would no longer be relevant and what would matter would be whether or not the commissionaire had had a ‘principal role’ in the contracts that would routinely result in the transfer of goods or services for the benefit of the client, be it in the name of the principal or the commissionaire. Second, the definition of independence would be restricted such that article 5(6) of the OECD Model could not apply where the local subsidiary acts exclusively or almost exclusively on behalf of a person that is closely related, as defined in the proposed new article 5(6), control would be presumed when a person has, directly or indirectly, 50% or more of the beneficial interest in an enterprise.

In view of this change to article 5(5) and (6) of the OECD Model as proposed by Action 7 of the OECD/G20 BEPS initiative, it is not possible to avoid thinking that the cases decided in Spain, especially Dell Spain, and to some degree, also Roche and Borax, despite all of their erroneous reasoning, envisage a very similar position to that now proposed by the OECD.

Although the issue of the attribution of profits to dependent agent PEs has not, so far, fully been addressed by the OECD, the relevant output on this issue is anticipated in 2016: a PE should only be attributed the profits that correspond to the activities it actually undertakes and the remainder of the company or related parties should derive the income corresponding to the activities that they undertake. This means that Action 7 of the OECD/G20 BEPS initiative does not go as far as Spanish case law, which may end up by attributing to the PE the income derived from sales in Spain with a deduction for expenses, even if such expenses are incurred abroad. That does not appear to be a

64. It is not the purpose of this article to analyse all of the changes proposed by OECD, Action 7 Final Report, supra n. 2, as, apart from article 5(5) and 5(6) of the OECD Model (2014), these refer to the splitting of contracts in the context of article 5(3) and the wording of the OECD Model Commentary on Article 5(4) (2014).

65. See the proposed new paragraph 35.1. of the New Draft Commentaries on Article 5 of the OECD Model derived from OECD, Action 7 Final Report supra n. 2.
true functional analysis of the kind required by the OECD Transfer Pricing Guidelines and/or the Reports on the Attribution of Profits to Permanent Establishments with regard to the intervention of commissionaires in contracts, although, from the facts of some cases, for example, Dell Spain, it is unclear as to whether or not that analysis would lead to a similar result, i.e. the functions carried on abroad in connection with Spanish sales are not dealt with in these cases. There is, therefore, a risk that the Spanish position would attract more profits to the tax base of the new PE under article 5(5) of the OECD Model than the OECD’s would do, but, it will be necessary to wait until the OECD releases its work on profit attribution linked to Action 7 of the OECD/G20 BEPS initiative to be able to arrive at a more final conclusion.

6.3. Fragmentation and aggregation of activities: The OECD/G20 BEPS initiative and article 5(4) of the OECD Model – The approach of the Spanish tax administration and courts

Action 7 of the OECD/G20 initiative has provided guidelines as to how to correctly interpret and apply article 5(4) of the OECD Model and has also proposed a new clause regarding the aggregation of activities, i.e. article 5(4)(1) of the OECD Model. Of these, some of the new paragraphs of the Commentary on Article 5(4) of the OECD Model and, of course, the aggregation clause are relevant in putting into perspective Spanish case law.

To begin with, new paragraph 22.3 of the Commentary on Article 5 of the OECD Model, as per Action 7 of the OECD/G20 BEPS initiative, explains that art. 5(4)(b) of the OECD Model, i.e. no PE in cases of the maintenance of stock or merchandise for the purpose of storage, display or delivery, would not apply:

in cases where a stock of goods or merchandise belonging to an enterprise is maintained by another person in facilities operated by that other person and the enterprise does not have the facilities at its disposal as the place where the stock is maintained cannot therefore be a permanent establishment of that Enterprise.

In the Spanish cases considered in this article, which affects all of them, i.e. Borax, Roche and Dell Spain, it would appear that the warehouses belonged to the Spanish subsidiaries and, therefore, unless, unlimited, access to them was granted to the non-resident companies that acted as principals, the warehouse would not be a fixed place of business for them. In Roche, it would appear that the warehouse was at the disposal of the Swiss company, such that there was a fixed place of business, even if the company claimed that only auxiliary activities were conducted there. This is relevant, as, if the foreign company has a fixed place of business to which article 5(4) of the OECD Model applies, this would facilitate the application of the new anti-fragmentation clause as explained below.

The situation is somewhat more complex in respect of article 5(4)(c) of the OECD Model, i.e. the maintenance of stock belonging to the enterprise solely for the purposes of processing by another enterprise. The proposed new paragraph 22.4 of the Commentary on Article 5 of the OECD Model explains that the premises of a toll-manufacturer that were not, in principle, at the disposal of the non-resident client and the place where the stock would be maintained would not be a PE of that company. If, however, the non-resident company was granted unlimited access to the premises of the toll-manufacturer for inspection and maintenance, it would have to be ascertained as to whether or not the activity would fall within the limited preparatory and auxiliary activities of article 5(4) of the OECD Model, as only, in that case, would article 5(4)(c).

The problem with the Spanish cases involving toll manufacturers, i.e. Borax and Roche, is precisely this, i.e. are the premises of the subsidiary at the disposal of the foreign parent? The TS presumed that they were by adopting the concept of a complex operative settlement and/or industrial dependent agent PE, but the new Commentary on Article 5 of the OECD Model would appear to exclude toll manufacturing activities from the scope of the definition of a PE, unless it is interpreted that, as the subsidiary would be a dependent agent of the parent company according to the new drafting of article 5(6) of the OECD Model, the premises were at the disposal of the parent company. However, in this case, it is unclear as to how the new article 5(6) of the OECD Model would interact with article 5(7). By maintaining article 5(7) of the OECD Model, the fact that there would be a dependent agent subsidiary in a state does not imply that the premises of that subsidiary would be at the disposal of the parent company and, therefore, there would not be a fixed place PE for those purposes. The Spanish tax administration and courts have adopted another approach and interpretation of article 5(1) and (4) of the OECD Model, which is not in line either with the orthodox interpretation of the Commentary on Article 5 of the OECD Model or with the proposed new Commentary on Article 5 that are derived from Action 7 of the OECD/G20 BEPS initiative. These presume that, due to the material activities, the business cycle, production and sales, that are completed in Spain, the exceptions in article 5(4) of the OECD Model would not apply, but that, at the same time, the premises of the subsidiary would “at the disposal of the parent company”. In the new draft OECD Commentary on Article 5, it is even clearer than before that this position is wrong and, therefore, the effect of the new OECD Commentary on Article 5 should be to limit the tax claims of the Spanish tax administration.

Finally, Action 7 of the OECD/G20 BEPS initiative has also proposed adding a new anti-fragmentation rule in a new paragraph 4(1) to article 5 of the OECD Model. It is unclear either how the new anti-fragmentation rule in the new draft paragraph 4(1) of article 5 of the OECD Model

66. The new rule would read as follows:

4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary nature, provided that the business activities carried on by the two enterprises at the same place, or by the same or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.
would apply, as its diffuse contours are not well defined. However, at least in some of the cases considered in this article, for example, Roche, where it appears that there was a warehouse available to the Swiss parent, the new rule could give rise to the same effect as the Spanish doctrine of PE. (In fact, the new rules would tend to realize a similar result, but the Spanish interpretation has more far-reaching effects.)

The effect of the anti-fragmentation rule would be to exclude the application of article 5(4) of the OECD Model, but, for a PE to exist, the foreign company would have to have a fixed place of business at its disposal in the source state, i.e. ultimately, article 5(4) refers to cases where the fixed place of business is not regarded as a PE. If such a condition were not met, there would be no PE under article 5(1) of the OECD Model and no accumulation with the activities of the subsidiary would take place. It is doubtful then that the new anti-fragmentation rule would be effective in the case of a fragmented structure that used subsidiaries and/or independent intermediaries if the fixed place of business were avoided by the foreign company. It is one thing for the new anti-fragmentation rule to take activities out of the scope of article 5(4) of the OECD Model, but it is quite another thing that there is a fixed place at the disposal of the foreign parent in the source state. Consequently, as long as the test in respect of disposal of fixed place of business at the level of the foreign company would be required in cases of fragmentation for the new rule to apply, there would be some leeway to avoid having a PE in the source state, or to divert profits from the source state. This conclusion is confirmed by example B in the new paragraph 30.3 of the Commentary on Article 5 of the OECD Model. This is because, in that case, which is similar to the fact pattern of some of the Spanish cases, the anti-fragmentation rule would apply, as the foreign company of the group would have a fixed place, i.e. a warehouse, at its disposal in the source state. If this were not the case, it would be difficult to defend the position that there was a PE in the source state in the example used in the new Commentary on Article 5 of the OECD Model.

However, the effects of Spanish case law on the complex operative settlement are more far-reaching than the new anti-fragmentation clause. Specifically, by considering the activities of the subsidiary and presuming that its premises are at the disposal of the foreign principal, all of the activities in Spain, primarily sales in all of the cases considered, would be attributed to the fictitious PE. This goes well beyond the proposed new anti-fragmentation rule of Action 7 of the OECD/G20 BEPS initiative.

It can also be said that the effects of the new anti-fragmentation rule or the examples and interpretation of article 5(4) of the OECD Model as derived from Action 7 of the OECD/G20 BEPS initiative would be limited, but these are the new rules and the Spanish doctrine on the complex operative settlement theory is not easy to accommodate with them, and less so in the traditional version of article 5 of the OECD Model.

In conclusion, the OECD’s approach on Action 7 of the OECD/G20 BEPS initiative, however, would continue to permit foreign companies to undertake substantial activities in the source state without overstepping the PE threshold for source taxation. It should be remembered that the concept of a PE was conceived to operate for the benefit of residence state and that this principle would still be the rule in the world post the OECD/G20 BEPS initiative, at least, from the perspective of Action 7, although the true dimension of the source/residence state debate would only be revealed when the works on attribution of profits to PEs are released by the OECD in 2016. In this context, it would not make any sense to widen, even if not too greatly, the definition of a PE, while, at the same time, attributing most of the benefits of the transactions to the foreign head offices.

6.4. Reform of the OECD Transfer Pricing Guidelines via Actions 8 to 10 of the OECD/G20 BEPS initiative and the Spanish cases on PEs

In Roche, Borax and Dell Spain, the Spanish subsidiary was regarded as a fixed place of business PE of the foreign principal, as it was there to conduct the business activities of the non-resident related company. What Spanish case law is proposing is to ‘pierce’ the legal independence of the subsidiary to attribute much of the subsidiary’s activities to the principal and/or non-resident related party. This would permit the taxation in Spain of the profits of the non-resident company through a fiction of PE, i.e. the complex operative settlement theory, and not only the intervention of the dependent agent subsidiary in the negotiation of the contract or the services provided to the non-resident company.

This can be closely related, or linked, to the new concept of “risks allocation”, which is derived from the modifications to Chapter 1 of the OECD Transfer Pricing Guidelines that have been proposed by Actions 8-10 of the OECD/G20 BEPS initiative. These propose the disregarding and/or the non-recognition of contractual, i.e. legal or “paper”, allocations of risks where the parties do not have the means to effectively “control” those risks and those risks are effectively controlled by different parties of the same group of companies. In essence, that is what the Spanish tax administration has done and what the courts have endorsed in all of the cases considered. This is because the courts did not recognize the restructuring of groups where it appeared that no changes accompanied the new legal form and risks were still factually managed and controlled in Spain after the restructuring, even if legally allocated by contracts with non-resident companies, i.e. principals. It is clear to the OECD that these cases should not be dealt with using an expansive interpretation of the concept of a PE, but rather, with transfer pricing tools and norms. In this respect, the Spanish answer is also heterodox and not in line with, especially, the new international standards.

67. Martin Jiménez, supra n. 59.
68. On the problems of the deemed theory of a PE, see Andrus & Durst, supra n. 63, at pp. 63-64, but this article was written prior to the OECD/G20 BEPS initiative and, therefore, assumes a contractual distribution of risk as a valid standard. This assumption does not hold true following Actions 8-10 of the OECD/G20 BEPS initiative and the changes that are proposed to be made to OECD, supra n. 42, at ch. 1.
There has been a certain evolution on this issue on the part of the OECD. In 2002, the OECD appeared to warmly support business restructurings that resulted in the fragmentation of activities that could make use of article 5(4) of the OECD Model to avoid having a PE in the source state. In this context, Chapter IX of the OECD Transfer Pricing Guidelines on business restructuring supported the disaggregation of business profits and presence in a jurisdiction, as business restructurings that were properly executed from a transfer pricing perspective could not be countered, even if local entities were transformed into limited risk distributors, toll manufacturers or commissionaires. The only limits, i.e. the then referred to disregard principle and the now called delineation of actual transactions/non-recognition principle or domestic GAARs, were not very effective, as they conflicted with the PE thresholds in article 5 of the OECD Model, which operate in favour of residence states and/or separate companies within a group. This was more the case in a context where legal transfers in respect of risk were given more weight than they have now. However, as defended previously in this section, the legal context before the OECD/G20 BEPS initiative did not prevent tax administrations from using transfer pricing tools or GAARs where the legal and factual reality were not aligned.

What the OECD is now proposing with Actions 8-10 of the OECD/G20 BEPS initiative and the reform of Chapter I of the OECD Transfer Pricing Guidelines is to eliminate the effects of legal transfers of risk, which would permit the attribution to subsidiaries in the source state of part of the profits that would go to the foreign principal under “formal” business restructurings executed with contracts only and not with the real transfer of functions and controls of risks. This is simply saying that cases, such as those determined by Spanish courts, should be decided, instead of using GAARs, by applying transfer pricing techniques and norms at the level of the subsidiary. How much profit would be attracted by the subsidiary in such cases cannot be known, as the final work on profit split by the OECD has not yet been released, but, if the domestic subsidiaries and/or new PEs derived from Action 7 of the OECD/G20 BEPS initiative are remunerated under traditional methods that apply to “routine” functions, the effects of the initiative for countries where the commissionaire, toll manufacturer is located would not be very relevant terms of profit attribution. If this is so, it is unlikely that countries, such as Spain, would abandon their expansive interpretation of the concept of a PE or, other countries, their interpretation of transfer pricing rules.

There is, therefore, a very relevant difference between the outputs of the OECD/G20 BEPS initiative and the Spanish position. Specifically, the OECD is proposing to simply use transfer pricing techniques to remunerate either the new, PE that results from Action 7 of the OECD/G20 BEPS initiative or the local subsidiary in view of the assets, functions and risks that the local subsidiary factually controls, regardless of legal distribution of risks. The OECD’s “new” approach facilitates carrying on activities in the source state, while, at the same time, transferring profits from that state to other jurisdictions as long as real functions and risks (together with intangibles of the group) are transferred out of the source state. Although the final OECD documents on the profit split method, which are to be published in 2016, may imply some, very relevant, modifications in this regard, it may be that “routine” and/or “end” of the value chain functions, such as commissionaires, local low risk distributors, toll manufacturers, would not be much affected by the changes, depending on the group and the structure of the value chain.

---

69. OECD, Issues Arising under Art. 5 (Permanent Establishment) of the Model Tax Convention, in Issues in International Taxation: 2002 Reports Related to the OECD Model Tax Convention (OECD 2002). In this context, the following example was provided by the OECD’s Committee of Fiscal Affairs (CFA): A non-resident parent company owns a resident subsidiary that hitherto has been engaged in selling both automobiles and spare parts. The spare parts storage facility is now to be hived off and treated as a separate branch of the parent company. The activities of the storage facility will be limited to the storage, relocation, and distribution of the spare parts, which will be ordered ‘directly’ from the parent by the customers. Specifically, this means that (a) the settlement of the transactions, with regard to both contracting and accounting, is to be effected exclusively by the parent in its name and for its account; (b) ancillary activities such as settling warranty claims, installing, performing customer service, and advertising are not performed by the storage facility; and (c) the necessary staff is provided under a lease contract, and the facility’s own staff is engaged merely in instructing and supervising (2002 Report, pp. 100-101).

The conclusion of the CFA was that the source state had lost its taxing rights, as the new activities conducted by the branch fall squarely into article 5(4(a) to (d) of the OECD Model ‘are always exempt and are not subject to examination for whether or not they are truly preparatory or auxiliary’ as the provisions in those letters were initially adopted to ‘provide certainty to taxpayers that their income from those activities would be taxable, if at all, only in the country of residence’ (at p. 100, para. 92). Even if this could give rise to tax planning opportunities, the CFA argued that, as long as the transaction was not ‘exclusively’ tax motivated, taxing rights should be allocated to the residence state (at p. 100, para. 96). For these, the company could have commenced with that structure and it would have obtained the same result without it being held to be offensive. It can be easily inferred, for example, that strong support for business restructuring and the fragmentation of activities, even if tax savings in the source state play a very relevant role in the restructuring.

---

70. OECD, supra n. 42, at ch. IX, para. 9.182 manifestly recognizes this in stating that: ‘Provided functions, assets and/or risks are actually transferred, it can be commercially rational from an Article 9 perspective for an MNE group to restructure in order to obtain tax savings. However, this is not relevant to whether the arm’s length principle is satisfied at the entity level for a taxpayer affected by the restructuring (see paragraph 9.178).’ See also, for example, example A in OECD, supra n. 42, at ch. IX, para. 9.188.

---

71. OECD, Action 7 Final Report 2015, supra n. 2, at para. 9. Action 7 BEPS states that: ‘Such changes [it refers to changes in art. 5.5 and 5.6. OECD MC], however, are not intended to address BEPS concerns related to the transfer of risks between related parties through low-risk distributor arrangements. In these arrangements, sales generated by a local sales workforce are attributed to a resident taxpayer, which is not the case in the situations that the changes to Art. 5(5) and 5(6) are intended to address. Given the perception of BEPS concerns related to low-risk distributor arrangements are best addressed through the work on Action 9 (Risks and Capital) of the BEPS Action Plan.’ This sentence, together with the proposed new paragraph 32.12 of the draft Commentary on article 5 of the OECD Model, as per OECD, Action 7 Final Report 2015, supra n. 2, appears to explain how to avoid the changes in article 5(5) and (6) of the OECD Model and also reflects the fact that, in these cases, the OECD prefers to use transfer pricing techniques.

---

72. An overattribution of income to intangibles and intangible related functions, which is also stressed by OECD, Actions 8-10 Final Report 2015, supra n. 2, as well as by the fact that there is no withholding taxes for royalties in article 12 of the OECD Model (2014) and the fact that there may be no or low taxation in the residence state of the recipient of the royalties (see OECD, Action 5 Final Report 2015 – Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance (OECD 2015), International Organizations’ Documentation IBFD), may...
The Spanish interpretation could, however, have the effect of retaining, or permitting the retention of, more profits in the source state, even if, in the specific cases considered, how much profit is retained would depend on the approach adopted to calculate the tax base of the “fictitious PE” and the capacity of the company to prove the deductible expenses that should be allocated to the PE. For instance, under the new framework following the OECD/G20 BEPS initiative, if the local subsidiary commercializes goods as a low-risk distributor, it would be remunerated as such, taking into account the real functions, assets and risks that it would assume and control, i.e. a profit-split would be unlikely to be applied in such a case, although this would depend on what the distributor did and the work of the OECD on this method. Again, if there is a toll manufacturer in the same jurisdiction, its remuneration would be at arm’s length with all the caveats for the low-risk distributor. However, with the Spanish theory, all of the activities in the source state could be captured, accumulated and taxed in a “horizontal manner”, i.e. under the theory of “complex operative settlement”), though, probably not conferring to “coordination” outside the jurisdiction as much relevance as the OECD does, or not recognizing the possibility of transferring “intangibles” as easily as is assumed in the new chapter on intangibles derived from Actions 8-10 under the OECD/G20 BEPS initiative, by simply removing some of the relevant functions, risks and individuals from the market jurisdiction.73 It is true that the judgements considered in this article refer to cases regarding the legal transfer of risks, but, depending on how the tax base of the PE is calculated, this may also entail that the transfer of real functions is not recognized and too much profit is attributed to the Spanish PE, which would also conflict with the new OECD approach.

Although the methods of attributing profits to the “Spanish dependent agent subsidiary” are not very detailed in the cases considered in this article, it can be assumed that their effect is probably more burdensome than usual transfer pricing techniques that could have been used to attribute profits to the subsidiary. There is not much information on profit attribution in the cases in question, but there are indicia that the outcome of the cases might not be in line with an orthodox transfer pricing analysis and/or attribution of profits to PEs carried on in line with the OECD work. First, as, in some cases, the attribution of profits arises from the “sales figures” in Spain, for example, in Borax. Second, the pre-business restructuring situation is often taken into account as a reference, which was probably correct if nothing at all had changed, although it is not fully clear in the decisions if, at least, some real functions were transferred abroad apart from shifting risks with legal contracts. And, third, and no less relevant, in the absence of reports of the PE in Spain, as the group assumed that no PE existed, it is easier for the tax administration to deny expenses in Spain because the taxpayer has to prove the connection of expenses with income derived in Spain in Dell Spain, which is harder in a tax audit than if the companies had started with a PE that has prepared all the documentation to prove its relationship with the head office or if the starting point is the accounts of the subsidiary and the accounts of the foreign companies of the group.

7. Conclusions

Questionable as it may be, the Spanish approach to the concept of a PE, as represented by the cases considered in this article, is nothing more and nothing less than a reaction that questions the current PE threshold, before the OECD/G20 BEPS initiative and as derived from BEPS Action 7. In the author’s view, that reaction should have been undertaken using other mechanisms rather than by way of a peculiar interpretation of article 5 of the OECD Model.74 The first and most obvious mechanism is that, if the threshold in article 5 of the OECD Model is regarded as too rigid from the source state perspective (Spain in this case), it should be lowered in Spanish tax treaties, as other states have done. Trying to lower that threshold by interpretation obviously gives rise to a problem of uncertainty. The second mechanism, i.e. the application of anti-avoidance norms where the tax administration considers that there is unacceptable behaviour by the taxpayer in the most aggressive cases, would probably be better understood by the international community than an interpretation of the concept of a PE that is overly in disharmony with the common understanding of article 5 of the OECD Model.

The Spanish heterodox theory on the interpretation of the concept of a PE should also be viewed in the context of other legislative options, for example, the United Kingdom’s DPT, the Australian MAAL, the Indian equalization levy for online advertising and the Turkish electronic place of business PE, but it has a disadvantage with regard to all of these, i.e. whereas, in other countries, there is new legislation, in Spain there is only the “interpretation” of article 5 of different tax treaties in the Spanish treaty network that follow the OECD Model. In all cases, there may be problems with the compromise to

73. Nothing prevents states, however, from attaching tax significance to such transfers of value. On the relationship of the economics and legal issues in transfer pricing, see Wilkie, supra n. 61.

74. On the different reactions in connection with the PE threshold, see Martin Jiménez, supra n. 59, at p. 325 et seq., especially p. 380 et seq.
respect international obligations and tax treaties, but legislative reactions have greater legitimacy than the Spanish ‘interpretation’ and give rise to less uncertainty; i.e. the Australian MAAL may be a better accommodation with international obligations. All of the reactions reflect discontent with the current status quo in international taxation. However, in some respects, despite all of its flaws, the Spanish theory is much more limited than other initiatives and, to date, it would appear to be focused on extreme cases where most of the activities took place in Spain without much going on in the residence state of the company to which the profits were “diverted” following business restructurings that implemented ‘principal company’ structures with, from what appears in all of the cases considered in this article, a tax flavour.

It remains to be seen whether or not the Spanish interpretation will survive in the world post the OECD/G20 BEPS initiative, and the answer is probably “yes”, as it has more far reaching effects than the changes brought by BEPS Action 7. However, what is sure is that the Spanish approach will give rise to conflicts and uncertainty, even if the claims of Spain as a source state are not as far-fetched as presented in some international circles. As in the world pre-the OECD/G20 BEPS initiative, PEs will probably continue to be a minefield, which will not be eliminated until a more balanced solution and/or threshold for source states is found.

8. Addendum

On 20 June 2016 (after this article was finalized), the Spanish Supreme Court released its judgement in the Dell case (rec. n. 2555/2015). The Supreme Court confirmed the conclusions of the AN on the concept of a PE, but (slightly) corrected the manner of attribution of profits to it. On the PE concept, the Supreme Court inverted the reasoning by the AN. First, it concluded, just as the AN did, that the Spanish subsidiary of Dell was a fixed place of business of Dell Ireland, with a very lax interpretation of the concept of “disposal”: Dell Ireland, when it carries on activities and functions in Spain with the personnel of Dell Spain, is factually and materially using the premises of Dell Spain to conduct its own business activities (even if Dell Spain is a subsidiary with a legal personality of its own). Second, the Supreme Court considered that there was no need to express an opinion on whether Dell Spain was a dependent agent PE of Dell Ireland, since Dell Spain was also deemed to be a fixed establishment of Dell Ireland in Spain. Still, the Supreme Court confirmed that Dell Spain was also a dependent agent PE of Dell Ireland because article 5(5) of the OECD Model also covers cases of indirect representation where there is no formal legal relationship between the client and the principal. It is interesting that the Supreme Court expressly rejected a formalistic interpretation of article 5(5) of the OECD Model even if “Norwegian and French courts” accepted it (an express reference to Dell Norway and Zimmer). In line with the reasoning of the AN, the Supreme Court also refused to recognize that Dell Spain was an independent agent of Dell Ireland.

75. The recent State aid proceedings opened by the EU Commission against Belgium, Luxembourg and the Netherlands that affect US multinationals are another sign of the state of things, even if it can be said that the claims made by the Commission are clearly misplaced. On this issue, see the excellent article by R. Tavares, B. Bogenschneider & M. Pankiv, The Intersection of EU State Aid and US Tax Deferral: A Spectacle of Fireworks, Smoke and Mirrors, Fla. Tax L. Rev. (2016) (forthcoming).

76. Even before the OECD/G20 BEPS final deliverables had been made, R. Collier, BEPS Action Plan, Action 7: Preventing the Artificial Avoidance of PE Status, Brit. Tax Rev. 5, p. 638 et seq. (2013) had referred to the concept of a PE and managing PE risks as a minefield.