

Skandia Update
An EU perspective



Indirect Tax

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EU Survey on Skandia and Welmory

Due to the current uncertainty in the marketplace regarding the impact of the Skandia ruling, we conducted a survey among the EU Member States to ascertain the differences in implication and interpretation across the EU. Our findings are analyzed are below.

Introduction

In the case of *Skandia America Corporation USA* (Case C-7/13) (“*Skandia*”), of September 2014, the Court of Justice of the European Union (“CJEU”) ruled on the VAT treatment of charges between a (non-EU) head office and its fixed establishment, which was part of a VAT group. A VAT group qualifies as a single taxable person for VAT purposes and by becoming part of a VAT group, the fixed establishment forms a different taxable person along with the other members of the VAT group. According to the CJEU the charges by a head office to its fixed establishment which was part of a (Swedish) VAT group were therefore within the scope of Swedish VAT.

This CJEU judgment has caused a lot of uncertainty on how to deal with charges between a head office and its fixed establishments in the Member States of the European Union. In this document we will elaborate on the impact of the Skandia case and how it is implemented within the EU.

Furthermore we will give insight on whether Member States have implemented VAT grouping in their local legislation, whether foreign entities can be included in a local VAT group, whether other CJEU case law (*Welmory sp. z o.o* (Case C-605/12) (“*Welmory*”)) on the definition of a fixed establishment complicates the impact of *Skandia*, and finally whether Member States have published official guidance on how the Skandia case should be interpreted.

Publications on the implications of CJEU Skandia

In February of this year the VAT Committee published a working paper (VAT Committee, taxud.c.1(2015)747072 Working paper No 845) on the issues arising from the Skandia case. In its introduction the VAT Committee emphasized that for the sake of legal certainty it is desirable to reach a common and consistent position on the impact of *Skandia*. The VAT Committee also requested delegations to express their views on the issues raised. Based on this request, the VAT Committee implicitly indicated that there are various questions outstanding on the impact of *Skandia* (such as whether *Skandia* has an impact on the supplies other than from a head office to its fixed establishment).

The VAT Expert Group published its working paper (VAT Expert Group, taxud.c.1(2015)3986774 VEG No 047) on the Skandia case in September 2015. The VAT Expert Group firmly expressed that a limited interpretation of *Skandia* is required and preferred a broad application of *FCE Bank plc* (Case C-210/04) principles (. The main arguments put forward by the VAT Expert Group were the protection of the fiscal neutrality principle, the respect of the territoriality principle and discretion of Member States in applying the VAT grouping regime. On a practical level, the VAT Expert Group also emphasized the need to avoid disproportionate administrative burdens for both businesses and tax authorities.

Official guidelines concerning the implications of CJEU Skandia

Whilst the majority of Member States have yet to issue formal guidance on how Skandia should be implemented, a few have offered some guidance on its interpretation. For example the Czech Republic has broadly accepted the Skandia case and has communicated this in an official guideline. In Hungary the tax authorities have stated that the conclusion of the CJEU in *Skandia* is consistent with their pre-existing interpretation of the Hungarian VAT Act, and therefore it should be applied as of 1 January 2008, when the current Hungarian VAT Act entered into force.

The Belgian government introduced a law, effective from 1 July 2015, which codified the outcome of the *Skandia* ruling in the Belgian VAT legislation and simultaneously implemented the immediate withdrawal of the previous anti-avoidance legislation.

The tax authorities in the United Kingdom released their initial Brief on the Skandia judgement which stated that “*the implication of the Skandia judgement is that an overseas establishment of a UK-established entity is part of a separate taxable person if the overseas establishment is VAT-grouped in a Member State that operates similar ‘establishment only’ grouping provisions to Sweden*”. Further guidance has followed, confirming that the UK will apply Skandia from 1 January 2016 to supplies between a UK-established entity and an overseas establishment in a VAT group if the overseas Member State has ‘establishment only’ VAT grouping and has implemented Skandia. However, the UK tax authorities have not issued an absolutely definitive list of which Member States they consider to meet these conditions, and have instead recommended that taxpayers should contact the tax authorities in the local Member State for further guidance.

Other countries, including the Netherlands, Italy, Ireland and Finland are expecting their respective authorities to issue an official position in due course. It is most likely that other Member States will await further guidance from the CJEU.

Complicating case law?

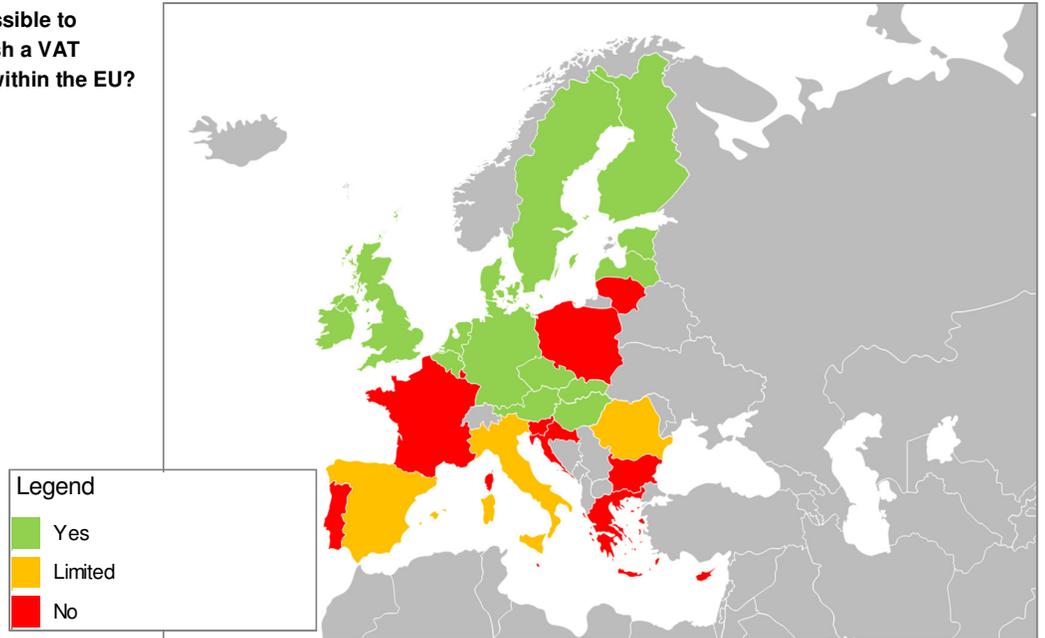
The CJEU ruled in *Welmorey* that a fixed establishment in a digital context requires a suitable structure, as regards human and technical resources, such as computer equipment, servers and adjusted software. The question arises therefore whether the context of fixed establishment has changed since this decision.

While the majority of EU countries have seen no official changes regarding the requirements for a fixed establishment there are a few exceptions as stated below. Additionally, some local VAT experts do expect the case to play an important role in future tax disputes, such as in Lithuania and Latvia.

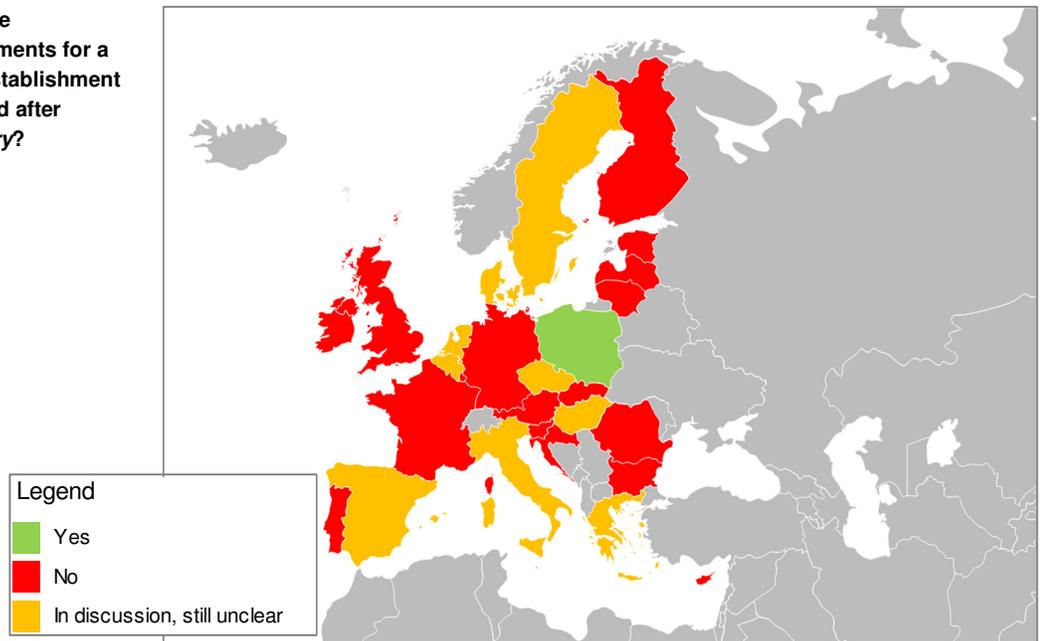
In Poland local VAT experts indicated that as a result of *Welmorey*, the administrative courts have started to consider the existence of a fixed establishment when a company has (a rented) technical infrastructure and human resources. Such an interpretation of *Welmorey* could complicate the implications of the Skandia case within the EU.

Results of survey

Is it possible to establish a VAT group within the EU?

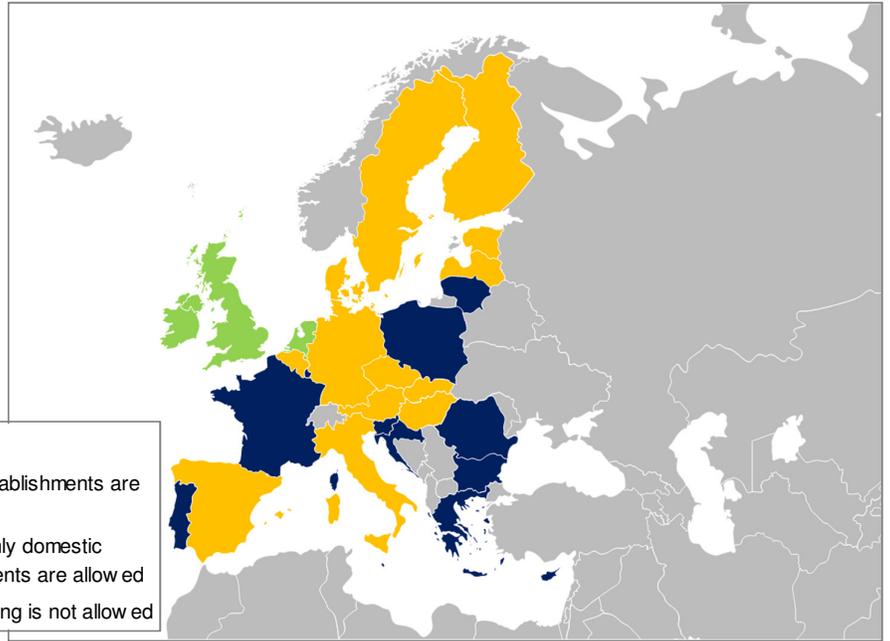


Have the requirements for a fixed establishment changed after *Welmory*?



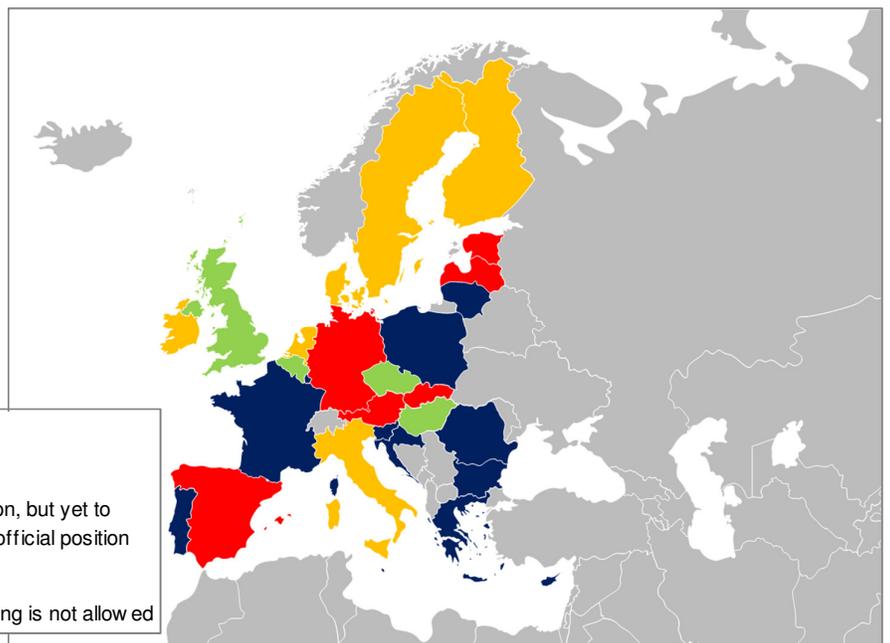
Can a fixed establishment be included in a VAT Group in the EU?
If yes, can the foreign head office and/or fixed establishment also be included in said VAT group?

- Legend
- Yes, all establishments are allowed
 - Yes, but only domestic establishments are allowed
 - VAT grouping is not allowed



Have the government / tax authorities taken an official position on *Skandia*?

- Legend
- Yes
 - In discussion, but yet to publish an official position
 - No
 - VAT grouping is not allowed



Conclusion

There is still a lot of uncertainty in the market regarding the interpretation and implications of *Skandia*. Several EU Member States claim that the *Skandia* judgement should be applied extensively whilst others have a more limited approach towards the interpretation of *Skandia*. In our opinion there is a need for the *Skandia* to be interpreted consistently across the EU as the current differences in interpretation could threaten the principle of fiscal neutrality.

It is now the responsibility of the European Commission to give a clear vision on how the *Skandia* case should be interpreted throughout Europe. The current uncertainty is not only created by the question whether *Skandia* should only be applied in a similar situation, i.e. that a head office recharges IT costs to its fixed establishment which is part of a VAT group in the EU, but also by the changing definition of a fixed establishment for VAT and the non-uniform guidance published by the Member States.

In our view, following that of the VAT Expert group, VAT grouping is of great importance for the EU economy. A limited interpretation of *Skandia* would therefore be in line with the intention behind the VAT grouping option in the Principal VAT Directive. Their purpose is to lower the administrative burden of both taxable persons and the tax authorities, thereby enabling efficient VAT compliance and audit activities. Considering this and the option available to EU Member States in implementing anti-avoidance regulations to prevent a situation of non-taxation, the most desirable scenario would be for the European Commission to announce that *Skandia* should only be limitedly interpreted on a limited basis. In this case, only a factual situation similar to *Skandia*, i.e. that a head office recharges external costs to an EU fixed establishment included in a VAT group, should be influenced by the decision in *Skandia*. In other situations *FCE Bank* principles should apply, via which a fixed establishment is treated as the same taxable person as its head office.

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