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**The concept of independence within the meaning of
Articles 9(1) and 10 of the VAT Directive**

by

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Summary

Article 9(1) of the VAT Directive requires a person to independently carry out economic activity in order to be considered as taxable for VAT purposes. Article 10 provides a negative definition of the term “independently”, precluding from the scope of this concept persons that are bound to an employer by a contract of employment or any other legal ties creating the relationship of employer and employee in terms of working conditions, remuneration and employer’s liability. The provision has, however, also been used by the Court of Justice of the European Union (“the Court”) to assess independence in situations related to entities other than natural persons, such as branches and municipal budgetary entities. The purpose of this thesis is to examine the meaning of the term “independently” within the context of Article 9(1) and 10 of the VAT Directive, as well as determining how branches and wholly owned subsidiaries are to be treated in this respect.

Firstly, it is examined how Article 10 has been used by the Court when assessing whether a person is to be regarded as performing its activities independently within the meaning of Article 9(1) or not. This is done by studying the case law from the Court dealing with the issue of independence within the context of VAT and discussing the various aspects considered. It is shown that the factors of working conditions, remuneration and employer’s liability stated in Article 10 are at the centre of the independence assessment and that they are to be evaluated from an overall perspective rather than in a cumulative manner. Notably the aspect of who is carrying the economic risk, originally derived by the Court from the remuneration condition, has frequently been relied on in case law and is therefore particularly elaborated on.

It is moreover concluded that legal independence is not a requirement in order for a person to be deemed to carry out its activities independently. The lack of legal personality might, however, cause it to fall within the scope of Article 10 and thereby indirectly precluding independence. Similarly, the factor of whether there is subordination present in the relationship between the person at issue and its principal entity is to some extent taken into account through the Article 10 criteria, but does not seem to have any bearing on its own.

Lastly, it is argued that branches normally not are to be deemed independent as they typically fall within the scope of Article 10. Certain branches, such as branches belonging to a credit institution established in a third country, may nevertheless have endowment capital allocated to them due to legal requirements, possibly leading to a different conclusion. In regard to wholly owned subsidiaries, the scarcity of relevant case law limits the certainty with which conclusions might be drawn. The case law currently available does however indicate that the relationship between wholly owned subsidiaries and their parent companies might in certain circumstances fall within the scope of Article 10 and consequently be precluded from independence within the meaning of Article 9(1).

Abbreviation list

AG	Advocate General
Art.	Article
EU	European Union
P.	Page
Para.	Paragraph
Sec.	Section
Sixth Directive	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes
TFEU	Treaty on the Functioning of the European Union
The Court	The Court of Justice of the European Union
The VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
UK	United Kingdom
US	United States of America
V.	Versus
VAT	Value Added Tax
Vol.	Volume

1 Introduction

1.1 Background

Determining if a person is a taxable person for VAT purposes is decisive for whether supplies of goods and services are to be subject to VAT, hence constituting a fundamental issue for the Union VAT system.¹ The term “taxable person” is part of defining the scope of VAT and, as stressed in case law, it is important that such terms are given a uniform and autonomous interpretation.² Article 9(1) of the VAT Directive³ defines who is a taxable person by laying down three cumulative conditions. Those conditions are “any person”, “independently” and “economic activity”,⁴ each entailing complexities when it comes to assessing taxability. The condition of “any person” raises the question of what is an entity for VAT purposes and does for instance complicate the classification of partnerships.⁵ The term “economic activity” has been elaborated on in case law⁶ but still gives rise to issues to be solved by the Court.⁷ However, the focus of this thesis is the condition of “independently”.

The term “independently” was originally intended to preclude from VAT the work carried out by employees within their contracts of employment. Article 10 therefore excludes employees and persons bound by similar legal ties from being deemed to carry out their activities independently.⁸ An issue arising in connection with the application of this provision is defining who is an employee, which is not only a matter within the area of VAT but also for direct taxation. In this regard, the fundamental freedoms from the TFEU⁹ are central, and workers are to be distinguished from self-employed when determining whether it is the free movement of workers¹⁰ or the freedom of establishment¹¹ that is applicable.

¹ See Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal of the European Union, L 347, 11 December 2006, Art. 2(1)(a) & (c).

² See for instance Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635 para. 26.

³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal of the European Union, L 347, 11 December 2006, p. 1-118.

⁴ See A. van Doesum, *Contributions to Partnerships from a European VAT Law Perspective*, EC Tax Review 2010/6, p 260.

⁵ *ibid.* p 260-261.

⁶ See for instance Case C-219/12, *Finanzamt Freistadt Rohrbach Urfahr v. Unabhängiger Fianzsenat Außenstelle Linz* [2013] ECLI:EU:C:2013:413, para. 18.

⁷ See for instance Case C-520/14, *Gemeente Borsele v. Staatssecretaris van Financiën and Staatssecretaris van Financiën v. Gemeente Borsele*. [2016] ECLI:EU:C:2016:334.

⁸ B. Terra & J. Kajus, *Commentary – A Guide to the Recast VAT Directive*, IBFD, last reviewed 1 July 2015, sec. 3.5.

⁹ Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Communities, C 326, 26 October 2012, p.1-407.

¹⁰ *ibid.*, Art. 45.

¹¹ *ibid.* Art. 49.

Nevertheless, the Court has stated that the manner in which the term “worker” is defined in case law concerning direct taxation is irrelevant for VAT purposes.¹²

The term “independently” as defined in Articles 9(1) and 10 has, however, not only been applied to employment relations, but also to other situations concerning various types of entities.¹³ For instance, the term has been used in a couple of cases to assess whether a branch is to be seen as a taxable person separate from the legal person to whom it belongs.¹⁴ In both cases, the Court established that this was not the case. The issue nevertheless remains of whether it, under different circumstances, is possible for a branch to be considered as independent.¹⁵

Moreover, the recent conclusion by the Court that a private limited company, 100% owned by a region, not necessarily is to be regarded as independent from the public administration¹⁶ raises the question of how to treat wholly owned subsidiaries. Treating closely connected companies, such as parent companies and subsidiaries, as a single taxable person is allowed in accordance with the VAT grouping provisions found in Article 11 of the VAT Directive. The notion that wholly owned subsidiaries not necessarily are to be treated as independent implies that treatment as a single taxable person might even be obligatory in such situations.

A major consequence of being deemed to perform activities independently within the meaning of Articles 9(1) and 10 is that supplies made between the person and its principal entity might be subject to VAT. Provided that such VAT is fully deductible by the recipient, this does not result in any additional costs except possibly for administrative expenses. However, for entities lacking full right to deduct, typically providers of financial services,¹⁷ this generates additional non-deductible input VAT.

1.2 Purpose

The concept of independence is essential when determining whether a person is a taxable person or not and consequently constitutes an integral part of the Union VAT system. Its implications are, however, not entirely clear, which is

¹² Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615 para. 31.

¹³ See sec. 2.3.

¹⁴ See Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 & Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225.

¹⁵ See for instance A. van Doesum, H. van Kesteren, G. van Norden, *The Internal Market and VAT: intra-group transactions of branches, subsidiaries and VAT groups*, EC Tax Review 2007/01, p. 35.

¹⁶ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733., see sec. 2.2.9.

¹⁷ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal of the European Union, L 347, 11 December 2006, Art. 135(1)(a)-(g).

demonstrated by the fact that this matter has recently been dealt with in case law.¹⁸ The issues associated with assessing independence therefore compile a relevant, as well as topical, area of discussion. In particular, the question of how to treat branches and wholly owned subsidiaries raised in case law¹⁹ is of relevance for the VAT treatment of companies all over the EU.

This thesis thus has as its purpose to research the term “independently” within the meaning of Article 9(1) and 10 of the VAT Directive and subsequently to assess whether branches and wholly owned subsidiaries are to be treated as independent taxable persons or not. The research question to be answered is formulated in the following way:

What is the meaning of the term “independently” within the context of Articles 9(1) and 10 of the VAT Directive and are branches and wholly owned subsidiaries to be treated as performing their activities independently?

1.3 Method and material

Since the intention is to describe the law as it stands, the legal dogmatic method²⁰ has been applied in order to answer the question stated above. The approach taken is entirely positivistic and no attempt has been made to normatively establish how Union VAT law ought to be constructed in order to achieve an optimal outcome.

The material used includes provisions from the VAT Directive, which constitute secondary EU law introduced on the basis of Article 113 of the TFEU. Other sources encompass case law from the Court and material of doctrinal value such as AG opinions, case commentaries, journal articles and books. Some AG opinions have, however, been referred to by the Court and thereby obtained status of case law. The legal value of these opinions is therefore continuously evaluated.

The case law mainly focused on has been restricted to cases relating to independence within VAT, most of them explicitly referring to Articles 9(1) and 10. Cases dealing with direct taxes and the fundamental freedoms have not been considered due to the Court’s reluctance to apply them when determining who is a taxable person in respect to VAT.²¹

¹⁸ See for instance Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635.

¹⁹ See Case C-210/04, *Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196, Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225 & Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733.

²⁰ S. Douma, *Legal Research in International and EU Tax Law*, Kluwer, Deventer 2014, p. 17-20.

²¹ See Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615 para. 31.

1.4 Delimitation

As stated above, this thesis is written from a solely positivistic perspective. Therefore, it has not been considered how the Union VAT law in regard to taxable persons and independence ought to look like. No attempt has been made to suggest how to for instance prevent distortion of competition, minimize practical difficulties or combat abusive practices, which are topics that have already been dealt with in earlier literature.²²

Neither has compatibility with the fundamental freedoms been considered. The reason being that as long as the definition of taxable persons and the term “independently” is applied equally in national and cross-border situations, there is no need to investigate whether there is a restriction of these freedoms. This way of reasoning has been elaborated on by van Doesum, van Kesteren and van Norden, who concluded that the treatment of branches and subsidiaries within VAT is the same for national and cross-border cases.²³

Finally, it is appropriate to explain why wholly owned subsidiaries, and not subsidiaries in general, are to be assessed. The reason is that the issue of whether a subsidiary might be seen as independent was raised in connection with the *Saudaçor* and *DFDS* rulings, which both dealt with wholly owned subsidiaries.²⁴ The case law regarding independence of subsidiaries is limited as it is, and the few existing cases on the topic concern subsidiaries that are wholly owned. Any attempt to reach a conclusion in respect of subsidiaries in general would therefore result in mere speculation.

1.5 Outline

Initially, a general discussion on the concept of independence is held, covering a description of relevant provisions from the VAT Directive, relevant case law, the scope of application of Article 10 and the context in which independence is to be assessed. This is followed by a section dealing with specific aspects of the concept including a discussion on the different elements of Article 10. Finally, based on the

²² See for instance C. Amand, *Cross-Border Entities and EU VAT: A Contradictory Concept?*, International VAT Monitor January/February 2010, p. 20-24, C. Amand, *VAT Grouping, FCE Bank and Force of Attraction – The Internal Market is Leaking*, International VAT Monitor July/August 2007, p. 237-249 & M. Merx, *Establishments in European VAT*, Wolters Kluwer International BV, The Netherlands 2013, p. 126-134.

²³ A. van Doesum, H. van Kesteren, G. van Norden, *The Internal Market and VAT: intra-group transactions of branches, subsidiaries and VAT groups*, EC Tax Review 2007/01, p. 35-36.

²⁴ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733 & Case C-396/02, *DFDS BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2004] ECLI:EU:C:2004:536.

preceding analysis, it is assessed whether branches and wholly owned subsidiaries are to be considered as independent or not.

2 Generally on the concept of independence

2.1 Relevant provisions from the VAT Directive

Article 9(1) defines a taxable person as any person who in any place carries out any economic activity independently, whatever the purpose or result of that activity. The term “independently” is negatively defined in Article 10 through the following provision:

The condition in Article 9(1) that the economic activity be conducted ‘independently’ shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards work conditions, remuneration and employer’s liability.

In the no longer applicable Sixth Directive,²⁵ the provision corresponding to Article 10 of the VAT Directive is to be found in the first paragraph of Article 4(4). The second and third paragraphs of the same article contain the VAT grouping provisions that currently are to be found in Article 11 of the VAT Directive, stating that:

After consulting the advisory committee on value added tax (hereafter, the “VAT Committee”), each Member state may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organizational links.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.

As a deviation from Article 9(1), Article 13 lays down an exemption for bodies governed by public law.

1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

If treatment as a non-taxable person would lead to significant distortions of competition, these bodies might, however, be treated as taxable persons. A list of

²⁵ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, Official Journal of the European Communities, L 145, 13 June 1977.

activities in regard to which bodies governed by public law always are to be regarded as taxable is found in Annex 1.²⁶

2.2 The concept of independence in case law

2.2.1 Introduction

The Court has on several occasions dealt with the issue of determining whether a person is to be regarded as independent from its principal entity for VAT purposes. These cases concern legal as well as natural and even non-legal persons from various businesses and are of central importance when interpreting the concept of independence within the meaning of Article 9(1). This section therefore intends to provide an overview of this case law.

2.2.2 *Commission v. Netherlands*²⁷

Starting with the oldest case, *Commission v. Netherlands* from 1987 dealt with the issue of whether Dutch law was infringing Articles 4(1), 4(2), 4(4) and 4(5) of the Sixth Directive (Articles 9(1), 10 and 13 of the VAT Directive) when not subjecting notaries and bailiffs to VAT. These persons performed official services and were remunerated by the users of their assistance.²⁸ The Commission held that since they were carrying out economic activity independently, “free from any relationship of subordination and on their own responsibility in law”, they were to be subject to VAT.²⁹ In reply, the Kingdom of Netherlands claimed that the notaries and bailiffs did not carry out economic activities in the regular sense but instead provided, in return for remuneration fixed by statute, services that individuals were obligated to use due to reasons of public interest.³⁰ The Court agreed with the Commission’s view that the notaries and bailiffs were performing their activities independently on the following grounds:

They carry out their activities on their own account and on their own responsibility; they are free, subject to certain limits imposed by statute, to arrange how they shall perform their work and they themselves receive the emoluments which make up their income. The fact that they are subject to disciplinary control under the supervision of the public authorities (a situation to be found in other regulated professions) and the fact that their remuneration is determined by statute are not sufficient grounds for regarding them as persons who are bound

²⁶ See para. 2 & 3 of Art. 13(1) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal of the European Union, L 347, 11 December 2006.

²⁷ Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161.

²⁸ *ibid.* para. 1.

²⁹ *ibid.* para. 4.

³⁰ *ibid.* para. 5.

by legal ties to an employer within the meaning of Article 4(4) [Article 10 of the VAT Directive/EÖ].³¹

The Court furthermore concluded that the activities of the notaries and bailiffs did not fall within the scope of the exemption for public bodies found in Article 13. It was stated that two conditions must be satisfied in order for this exemption to apply – “the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority”.³² The Court found that the first criterion was unfulfilled as the notaries and bailiffs carried out independent economic activity rather than pursuing activities as a body governed by public law.³³

2.2.3 Commune of Seville³⁴

In 1991, the *Commune of Seville* case concerning Spanish tax collectors was decided. The tax collectors were appointed by the local authorities and tasked with collecting the taxes due in a certain zone. They set up their own offices, recruited their own auxiliary staff and were required to provide a security fixed by that authority. In return they were entitled to a percentage of the taxes they collected without constraint and a proportion of the fees charged in connection with enforced recoveries.³⁵

In the first question referred, the National Court asked which factors are to be taken into account when assessing whether the tax collection was carried out independently.³⁶ The Court made an assessment based on the three criteria stated in Article 10. Firstly, no relationship of employer and employee was deemed to exist in regard to working conditions as the tax collectors themselves organized the staff, equipment and materials necessary to carry out their activities. This was not changed by the fact that they were subject to instructions and disciplinary control from the local authority.³⁷ Secondly, the criterion of remuneration was considered to indicate independence as the profits depended not only on the amounts of tax collected but also expenses incurred and hence they were considered to bear the economic risk entailed in their activity.³⁸ Thirdly, the fact that the Commune of Seville could be held liable for the actions of the tax collectors when acting as representatives of the public authority was not enough for an employer-employee

³¹ *ibid.* para. 14.

³² *ibid.* para. 21.

³³ *ibid.* para. 22.

³⁴ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332.

³⁵ *ibid.* para. 3.

³⁶ *ibid.* para. 8.

³⁷ *ibid.* para. 11-12.

³⁸ *ibid.* para.13.

relationship to exist.³⁹ The Court therefore concluded that the activities of the tax collectors were carried out independently.⁴⁰

The second question concerned the interpretation of the exemption for bodies governed by public law laid down in Article 13. In this regard, the Court repeated its findings from *Commission v. NL* and held that as an independent third party entrusted with public tasks, the tax collectors were not falling within the scope of Article 13.⁴¹

2.2.4 Heerma⁴²

The *Heerma* case from 2000 concerned the owner of a farming business, Mr Heerma. Mr Heerma formed, together with his wife, a partnership into which movable assets constituting means of production were introduced.⁴³ He subsequently constructed a cattle shed, which he let to the partnership in return for an annual rent.⁴⁴ The question submitted to the Court concerned whether this letting was to be regarded as an independent economic activity or if Mr Heerma and the partnership was to be deemed as a single taxable person.⁴⁵ The Court relied on Article 10 when concluding that Mr Heerma was to be regarded as independent from the partnership in which he was a member.

In so far as the activity at issue is concerned, there is between the partnership and the partner no relationship of employer and employee similar to that mentioned in the first subparagraph of Article 4(4) of the Sixth Directive [Article 10 of the VAT Directive/EÖ] which would preclude the independence of the partner. On the contrary, the partner, in letting tangible property to the partnership, acts in his own name, on his own behalf and under his own responsibility, even if he is at the same time manager of the lessee partnership.⁴⁶

The *Heerma* judgment is also relevant for the VAT treatment of partnerships. Interestingly, the Court held that they might be regarded as independent even though they are not legal persons.

Partnerships governed by Netherlands law are not legal persons in their own right. However, they do have the *de facto* independence of companies, which are legal persons and may carry on economic activities independently, with the result that it is the partnership, and not the partner or partners running the business, that, in accordance with Article 4 of the Sixth Directive [Articles 9-13 of the VAT Directive/EÖ], is to be considered as the taxable person.⁴⁷

³⁹ *ibid.* para. 14.

⁴⁰ *ibid.* para. 16.

⁴¹ *ibid.* para. 18-21.

⁴² Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46.

⁴³ *ibid.* para. 7.

⁴⁴ *ibid.* para. 9.

⁴⁵ *ibid.* para. 12.

⁴⁶ *ibid.* para. 18.

⁴⁷ *ibid.* para. 8.

2.2.5 FCE⁴⁸

In 2006, the existence of independence between a branch and its main office was assessed in connection to the *FCE* case, in which a UK bank (FCE Bank) supplied services to its Italian branch (FCE IT).⁴⁹ The services consisted of consultancy, management, staff training, data processing and the supply and management of application software. In accordance with a cost sharing agreement, FCE Bank issued invoices to FCE IT on the basis of which it had paid VAT from 1996 to 1999, and the dispute in the case concerned FCE Bank's claim for a refund of these VAT payments.⁵⁰ It should be noted that, as a provider of credits, FCE Bank was not entitled to full deduction and any additional input VAT hence translated into an increase in irrecoverable VAT.⁵¹ The tax authorities did, however, reject this claim and the dispute eventually ended up in the National Supreme Court. Three questions were referred for a preliminary ruling, although the second and third questions were rendered irrelevant due to the answer to the first one, in which it was essentially asked

whether Articles 2(1) and 9(1) of the Sixth Directive [Articles 2(1)(a) and (c) and 43 of the VAT Directive/EÖ] are to be interpreted as meaning that a fixed establishment, which is not a legal entity distinct from the company of which it forms part, established in another Member State and to which the company supplies services, must be treated as a taxable person by reason of the costs imputed to it in respect of those supplies.⁵²

Recalling that a transaction has to be carried out by a taxable person in order to be taxable in accordance with Article 2(1)(c) of the VAT Directive, the Court focused its assessment on Article 9(1) and in particular on the existence of independency.⁵³ Its key concern in this respect was whether FCE IT was bearing the economic risk arising from its business. It was pointed out that the economic risk associated with borrower default was borne by the bank as a legal person and that the branch lacked endowment capital.⁵⁴ The economic risk was consequently not borne by FCE IT. Moreover, the Court deemed the existence of a cost sharing agreement to be irrelevant, as it was not negotiated between independent parties.⁵⁵

⁴⁸ Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196.

⁴⁹ *ibid.* para. 14.

⁵⁰ *ibid.* para. 15.

⁵¹ See Art. 135(1)(b) & 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal of the European Union, L 347, 11 December 2006.

⁵² Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196, para. 24.

⁵³ *ibid.* para. 32-33.

⁵⁴ *ibid.* para. 35-37.

⁵⁵ *ibid.* para. 40.

2.2.6 *Van der Steen*⁵⁶

The *van der Steen* case was decided in 2007. This case concerned Mr van der Steen who first carried out cleaning services through his own one-man business and then established a private limited company of which he was the director and sole shareholder. This company took over the cleaning business and concluded a contract of employment with Mr van der Steen, who became the only employee. The contract entitled him to a fixed monthly salary and holiday payments and the company deducted income tax and social insurance premiums from the salary.⁵⁷ The question referred concerned whether Mr van der Steen was to be regarded as a taxable person himself when carrying out the cleaning services.⁵⁸ The Court concluded that this was not the case as the persons concerned were not independent, but rather had the relationship of employer and employee.⁵⁹ Three factors in support for this were presented. Firstly, the contract of employment meant that Mr van der Steen was dependent on the company to determine his remuneration.⁶⁰ Secondly, when providing the cleaning services as an employee, he acted on behalf and under the responsibility of the company rather than in his own name, on his own behalf and under his own responsibility.⁶¹ Finally, Mr van der Steen did not bear the economic business risk associated with the activities.⁶² Moreover, the Court emphasized the fact that Mr van der Steen performed his work under a contract of employment as an essential difference from the *Heerma* case and stated that in so far as his work fell within the scope of the contract, it was in principle excluded from VAT “by the clear terms” of Article 10.⁶³

2.2.7 *Skandia*⁶⁴

In the *Skandia* case from 2014, the Court once again dealt with the issue of whether a branch and its main office were to be seen as separate persons in regard to VAT. A Swedish branch (Skandia Sverige) belonged to a company established in the US (SAC) and was also part of a Swedish VAT group in which SAC was not included. SAC acted as the purchasing company for IT services for the Skandia group and carried out its activities in Sweden through Skandia Sverige. SAC purchased IT services externally and distributed them to Skandia Sverige. Skandia Sverige was

⁵⁶ Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615.

⁵⁷ *ibid.* para. 8-10.

⁵⁸ *ibid.* para. 17.

⁵⁹ *ibid.* para. 19-21.

⁶⁰ *ibid.* para. 22.

⁶¹ *ibid.* para. 23.

⁶² *ibid.* para. 24-25.

⁶³ *ibid.* para. 30.

⁶⁴ Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225.

tasked with processing those IT services into the final product, which was supplied to various companies within the Skandia group. Cost-allocation between SAC and Skandia Sverige was effectuated through internal invoicing.⁶⁵

The Court firstly assessed whether Skandia Sverige was to be regarded as independent. Referring to *FCE*, it established that it is of particular importance in this respect to consider whether the branch bears the economic risk arising from its business.⁶⁶ The Court concluded that as a branch, Skandia Sverige did not operate independently nor did it bear the economic risk. Moreover, in accordance with national legislation, it did not own any capital or assets.⁶⁷ The fact that there was a cost sharing agreement present was deemed irrelevant since it was not negotiated between independent parties.⁶⁸ Nevertheless, in the light of the fact that Skandia Sverige was member of a VAT group, the Court concluded that SAC and Skandia Sverige were to be considered as separate entities for tax purposes.⁶⁹

2.2.8 *Gmina Wrocław*⁷⁰

The *Gmina Wrocław* case was decided in 2015. This case dealt with the issue of whether the budgetary entities of the Municipality of Wrocław, entrusted with running for instance schools, cultural centres, district inspectorates and police services,⁷¹ were to be regarded as taxable persons when they do not satisfy the criterion of independence set out in Article 9(1).⁷² Neither the economic nature of the activities concerned, nor the view that they fell outside the Article 13 exception was disputed.⁷³ The focus of the Court's assessment was instead whether the budgetary entities were independently carrying out the activities concerned.⁷⁴ In doing so it was deemed necessary to determine whether such an entity is in an employer-employee relationship with the municipality.⁷⁵

The Court found that the entities carried out the activities in the name and on behalf of the Municipality of Wrocław and did not bear liability for damage caused by those activities. It was likewise observed that they did not bear the economic risk associated with carrying out those activities. Moreover, they did not own their own

⁶⁵ *ibid.* para. 17.

⁶⁶ *ibid.* para. 25.

⁶⁷ *ibid.* para. 26.

⁶⁸ *ibid.* para. 27. Reference made to Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 para. 40.

⁶⁹ Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225, para. 28-31.

⁷⁰ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635.

⁷¹ *ibid.* para. 9.

⁷² *ibid.* para. 24.

⁷³ *ibid.* para. 31.

⁷⁴ *ibid.* para. 32.

⁷⁵ *ibid.* para. 33.

property, generate their own earnings or bear the costs of those activities.⁷⁶ On these grounds, the Court concluded that the activities of the budgetary entities of Wrocław were not carried out independently.⁷⁷

2.2.9 *Saudaço*⁷⁸

Another case from 2015 is the *Saudaço* case, in which the Court dealt with a situation where *Saudaço*, a limited company governed by private law and fully owned by the Autonomous Region of the Azores (RAA), carried out services in respect of the planning and management of the regional health service.⁷⁹ The central issue was whether *Saudaço* was to be regarded as a body governed by public law within the meaning of Article 13.⁸⁰ The Court reiterated the two conditions from *Commission v. Netherlands*; “the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority”.⁸¹ In regard to the first of the two conditions, it was stated that

[T]he Court has already held that a person which, not being part of the public administration, independently performs acts falling within the powers of the public authority cannot be classified as a body governed by public law within the meaning of that provision (see to that effect, inter alia, order in *Mihal*, C-456/07, EU:C:2008:293, paragraph 18 and the case-law cited).⁸²

The Court found that “genuine autonomy” was limited on several grounds. Firstly, the capital of *Saudaço* was wholly owned by RAA, which was also essentially its only client.⁸³ Furthermore, programme agreements were concluded between the parties, requiring *Saudaço* to follow the guidelines of RAA and working under its supervision.⁸⁴ In addition, there seemed to exist an organizational link between the entities.⁸⁵ This, together with other characteristics indicative of bodies governed by public law,⁸⁶ formed the basis of the Court’s conclusion that it is possible for a limited company such as *Saudaço* to be classified as a body governed by public law.⁸⁷

⁷⁶ *ibid.* para. 37-38.

⁷⁷ *ibid.* para. 39.

⁷⁸ Case C-174/14, *Saudaço – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733.

⁷⁹ *ibid.* para. 29.

⁸⁰ *ibid.* para. 27-28.

⁸¹ *ibid.* para. 51, see also Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161 para. 21.

⁸² Case C-174/14, *Saudaço – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 56.

⁸³ *ibid.* para. 63.

⁸⁴ *ibid.* para. 64.

⁸⁵ *ibid.* para. 67.

⁸⁶ *ibid.* para. 64-72.

⁸⁷ *ibid.* para. 75.

2.3 Scope of application of Article 10

Article 10 of the VAT Directive was originally intended to limit the number of taxable persons by excluding employees from the scope of VAT.⁸⁸ As noted by van Doesum, labour law might not be identical in all Member States and this provision seeks to include all kinds of employment contracts in a VAT-neutral manner. The elements of working conditions, remuneration and employer's liability are generally considered as fundamental parts of an employment contract.⁸⁹ An example of a person that by the Court has been regarded as an employee is Mr van der Steen,⁹⁰ who was the director and sole shareholder of the private limited company in which he was employed. This case shows that as long as the work is carried out within a contract of employment it is possible to be regarded as an employee in one's own company.

Up until recently there has been reason to believe that Article 10 only concerns employees. As observed by van Doesum, the wording of this provision does not provide any support for also excluding from VAT other relationships where one person is dependent on the other. Rather, it indicates the opposite by using terminology such as "contract of employment", "the relationship of employer and employee" and "employer's liability". Moreover, van Doesum has argued that applying Article 10 to other relationships renders Article 11 meaningless, as persons qualifying for VAT grouping would be regarded as a single person anyway.⁹¹ In this regard, it is however submitted that two companies that are "closely bound to one another by financial, economic and organizational links" do not necessarily meet the criteria of dependence stated in Article 10 as the relationship in this case also has to resemble that between an employer and an employee.⁹²

Recent case law has nevertheless shown that the scope of application of Article 10 extends beyond employment relations and natural persons. The article was for example briefly mentioned in *FCE*, although the independence assessment was solely based on economic risk.⁹³ The connection between the assessment and the use of Article 10 was perhaps not obvious considering that van Doesum published

⁸⁸ B. Terra & J. Kajus, *Commentary – A Guide to the Recast VAT Directive*, IBFD, last reviewed 1 July 2015, sec. 3.5.

⁸⁹ A. van Doesum, *Contributions to Partnerships from a European VAT Law Perspective*, EC Tax Review 2010/6, p. 262.

⁹⁰ Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615., see sec. 2.2.6.

⁹¹ A. van Doesum, *Contributions to Partnerships from a European VAT Law Perspective*, EC Tax Review 2010/6, p. 262.

⁹² See for instance Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46. para. 20-21, implying that entities falling outside the scope of Art. 10 still might meet the requirements for VAT grouping.

⁹³ Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 para. 33-37.

his article four years after this case had been settled and still held that it was only applicable to actual employment relations.

The *Gmina Wrocław* ruling did, however, confirm that the scope of the employer-employee relationship assessment found in Article 10 extends beyond natural persons. The Court referred to previous case law, including *FCE* and cases concerning natural persons performing public tasks such as the *Commune of Seville* and *Commission v. Netherlands*, when concluding that the presence of an employer-employee relationship was to be assessed when determining whether the municipal budgetary entities were performing their activities independently.⁹⁴ This indicates that *FCE* is to be interpreted as recognising applicability of Article 10 to private entities. Furthermore, referring to point 44 of AG Jääskinen's opinion, the Court clarified that "the same criteria for assessing the condition of independence in the pursuit of economic activities may apply to public and private persons".⁹⁵ Jääskinen supported this view with the following statement.

If the above criteria can be applied to, inter alia, private entities, whose internal structures and commercial practices may also be more diverse and complex than those of bodies governed by public law, I think that they should be applied to bodies governed by public law in the same way. In this connection, the specific nature of bodies governed by public law relates instead to their activities carried out as public authorities, which are taken into account separately under the exemption provided for in Article 13 of Directive 2006/112.⁹⁶

The Article 10 criteria might even be relevant for the interpretation of Article 13. In *Saudaçor* it was stated that a person carrying out activities within the powers of the public authority and does so independently cannot be classified as a body governed by public law if it is not part of the public administration. When stating this, the Court referred to paragraph 18 of the *Mihal* case⁹⁷, which in turn refers to *Commission v. Netherlands*⁹⁸ and *Commune of Seville*⁹⁹. The conclusion that the applicability of Article 13 partly depends on whether "genuine autonomy"¹⁰⁰ is

⁹⁴ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635 para. 33. Reference made to Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161, para. 14, Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 10 and Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196.

⁹⁵ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635 para. 35.

⁹⁶ Opinion of Advocate General Jääskinen, 30 June 2015, Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 44.

⁹⁷ Case C-456/07, *Karol Mihal v. Daňový úrad Košice V* [2008] ECLI:EU:C:2008:293.

⁹⁸ Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161 para. 22.

⁹⁹ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332 para. 20.

¹⁰⁰ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 63, see also Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 36, where the expressions of "autonomy" and "independence" were deemed as materially equal.

enjoyed by the person at issue was thus based on outcomes from the *Commune of Seville* and *Commission v. Netherlands* cases, which in turn relied on Article 10 to assess independence. Although not explicitly mentioned in *Saudaçor*, it is therefore likely that this provision has an impact on the interpretation of Article 13. This is further supported by the fact that the aspects considered when determining whether *Saudaçor* enjoyed “genuine autonomy” resemble to some extent those stemming from Article 10. It was for instance noted that *Saudaçor* was governed by guidelines set by RAA and subject to supervision by that authority when performing its tasks.¹⁰¹

The notion that independence as defined by Article 10 has an impact on the application of Article 13 is additionally supported by the Court’s reasoning in *Commission v. Netherlands* and *Commune of Seville*. In these cases, it was initially established that the persons at issue were independent from the public administration by means of Article 10. The Court subsequently relied on this conclusion when deeming them to not be carrying out activities as bodies governed by public law within the meaning of Article 13.¹⁰²

It can be derived from the above reasoning that although the original intention behind Article 10 was to exclude employees from being subject to VAT and thus limit the number of taxable persons, the Court has also used it for assessing the independence of other persons as well as for determining the applicability of the exemption for public bodies provided in Article 13. This must be seen as an application by analogy since the wording of Article 10 only relates to employment relationships. This extended scope of Article 10 might be explained by the fact that there is no provision offering guidance on how to assess independence in other situations.

2.4 Context of the independence assessment

In order to be able to accurately discuss the meaning of the term “independently”, it first has to be established in what context this concept is to be determined. It can be ascertained from the wording of Article 9(1) that “independently” describes the verb “carry out”, implying that it is the economic activity and the way it is performed that is to be the focus of the independence assessment. This interpretation has also been emphasized in case law, which for instance can be deduced from the use of the phrase “in so far as the activity at issue is concerned”¹⁰³ from the *Heerma* ruling.

¹⁰¹ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 64. These considerations resemble aspects that have been taken into account when assessing working conditions (see sec. 3.1.2)

¹⁰² See sec. 2.2.2-3.

¹⁰³ Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46 para.18.

The question is therefore which circumstances are to be regarded as pertaining to the activity carried out. In *Heerma*, the Netherlands Government argued that since the lease took place between a partnership and one of its partners, the transaction was carried out within a closed circuit.¹⁰⁴ The Court stated, in contrast, that “in so far as the activity at issue is concerned” there was no relationship of employer and employee.¹⁰⁵ In his opinion to this case, AG Cosmas made a distinction between independence at the “general level”, i.e. the legal regime and occupation of the person at issue, and independence at the level of the particular circumstances in which the activity is carried out. He held that only the latter was to be assessed for the purpose of Article 9(1).¹⁰⁶

Although the Court did not explicitly refer to the opinion of the AG in *Heerma*, its conclusion supports the view presented by Cosmas’ that the general level of the persons involved is to be excluded from the assessment. An individual forming a partnership together with their spouse must be said to have mutual interests with that partnership and hence not being entirely independent from it in the general sense. Still, they were considered to be independent within the meaning of Article 9(1), suggesting that the scope of this term is larger than the general meaning of the word. Therefore, partners can be independent from their partnerships when they enter contractual arrangements with each other in the context of their economic activities. This logic also allows transactions between subsidiaries and parent companies to be seen as carried out between independent parties.¹⁰⁷

What instead seems to be essential when assessing independence in the context of the circumstances of the activity carried out is considering the contractual relationship between the two entities. This is suggested by the formulation “bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee” found in Article 10. Moreover, it was stated in *van der Steen* that

[I]n so far as the work the appellant provided to the company fell within the scope of that contract of employment, it is in principle excluded from the scope of VAT by the clear terms of Article 4(4) of the Sixth Directive [Article 10 of the VAT Directive/EÖ].¹⁰⁸

The Court furthermore pointed at the contract of employment as a main difference from the *Heerma* case, where there was no such contract.¹⁰⁹ This indicates that the

¹⁰⁴ *ibid.* 15.

¹⁰⁵ *ibid.* 19.

¹⁰⁶ Opinion of Advocate General Cosmas, 20 May 1999, Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma* [2000] ECLI:EU:C:2000:46, para. 18.

¹⁰⁷ More about subsidiaries in sec. 5.

¹⁰⁸ Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615 para. 30.

¹⁰⁹ *ibid.* para. 29, see also Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46, para. 21, where it was concluded that the lease contract was not deemed to create a legal relationship giving rise to “ties of legal dependence” within the meaning of Art. 10.

contract is key. If it has the character of a contract of employment, the relationship appears to fall within the scope of Article 10 even though it might lack other features of an employer-employee relationship such as true subordination.¹¹⁰

3 Specific aspects of independence

3.1 The Article 10 criteria

3.1.1 Introduction

Article 10 lays down three factors to be taken into account when determining the existence of an employer-employee relationship, namely working conditions, remuneration and employer's liability. The purport of these conditions will be dealt with in the following sections.

3.1.2 Working conditions

3.1.2.1 Freedom to organize how the work is carried out

The focus when assessing the working conditions appears to be to what degree the person at issue is free to arrange how its tasks are carried out.¹¹¹ In the *Commune of Seville* case the following statement was made.

With regard, firstly, to working conditions, there is no relationship of employer and employee since the tax collectors themselves procure and organize independently, within the limits laid down by the law, the staff and the equipment and materials necessary for them to carry out their activities.¹¹²

The Court drew this conclusion based on the facts that the tax collectors set up their own offices, recruited their own auxiliary staff¹¹³ and “more generally” organized their own undertakings¹¹⁴. Thus, if a person procures and organizes independently the staff, equipment and materials necessary for performing its activities, there is no employer-employee relationship in terms of working conditions.

The view that the tax collectors were independent in regard to working conditions was neither changed by the fact that the local authority was able to give them

¹¹⁰ See the discussion on subordination in sec. 3.4, in particular the reasoning about the *van der Steen* case.

¹¹¹ See for instance Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161, para. 14, where the phrase “arrange how they shall perform their work” was used.

¹¹² Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332 para. 11.

¹¹³ *ibid.* para. 3.

¹¹⁴ Opinion of Advocate General Tesauro, 4 June 1991, Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 2.

instructions, nor by the disciplinary controls exercised by that authority. The Court expressed that these limitations were “not decisive for the purpose of defining their legal relationship with the Commune for the purposes of Article 4(4) of the directive”.¹¹⁵ In regard to disciplinary control, the Court referred to the *Commission v. Netherlands* case where it was stated that “The fact that they [the notaries and bailiffs/EÖ] are subject to disciplinary control under the supervision of the public authorities (a situation to be found in other regulated professions)” was not sufficient for regarding them as bound by legal ties to an employer.¹¹⁶

The conclusion drawn by the Court that there can be a certain degree of control and instructions present without precluding independence is reasonable seeing the following argument submitted by AG Tesauro.

On the other hand, while it is part of the relationship between employer and employee for an employer to be able to give a worker instructions and to have a certain control and disciplinary power over him, those circumstances are not incompatible with an activity which is carried out independently. In fact, a requirement to take instructions from another person can be clearly seen in relationships whose object is an activity which is indisputably independent, such as contracts for work.¹¹⁷

The question then arises what sort of influence over working conditions creates an employer-employee relationship. A case that might provide guidance in this area is *Saudaçor*. As stated above, the existence of an employer-employee relationship was not explicitly discussed in this case. It did, however, deal with independence in general terms and implicitly with Article 10.¹¹⁸ Since *Saudaçor* appears to be the only case where the influence exercised over the tasks performed by the person at issue is considered to significantly limit independence, it is of interest to look at how the Court reasoned in this regard. It was found that RAA was “in a position to exercise decisive influence over the activities of *Saudaçor*”. The circumstances leading them to this conclusion was the fact that RAA was the sole owner in and client to *Saudaçor*¹¹⁹ in combination with the agreements concluded between the entities obliging *Saudaçor* to perform its task in conformity with the guidelines specified by RAA as well as subjecting them to supervision by the RAA.¹²⁰

What distinguishes the circumstances in this case from those in *Commune of Seville* and *Commission v. Netherlands* is that RAA, through its ownership, has decisive power over *Saudaçor* as well as the ability to control all its operations and how they

¹¹⁵ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 12.

¹¹⁶ Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161 para. 14.

¹¹⁷ Opinion of Advocate General Tesauro, 4 June 1991, Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 6.

¹¹⁸ See sec. 2.2.9 and 2.3.

¹¹⁹ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 63.

¹²⁰ *ibid.* para. 64.

are organized. This power does, in fact, resemble the power enjoyed by an employer, who normally has the authority to give instructions and supervise the employee as well as determine how the work is to be carried out. It thus seems that in order for a relationship to have the character of that between employers and employees when it comes to working conditions, a combination of decisive influence over the way the work is organized and control and surveillance over the daily operations is required.

3.1.2.2 *Organizational structure*

Another circumstance that has been suggested as relevant in respect of working conditions is the factor of organizational structure. In his opinion to the *Commune of Seville* case, AG Tesauro has stated the following.

With regard to working conditions, the first thing to be determined is whether the worker in question forms a part of the employer's organization – in the present case the communal administration – or whether he is free to organize his activity independently, and to what extent. The freedom to organize one's own work independently (to choose colleagues, the structures necessary for the performance of one's tasks and one's working hours), in conjunction with the fact of not forming part of the organization of an undertaking or an administrative authority, are characteristic features of an activity which is carried out independently.¹²¹

Thus, Tesauro presented the notion that as a part of applying the criterion of working conditions it should be taken into account whether the person at issue is “organically part of an undertaking or an administrative authority”.¹²² Referring to this opinion, Terra and Kajus have stated that organizational integration is one out of three factors to be considered when assessing independence.¹²³ No reference to this aspect was, however, made by the Court in the *Commune of Seville* judgment. Admittedly, it did come to the same conclusion in regard to the importance of whether the person was able to “organize independently” its activities,¹²⁴ but the organizational structure of the local authority and whether the tax collectors were integrated into it was not considered.

In order to discuss the organizational aspect and whether it should be taken into account when assessing independence, it needs to be established what it actually means to be organically integrated. No definition is to be found in the VAT Directive or the Implementing Regulation,¹²⁵ but presuming that the meaning is similar to that of the expression “organisational link” which can be found in Article

¹²¹ Opinion of Advocate General Tesauro, 4 June 1991, Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 6.

¹²² *ibid.* para. 8.

¹²³ B. Terra & J. Kajus, *European VAT Directives – Introduction to European VAT 2014* vol 1, IBFD, 2014, p. 420. The other two factors mentioned were organizational freedom with regard to human and material resources and the economic risk inherent in the activity.

¹²⁴ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 11.

¹²⁵ B. Terra & J. Kajus, *Commentary – A Guide to the Recast VAT Directive*, IBFD, last reviewed 1 July 2015, sec. 3.6.4

11, the Commission’s communication on the VAT group option provides some guidance. According to this communication, the organizational link is “defined by reference to the existence of a shared, or at least partially shared, management structure”.¹²⁶ What is meant by “management structure” is not explained, but the wording suggests that it concerns how an entity is organized from a governance perspective.

Since there, according to Article 10, has to be a contract or “any other *legal ties*” creating an employer-employee relationship, the question is whether the management structure has any legal effect in terms of working conditions, remuneration or employer’s liability. Whilst being a matter of national law, such structures often give authorization to certain people to govern the work of others, thus creating employer-employee dependences. There might for instance be labour laws or collective agreements giving managers the right to determine division of labour and to direct the employees in performing their tasks. An organizational structure acknowledging who is in charge and to whom the person at issue is subordinate might thus give rise to a legal right to influence the working conditions.

It can hence be derived that the organizational structure might be taken into account when assessing independence under the condition that it has a legal impact. This would however normally require some sort of law or contract. In the *Saudaçor* case, for instance, the existence of an “organizational link” was acknowledged as an indication of absence of “genuine autonomy”¹²⁷ through the following statement:

[A]n organisational link seems to exist between Saudaçor and the RAA, if only due to the fact that that company was established by a legislative act adopted by the legislature of the RAA for the purpose of providing that region with ‘services of general economic interest in the field of health’, as is apparent from Article 2(1) of Regional Legislative Decree No 41/2003/A.¹²⁸

This indicates that the Court assessed the existence of an organizational link from a legal perspective.

The *Gmina Wrocław* case has, however, shown that lack of organizational integration is not enough to establish independence. In spite of the fact that the budgetary entities were separate from the organizational structure of the municipality they were not considered to be independent.¹²⁹ As in *Commune of Seville*, the Court did not at all discuss the aspect of organizational integration. A

¹²⁶ Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax*, Brussels 2 July 2009, COM(2009)325 final, p. 9.

¹²⁷ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 63 & 67.

¹²⁸ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 67.

¹²⁹ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 11.

possible explanation to this might be the difficulty in showing the legal impact of an organizational structure.

3.1.3 Remuneration

The remuneration received by the person at issue can either have the character of a salary or constitute revenue for a service provided. From case law, three factors to take into account when determining the nature of the remuneration can be discerned, namely from whom it is received, how the amount is determined and whether any economic risk is borne by the person at issue. The first two aspects will be discussed in this section while the third will be discussed in a separate part below.¹³⁰

The first factor, concerning from whom the remuneration is received, is highlighted in the *Commission v. Netherlands* case. The fact that the notaries and bailiffs themselves obtained the emoluments from the end users of their services was considered to indicate that the remuneration was not of the kind received by employees.¹³¹ This view was recently reiterated in the *Gmina Wrocław* case.¹³² Conversely, in *van der Steen*, it was the company that received the payments for the cleaning services while Mr van der Steen was paid a fixed monthly salary.¹³³

The *Commune of Seville* case is different in the sense that the local authority was itself the end user benefitting from the work carried out by the tax collectors and the factor of from whom the remuneration was received did not give any indication of whether the remuneration had the character of salary or revenue. Instead, the factor of how the amount is determined was taken into account. The tax collectors were entitled to a collection premium calculated as a percentage of the sums collected as well as a proportion of the supplements levied in the event of enforced recovery,¹³⁴ which was deemed not to constitute a salary.¹³⁵ A difference from the *van der Steen* case in this regard was that the remuneration paid to the tax collectors depended on how much work was carried out, measured by the size of the tax collected, regardless of how much time was used. In *van der Steen*, the salary was fixed and did not depend on the quantity of cleaning services performed. As noted by AG Sharpston in this case,

¹³⁰ See sec. 3.2.

¹³¹ Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161 para. 14-15.

¹³² Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635 para. 34.

¹³³ Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615 para. 22.

¹³⁴ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332. para. 3.

¹³⁵ *ibid.* para. 10.

[A]t least on the transaction-by-transaction level on which VAT operates - there is no reciprocal performance in which the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient. The person concerned receives a fixed amount of salary and holiday pay, regardless of the services actually provided.¹³⁶

It should, however, be noted that salaries are not always fixed. Some employees are for instance employed by the hour and some get salaries partially or fully based on commission. In order to make a reasonable assessment, the first factor also has to be taken into account. For example telemarketers with a commission-based salary normally do not receive their remuneration from the customers but from the company they work for and might therefore still be regarded as employees. An overall and non-cumulative assessment is thus appropriate.

Moreover, the fact that the amount received is not set freely between the person at issue and the end consumer does not seem to preclude independence. In the *Commission v. Netherlands* case it was concluded that the fact that the remuneration received by notaries and bailiffs was fixed by statute was not sufficient for them to be regarded as legally bound to an employer.¹³⁷

3.1.4 Employer's liability

3.1.4.1 Liability

The Court has infrequently assessed the factor of liability explicitly. A possible explanation for this is that it has instead taken into account whether the person is acting on its own account and responsibility, which might have been considered to overlap the liability assessment. This notion will be elaborated on in section 3.1.4.2. The following paragraphs from *Commune of Seville* comprise one of few examples of when the issue of liability has explicitly been discussed.

14. With regard, finally, to employer's liability, the fact that the Commune can be held liable for the conduct of tax collectors when they act as representatives of the public authority is not sufficient to establish the existence of a relationship of employer and employee.

15. The decisive criterion for this purpose is the liability arising from the contractual relationships entered into by tax collectors in the course of their activity and their liability for any damage caused to third parties when they are not acting as representatives of the public authority.¹³⁸

Thus, the sole fact that the principal entity is responsible for the actions of the agent when performing the job it is hired for is not enough to establish an employer-

¹³⁶ Opinion of Advocate General Sharpston, 14 June 2007, Case C-355/06, *J.A. van der Steen v. Inspecteur van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615, para. 36.

¹³⁷ Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161 para. 14.

¹³⁸ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 14-15.

employee relationship in this regard. Instead, the focus of this assessment is, firstly, whether the agent bears liability in its contractual relations. Secondly, it is to be considered whether the agent is liable for damage against third parties when it is not representing the principal. The last part appears to contradict the wording of Article 10, as not even employers are responsible for the actions of their employees when they are off duty and thus not acting as representatives.

Perhaps the Court was referring to economic activities carried out by the tax collectors apart from tax collection, such as debt collection for private companies, and sought to establish that the existence of liability to third party damage in this regard is an indication of independence. This does, however, require that circumstances outside the activities carried out within the contractual relation to the local authorities are taken into account, which appears somewhat counterintuitive seeing that it is the contractual relation between the parties that appears to be the focus of the assessment.¹³⁹ Moreover, bearing in mind that employees might also be engaged in economic activities outside of their employment in regard to which they are liable to third parties, it is not necessarily a distinguishing feature of independence.

Another interpretation of the above statement is that the Court was referring to liability for damage caused to third parties in the course of activities carried out by the tax collectors not constituting tax collecting per se, but having a general character and an indirect link to the fulfilment of their contractual obligations. For example, activities related to human resources might create liability to third party damage due to for instance discrimination of job applicants. In such a scenario, the tax collector is not acting as a representative for the local authorities, but the activities for which they might be held liable enable them to provide the tax collection services.

This way of viewing the economic activity from a general perspective can be linked to the Court's reasoning in regard to costs of a general nature and the right to deduct. It has been stated that, while not directly and immediately linked with a particular output transaction, general costs are part of the price components, thus having a direct and immediate link to the economic activity as a whole.¹⁴⁰ Liabilities not directly connected to the service performed could similarly still be of importance for the independence assessment if related to the economic activity in general.

3.1.4.2 Own name, behalf and responsibility

The Court has on several occasions considered whether the person at issue was acting in its own name, on its own behalf and under its own responsibility when

¹³⁹ See sec. 2.4.

¹⁴⁰ See Case C-108/14, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v. Finanzamt Nordenham* [2015] ECLI:EU:C:2015:496, para. 24 & the case law cited.

assessing the existence of an employer-employee relationship. In *Commission v. Netherlands*, notaries and bailiffs were deemed to carry out their activities “on their own account and on their own responsibility”.¹⁴¹ Similarly, in *Heerma and van der Steen*, it was assessed whether the person at issue was acting “in his own name, on his own behalf and under his own responsibility”.¹⁴² In *Gmina Wrocław* the Court observed that

In the present case, it is apparent from the order for reference that the budgetary entities at issue in the main proceedings carry out the economic activities which are entrusted to them in the name and on behalf of the Municipality of Wrocław and that they do not bear liability for damage caused by those activities; that liability is borne solely by that municipality.¹⁴³

Being considered together in this manner, it seems that the factors of own name, own behalf and own responsibility are intertwined with the condition of employer’s liability. They might even be regarded as two sides of the same coin since acting in one’s own name, on one’s own behalf and under one’s own responsibility denotes an absence of employer’s liability.

When discussing the aspects of own name and own behalf, a certain provision from the VAT Directive comes to mind, namely Article 28 stating that

Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

It is thus not necessary to act on one’s own behalf in order to receive and supply services within the meaning of the VAT Directive.¹⁴⁴ Even exclusively operating in this manner is unlikely to change this conclusion¹⁴⁵ and supplies between commission agents and their principals are consequently taxable by definition. This presupposes, however, that the commission agent is a taxable person, a condition that is unfulfilled if independence is lacking. The fact that the aspect of on behalf of whom the activity is carried out has been repeatedly mentioned in case law as an indication of whether or not independence exists is therefore material. Whereas Article 28 states that a person might receive and supply services despite not acting on its own behalf, a person performing activities on behalf of its principal might in some cases not fulfil the independence criterion that is necessary for being deemed a taxable person, rendering Article 28 inapplicable.

¹⁴¹ Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161, para. 14.

¹⁴² Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615 para. 23 & Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46 para. 18.

¹⁴³ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 37.

¹⁴⁴ A corresponding provision applicable to goods is to be found in Art. 14(2)(c).

¹⁴⁵ See B. Terra & J. Kajus, *Commentary – A Guide to the Recast VAT Directive*, IBFD, last reviewed 1 July 2015, sec. 3.2.9.

3.2 Economic risk

3.2.1 The concept of economic risk in case law

A consideration that was originally raised in connection with the remuneration condition is the economic risk. It was first mentioned in *Commune of Seville*, where it was held that, in regard to remuneration,

there is no relationship of employer and employee since tax collectors bear the economic risk entailed in their activity in so far as their profit depends not only on the amount of taxes collected but also on the expenses incurred on staff and equipment in connection with their activity.¹⁴⁶

It was thus considered whether the remuneration constituted a pure profit or if the tax collectors also bore the costs related to the activity. The Court came to the same conclusion as AG Tesauro, who described the connection between remuneration and risk in the following way.

With regard to the method of remuneration, the fact that pay (albeit fixed by law) is according to the individual services and is therefore uncertain is clear evidence of the existence of an independent employment relationship. It is obvious that in a relationship of employer and employee, the economic risk can fall only on the employer. In the present case the tax collector bears the entire economic risk in so far as any taxes he fails to collect translates into a loss of earnings, which would not be the case if he were bound to the commune by a contract of employment since in that case he would still be paid whether or not he collected the taxes.¹⁴⁷

The factor of economic risk was reiterated in *van der Steen*, where Mr van der Steen was not considered to bear any economic business risk in his work for the company.¹⁴⁸ It might be argued that he did in fact bear the economic risk, as he was the sole owner of the company and thus affected by variability in its profits. The contract of employment did, however, also put him in the position of an employee, in capacity of which he did not bear the economic risk as it created a debt owed to him by the company no matter the result of the business. Had there been no contract, he would have had to rely on withdrawing dividends from the profits earned. The size of the remuneration had then been uncertain and in the event of a bankruptcy procedure¹⁴⁹ he would not have a debt claim in regard to any unpaid salary, but only a residual right to the assets available for distribution. It thus seems that the contract of employment prevented Mr van der Steen from carrying the economic risk, at least in his capacity as employee.

¹⁴⁶ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 13.

¹⁴⁷ Opinion of Advocate General Tesauro, 4 June 1991, Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 6.

¹⁴⁸ Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615, para. 24-25.

¹⁴⁹ Which in fact did happen in the case.

In the cases relating to entities rather than natural persons, the criteria of economic risk has been given an even more central role. The Court did for instance state in *FCE* that it was necessary “to determine whether a branch such as FCE IT may be regarded as being an independent bank, in particular in that it bears the economic risk arising from its business”.¹⁵⁰ In this case, the economic risk was in fact the only factor discussed before concluding that FCE was not to be considered independent. A similar assessment was made in the *Skandia* case.¹⁵¹ In *Gmina Wrocław*, the economic risk was assessed together with the factor of liability.¹⁵²

The fact that the economic risk is the sole focus of the independence assessments in *FCE* and *Skandia* distinguish them from other cases. Moreover, the aspects considered when determining whether the person at issue did bear the economic risk differed. In *FCE* the Court reasoned in the following way.

36 As Advocate General Léger noted in point 46 of his Opinion, the branch does not itself bear the economic risks associated with carrying on the business of a credit institution, such as, for example, a customer defaulting on the repayment of a loan. The bank, as a legal person, bears that risk and is therefore the subject of supervision of its financial strength and solvency in the Member State of origin.

37 As a branch, FCE IT does not have any endowment capital. Consequently, the risk associated with the economic activity lies wholly with the FCE Bank. Consequently, FCE IT is dependent upon that company and, with it, constitutes a single taxable person.¹⁵³

In *Skandia* the Court established that

As a branch of SAC, Skandia Sverige does not operate independently and does not itself bear the economic risks arising from the exercise of its activity. In addition, as a branch, according to the national legislation, it does not have any capital of its own and its assets belong to SAC.¹⁵⁴

Instead of considering whether the person also bore the expenses related to the activity, the Court focused on endowment capital and ownership of assets in these cases. Although the connection to the remuneration condition was not mentioned, the fact that the *FCE* judgment referred to the AG’s opinion when discussing the economic risk, which in turn referred to *Commune of Seville*,¹⁵⁵ indicates that it is the same concept of economic risk that is being discussed.

¹⁵⁰ Case C-210/04, *Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 para. 35.

¹⁵¹ Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225, para. 25-26.

¹⁵² Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 37-38.

¹⁵³ Case C-210/04, *Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196, para. 36-37.

¹⁵⁴ Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225, para. 26.

¹⁵⁵ See Case C-210/04, *Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006]

An underlying complexity is that non-natural persons are fundamentally different from individuals in regard to risk. Whereas the latter may be personally exposed to uncertainty in regard to the size of the remuneration it receives, it is hard to see how entities such as branches could bear a corresponding risk. Legal persons have endowment capital that they may lose,¹⁵⁶ but branches are not legal persons. This does however not mean that non-legal entities cannot be independent, as will be discussed below.¹⁵⁷

The most recent case dealing with economic risk is *Gmina Wrocław*, in which the following was observed.

It is also apparent from the order for reference that those entities do not bear the economic risk associated with carrying out those activities since they do not own their own property, do not generate their own earnings and do not bear the costs of those activities; any earnings generated are assigned to the budget of the Municipality of Wrocław and expenses are directly attributed to the budget of that municipality.¹⁵⁸

Ownership of assets as well as whether the profit depended on earnings and expenses were thus considered. The whole range of aspects brought up in new as well as old case law therefore appears to be of relevance when assessing economic risk.

It can be derived from the above considerations that the Court has extended the economic risk assessment from merely looking at whether the person also bears the costs of the activity, to also taking into account whether there are assets that the person risks losing. Perhaps this has been a way for the Court to adapt the Article 10 criteria to other situations than employer-employee relationships, taking into account the fact that entities are fundamentally different from natural persons.

3.2.2 The meaning of economic risk

The following section is devoted to examining what type of economic risk the Court is referring to. As stated in case law, considering the economic reality is fundamental for the application of the Union VAT system¹⁵⁹ and it is therefore

ECLI:EU:C:2006:196 para. 36 & Opinion of Advocate General Léger, 29 September 2005, Case C-210/04, *Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196, para. 40 & 46.

¹⁵⁶ In Opinion of Advocate General Jääskinen, 30 June 2015, Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 46, it is suggested that in order to bear the risk you must have assets of some kind that you risk losing.

¹⁵⁷ See sec. 3.5.

¹⁵⁸ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 38.

¹⁵⁹ See case C-396/02, *DFDS BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2004] ECLI:EU:C:2004:536, para. 23, Case C-185/01, *Auto Lease Holland BV v. Bundesamt für Finanzen* [2003] ECLI:EU:C:2003:7, para. 35-36, Case C-320/88, *Staatssecretaris van Financiën v.*

appropriate to discuss what carrying the economic risk actually entails. In order to illuminate this phenomenon a couple of concepts from the economic field will be used.

The risks that firms are exposed to are normally categorized by the terms “business risk” and “financial risk”. The business risk is defined as the risk inherent in the firm, irrespective of the way in which it is financed. This risk is generally reflected in the variability of net operating income or net cash flows, which depends on factors related to inputs and outputs, i.e. expenses and turnover. The financial risk, on the other hand, is defined as the “added variability of the net cash flows of the owners of equity that results from the fixed financial obligation associated with debt financing and cash leasing” and covers the risk of cash insolvency.¹⁶⁰ In short, carrying the business risk means being exposed to variability in profits whereas the financial risk entails the risk of being unable to pay the creditors and being ultimately liable for paying one’s debts.

The Court has consistently held that it is the economic risk associated with carrying out the activity, or business, that is to be assessed.¹⁶¹ This can also be derived from Article 9(1) and the fact that the whole concept of independence relates to the way the activity is carried out. This focus on the business itself rather than the way it is financed appear to correspond to the business risk rather than the financial risk.

In the same spirit, it was concluded in *Commune of Seville* that the tax collectors bore the economic risk “in so far” as their profit depended not only on the income but also the on the expenses related to staff and equipment needed for carrying out their activity. The Court thus seems to be of the opinion that in order for a person to carry the economic risk it has to be exposed to variability in net profits, which corresponds to the concept of business risk.

Likewise, in *FCE* the Court discussed who bore the risk of customer default, which is a major business risk for credit institutions. The profits of these types of businesses partly depend on expenses associated with customer default. Consequently, within the credit sector, not being exposed to the risk of customer default implies not incurring essential business expenses and hence not bearing the

Shipping and Forwarding Enterprise Safe BV [1990] ECLI:EU:C:1990:61, para. 10-13 & Case C-73/06, *Planzer Luxembourg Sàrl v. Bundeszentralamt für Steuern* [2007] ECLI:EU:C:2007:397, para. 43.

¹⁶⁰ S. Gabriel & C. Baker, Concepts of Business and Financial Risk, *American Journal of Agricultural Economics*, vol. 62, No. 3 (Aug., 1980), p. 560.

¹⁶¹ See Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 13, Case C-210/04, *Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196, para. 35, Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615, para. 24, Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225, para. 25 & Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 34.

business risk. Had the FCE IT had any endowment capital on its own it might have been deemed to bear the risk of their clients defaulting. As a branch it does, however, not have any such capital, and the risk associated with the economic activity is therefore carried entirely by FCE Bank. Seemingly, the Court was also in this case referring to the business risk, although key here was the existence of endowment capital.

This interpretation of the *FCE* case emphasizes the importance of endowment capital when it comes to assessing independence within the credit sector. In an article dealing with the interaction between head offices, branches and VAT groups, Abdoelkariem and Prinsen have referred to this way of assessing economic risk as the “capital test” and stated that, although essential for actors in the financial industry, as for *FCE* and *Skandia*, it should not be decisive for other industries. Instead, as stated in earlier case law, it is important to take into account whether profits depend on expenses incurred.¹⁶²

The reasoning of Abdoelkariem and Prinsen can be disputed on two grounds. Firstly, the mere fact that the profit of a branch is calculated based on revenue and expenses does not provide a full picture of the situation. If the only consequence of bad performance is negative figures on a financial report, there is no actual materialisation of the risk. Secondly, the Skandia group as a whole might have operated within the financial sector, but the business of Skandia Sverige was focused on IT. In spite of this, the fact that Skandia Sverige lacked capital on its own in combination with not having its own assets was enough for the Court to preclude it from being independent. This is interesting because it provides an indication of what carrying the economic risk entails.

AG Jääskinen suggested in his opinion to the *Gmina Wrocław* case that “the materialisation of the economic risk may take different forms, but I think that the person who bears the risk must have assets of some kind he risks losing”.¹⁶³ This statement appears reconcilable with case law. As mentioned above, the existence of endowment capital and ownership of assets constituted central aspects in *FCE* and *Skandia*. In situations regarding natural persons there is no endowment capital as such, but instead there are private assets. For instance, variability in profits would affect the private assets of Mr Heerma. Conversely, in *van der Steen* it was the endowment capital of the limited company, rather than the private assets of Mr van der Steen, that was exposed to this variability. In *Commune of Seville*, the tax collectors had to provide a security to an amount fixed by the local authority and it

¹⁶² R. Abdoelkariem & F. Prinsen, *The Interaction between Head Office, Branch and VAT Grouping: New Challenges Ahead for the European Union*, 26 Intl. VAT Monitor 4 (2015), Journals IBFD, sec. 4.2.b.

¹⁶³ Opinion of Advocate General Jääskinen, 30 June 2015, Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 46.

was hence their own assets that were at stake if they failed to properly collect the taxes.¹⁶⁴

In a comment to the *FCE* case, Merkx has stated that

However, financially all establishments of a single entity are co-dependent. Their existence and the way they do business depend on how well the legal entity performs as a whole. The ECJ [the European Court of Justice/EÖ] seems to focus on this co-dependency in the *FCE* Bank case. Such co-dependency exists in any case the branch is just part of a legal person and does not in itself form a separate legal entity.¹⁶⁵

From this perspective, sharing assets and endowment capital as done in *FCE* creates financial co-dependency, implying that it is the same assets that are exposed to the economic risks of both entities. Accordingly, entities sharing assets cannot be regarded as independent in terms of economic risk.

It can be derived from the above reasoning that two conditions for being considered to bear the economic risk can be distinguished from case law. The person must, firstly, carry the business risk by being exposed to profit variability and, secondly, have assets of some kind that it risks losing.

With regard to financial risk, however, there is nothing to indicate that the liability for debt repayment would have to be carried by the person at issue. Unlimited partnerships might for instance be considered as independent¹⁶⁶ even though the partners are ultimately liable for its debts. Furthermore, it does not seem to be determinative whether the person at issue might be subject to insolvency procedures. In his opinion to the *Gmina Wrocław* case, AG Jääskinen discussed the following position taken by the Polish Government.

The Polish Government contends that the criterion concerning economic risk cannot be held to apply to bodies governed by public law, because neither the municipality nor its budgetary entities can be subject to insolvency procedures. Thus, according to the Polish Government, bodies governed by public law are not exposed to economic risks which are comparable to those taken by private bodies carrying out economic activities.¹⁶⁷

Jääskinen did, however, not agree with the conclusion that a person has to risk being subject to insolvency procedures since this would preclude public bodies from treatment as taxable persons, which is clearly in conflict with the idea behind the VAT Directive.¹⁶⁸

¹⁶⁴ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332 para. 3.

¹⁶⁵ M. Merkx, *Establishments in European VAT*, Wolters Kluwer International BV, The Netherlands 2013, p. 126.

¹⁶⁶ See Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46. para. 8.

¹⁶⁷ Opinion of Advocate General Jääskinen, 30 June 2015, Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 45.

¹⁶⁸ *ibid.* para. 47.

3.3 Overall assessment

When assessing a case using the above criteria it is relevant to consider whether they are to be applied cumulatively or from an overall perspective. Put differently, it is appropriate to consider whether all the conditions are to be met in order for a relationship to have the character of that between employer and employee, or if fulfilling a few is sufficient.

Article 10 includes the phrase “legal ties creating the relationship of employer and employee as regards working conditions, remuneration *and* employer’s liability”, vaguely suggesting that all criteria are to be fulfilled in order for an employer-employee relationship to exist. Describing the criteria as “cumulative”, this seems to be how Abdoelkariem and Prinsen interpreted this article when discussing independence.¹⁶⁹ AG Jääskinen did, however, express in his opinion in *Gmina Wrocław* that the issue of whether an economic activity is independent “must be assessed on a case-by-case basis, having regard to all the circumstances”.¹⁷⁰ In support for this, it can be ascertained from case law that the Court does not consistently mention all criteria, but often selects a few indicative factors.

Some circumstances appear to be of more importance than others. The factor of liability was for instance assessed in most cases referred to in section 2.2. Although no explicit reference was made in *FCE* or *Skandia*, these cases dealt with branches and thus non-legal persons, meaning that it was part of the factual circumstances that the persons could not act on their own account or bear the ultimate liability for their actions.¹⁷¹ In *Heerma*, the Court based its reasoning about independence solely on the fact that Mr Heerma was acting in his own name, on his own behalf and under his own responsibility.¹⁷² It was, however, also held that partnerships having de facto independence was to be regarded as independent, even though they lack legal personality and thus cannot act in their own name and on their own behalf.¹⁷³ Although important, this criterion does thus not seem to be absolutely necessary for a person to be regarded as independent.

Another crucial condition is economic risk, which was the only factor expressly taken into account in *FCE*.¹⁷⁴ Moreover, relying on the conclusion from section

¹⁶⁹ R. Abdoelkariem & F. Prinsen, *The Interaction between Head Office, Branch and VAT Grouping: New Challenges Ahead for the European Union*, 26 Intl. VAT Monitor 4 (2015), Journals IBFD, sec. 4.2.

¹⁷⁰ Opinion of Advocate General Jääskinen, 30 June 2015, Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 49.

¹⁷¹ See sec. 2.2.5 & 2.2.7.

¹⁷² Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46, para. 18.

¹⁷³ *ibid.* 8.

¹⁷⁴ See sec. 2.2.5.

3.2.2 that bearing the economic risk means incurring the expenses related to the activity as well as owning assets that are at risk, it appears that all persons from the case law cited in section 2.2 that were deemed by the Court as independent were bearing the economic risk.¹⁷⁵ Conversely, none of the persons that were not considered as independent bore that risk except for *Saudaçor*.¹⁷⁶

In contrast, the factor of working conditions seems to have had little impact in case law. In *van der Steen* and *Gmina Wrocław*, for instance, both economic risk and liability were included in the Court's reasoning, but not working conditions.¹⁷⁷ Moreover, even though it was observed in *Commune of Seville* and *Commission v. Netherlands* that the working conditions were limited by guidelines and supervision, this was not enough to preclude independence.¹⁷⁸

Considering that some employees enjoy a great deal of autonomy in their working conditions and some self-employed persons receive plenty of instructions from their principals, it appears reasonable not to treat this factor as decisive. A journalist employed by a newspaper might for instance write articles from home with minimal instructions or supervision. Meanwhile, it is not uncommon for suppliers to be subject to surveillance and receive careful instructions from their clients not only in relation to the result but also concerning how the work is organized, for instance in respect to social responsibility and environmental issues.

It can furthermore be argued that the manner in which a company chooses to organize its business internally should not affect whether it is required to pay VAT on internal transactions. Such a distinction might incentivize businesses without full right to deduct to avoid decentralization, as letting their branches work with a certain degree of autonomy then could result in irrecoverable input VAT.

3.4 Subordination

As established earlier in this section, the circumstances that the principal pays out the remuneration, governs the way the work is organized and carries the liability and economic risk of the activities carried out by the agent are all indicators of the existence of an employer-employee relationship. These are characteristics of an unbalanced relationship in terms of power and responsibility, suggesting that in the relationship referred to in Article 10, dependency is in many respects one-sided. This implies that some degree of subordination is required in order for Article 10 to apply, which is reflected in how the three factors of this provision are assessed.

¹⁷⁵ See sec. 3.2.2 & 2.2.2-4.

¹⁷⁶ See sec. 3.2.2 & 2.2.5-9.

¹⁷⁷ See sec. 2.2.6 & 2.2.8.

¹⁷⁸ See sec. 2.2.2-3.

Nevertheless, the Court has not explicitly acknowledged the aspect of subordination as a factor to take into account, even when given a clear opportunity to do so. In the *Commission v. Netherlands* case, the Commission submitted the lack of subordination as a ground for not deeming the notaries and bailiffs to be regarded as employees.¹⁷⁹ Although the Court came to the same conclusion, it never mentioned the aspect of subordination but instead pointed at specific circumstances relating to the Article 10 criteria.¹⁸⁰

Of the cases cited in section 2.2, the independence criterion was deemed unfulfilled in four of them: *FCE*, *van der Steen*, *Gmina Wrocław* and *Saudaçor*. Except for in *van der Steen*, the persons at issue appear to have been in a subordinate position in relation to their principals. Mr van der Steen was, however, the sole owner and director of the company and thus in control over its actions. As Terra and Kajus observed in a commentary to the case, “the request for a raise in salary by the sole employee will never be rejected by the private limited company”.¹⁸¹ The subordination aspect was brought up in the judgment, supported by the *Asscher* case,¹⁸² although the Court rejected it with the following motivation.

Moreover, the reasoning adopted by the Court – which held, in paragraph 26 of *Asscher*, that a director of a company of which he is the sole shareholder does not carry out his activity in the context of a relationship of subordination, and so is to be treated not as a ‘worker’ within the meaning of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) but as pursuing an activity as a self-employed person within the meaning of Article 52 of the EC Treaty (now, after amendment, Article 43 EC) – cannot be applied to the case at issue in the main proceedings, which is unrelated to the freedom of movement for persons and only concerns VAT and the definition of ‘taxable person’ in respect of VAT.¹⁸³

Terra and Kajus criticized this reasoning on the following ground.

Although, admittedly, the *Asscher* case did not concern the notion of employment in the context of VAT, we do not see why the notion of carrying out activities ‘in the context of a relationship of subordination,’ in order to distinguish between a ‘worker’ and a person pursuing an activity as a self-employed person is not equally applicable in order to distinguish between a person who independently carries out an economic activity and who does not.¹⁸⁴

¹⁷⁹ See Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161 para. 4.

¹⁸⁰ See sec. 2.2.2.

¹⁸¹ B. Terra & J. Kajus, *An individual who is its sole shareholder, sole director and sole employee of a private limited company is not to be regarded as a taxable person in respect of his work for the company*, Commentary to Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615, IBFD.

¹⁸² Case C-107/94, *P. H. Asscher v. Staatssecretaris van Financiën* [1996] ECLI:EU:C:1996:251.

¹⁸³ *ibid.* para. 31

¹⁸⁴ B. Terra & J. Kajus, *An individual who is its sole shareholder, sole director and sole employee of a private limited company is not to be regarded as a taxable person in respect of his work for the company*, Commentary to Case C-355/06, *J.A. van der Steen v. Inspector van de belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECLI:EU:C:2007:615, IBFD.

It is thus argued that there is no reason for why the existence of subordination should not be taken into account when assessing independence in the context of VAT. The *van der Steen* ruling did nevertheless suggest that true subordination is not an absolute requirement in order for Article 10 to apply. It should be considered, however, that had the Court come to a different conclusion, the consequence might have been that a large number of persons working for their own limited companies would have been required to register for VAT despite the existence of an employment contract. Recalling the intention behind Article 10 of reducing the number of taxable persons¹⁸⁵ it is possible that this influenced the outcome in *van der Steen*.

The aspect of subordination was moreover recently discussed in the *Larentia + Minerva* case,¹⁸⁶ which partly concerned whether a Member State might require subordination to exist in relationships between members of a VAT group. The Court held in this respect that:

The fact that the nature of the relationship binding those persons is merely one of ‘closeness’ may, in the absence of any other requirement, not therefore lead to the conclusion that the EU legislature intended to reserve the benefit of the VAT group scheme only to entities in a relationship of subordination with the controlling company of the group of undertakings considered.¹⁸⁷

Recalling that Article 11 requires the persons at issue to be “closely bound to one another by financial, economic and organizational links” in order to be qualified for VAT grouping, this conclusion is presumably not transferable to the employer-employee relationship in Article 10 which is expressed in terms of “legal ties creating the relationship of employer and employee”. The subordination aspect may in fact constitute an essential difference between these forms of connections. As stated above, the dependency tends to be more or less one-sided in Article 10 relationships whereas this is evidently not a requirement for the applicability of Article 11.

It can be derived from the above observations that the aspect of subordination appears to be inherent in how the Article 10 criteria are to be assessed as well as constituting a feature distinguishing Article 10 relations from those referred to in Article 11. Nevertheless, it seems that it does not on its own form a ground for deeming a relationship to have the character of that between employers and employees, and true subordination in the relationship between two persons does not appear to be required for the application of Article 10.

¹⁸⁵ See sec. 2.3.

¹⁸⁶ Case C-108/14, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v. Finanzamt Nordenham* [2015] ECLI:EU:C:2015:496.

¹⁸⁷ *ibid.* para. 44.

3.5 Impact of legal form

Another issue related to the independence assessment is whether the legal form of the person at issue should matter. The *FCE* ruling has for instance been criticized by Amand on the ground that concepts of national law are irrelevant for the interpretation of Community concepts.¹⁸⁸ Merkx has, on the other hand, disputed this reasoning, arguing that:

[U]nlike direct taxation, VAT as a transaction tax is closely connected to the legal relationship between the supplier and customer. Such legal relationship exists between entities that conclude an agreement. The entities as such, not one of their establishments, have the obligation to keep their end of the agreement and they have the right to force their counterparty to do the same.¹⁸⁹

Merkx has thus argued that since the legal form has an impact on a person's ability to enter legal relationships, it is also relevant to take into account when assessing independence. In this regard, it is submitted that the liability criterion from Article 10 appears impossible for a non-legal person to fulfil, as they are unable to act on their own account or bear the liability arising from contractual relations.¹⁹⁰ Likewise it is debatable whether a person incapable of owning assets can meet the condition of economic risk,¹⁹¹ implying that legal form matters.

Nevertheless, it has been concluded by the Court in *Heerma* that legal independence is not necessary in order to be considered to act independently.¹⁹² In his opinion to the case, AG Cosmas reached the same conclusion and stressed the importance of a broad definition of the term "taxable person" for ensuring fiscal neutrality and concluded the following.

In particular, therefore, the possession of legal personality is not a sine qua non [necessary condition/EÖ] for the classification of an association of persons as a 'taxable person'. Where, under national law, an association of persons lacking legal personality can, in practice, carry out economic activities which are subject to VAT in accordance with the provisions of Article 4 of the Sixth Directive [Article 9-13 of the VAT Directive/EÖ], it may, from the point of view of the VAT system, be deemed a 'taxable person' in exactly the same way as any person possessing legal personality.¹⁹³

Thus, non-legal associations of persons that in practice are able to carry out economic activities might be considered as independent taxable persons.

¹⁸⁸ C. Amand, *VAT Grouping, FCE Bank and Force of Attraction – The Internal Market is Leaking*, International VAT Monitor July/August 2007, p. 241-242, reference made to Case C-320/88, *Staatssecretaris van Financiën v. Shipping and Forwarding Enterprise Safe BV* [1990] ECLI:EU:C:1990:61.

¹⁸⁹ M. Merkx, *Establishments in European VAT*, Wolters Kluwer International BV, The Netherlands 2013, p. 127.

¹⁹⁰ See sec. 3.1.4.

¹⁹¹ See sec. 3.2.2.

¹⁹² See sec. 2.2.4.

¹⁹³ Opinion of Advocate General Cosmas, 20 May 1999, Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma* [2000] ECLI:EU:C:2000:46, para. 15.

Conversely, the *Saudaçor*¹⁹⁴ and *DFDS*¹⁹⁵ rulings indicate that a legal person might be regarded as dependent on its principal. The *DFDS* case concerned a UK subsidiary (DFDS Ltd.) to a Danish transport company (DFDS). DFDS Ltd. was by an agency agreement appointed as a general sales and port agent and a central booking office for DFDS.¹⁹⁶ Due to the contractual obligations imposed on it and the fact that DFDS Ltd. was wholly owned by DFDS, it was not regarded as independent but as a mere “auxiliary organ” to DFDS.¹⁹⁷ This case did not concern Article 9(1), but rather sought to establish whether the UK subsidiary was to be regarded as a fixed establishment. Nevertheless, it is noteworthy how the Court seems to disregard national legal forms.

Although not decisive for the independence assessment, legal form still appears to have a certain impact. It was for instance stated by the Court in *FCE* that it was FCE Bank as a legal person that bore the economic risk and that “As a branch, FCE IT does not have any endowment capital”.¹⁹⁸ Similarly, the Court held in *Skandia* that as a branch, Skandia Sverige did not have any capital or assets on its own.¹⁹⁹ In these cases, the legal form of the persons assessed hence precluded them from carrying the economic risk and acting independently. In contrast, partnerships generally have assets at their disposal contributed by the partners,²⁰⁰ which is a difference that could explain why the Court, at least up to this date, has established that partnerships but not branches might be regarded as independent.

It can be derived from the above reasoning that, on one hand, legal independence is not a necessary requirement for a person to be acting independently within the meaning of Article 9(1). However, as shown in *FCE* and *Skandia*, the lack of legal personality might preclude a person from having assets and capital on its own, thereby indirectly preventing it from being viewed as independent.

¹⁹⁴ See sec. 2.2.9.

¹⁹⁵ Case C-396/02, *DFDS BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2004] ECLI:EU:C:2004:536.

¹⁹⁶ *ibid.* para. 5.

¹⁹⁷ *ibid.* para. 26.

¹⁹⁸ Case C-210/04, *Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 para. 36-37.

¹⁹⁹ Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225, para. 26.

²⁰⁰ A. van Doesum, *Contributions to Partnerships from a European VAT Law Perspective*, EC Tax Review 2010/6, p. 262. See also Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma* [2000] ECLI:EU:C:2000:46, para. 7, where it was stated that movable assets had been introduced to the partnership.

4 Branches and independence

4.1 Introduction

Within VAT, branches are referred to as “fixed establishments”, a term defined in Articles 11(1) and 11(2) of the Council Implementing Regulation from 2011.²⁰¹ As observed by Heydari, the definition laid down here is similar to that previously provided in case law.²⁰² Article 11(1) reads:

For the application of Article 44 of Directive 2006/112/EC, ‘fixed establishment’ shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.²⁰³

Article 11(2), applicable to inter alia Article 45 of the VAT Directive is similar with the difference that it ends with “enable it to provide the services which it supplies”. It can be derived from these definitions that, in order for an entity to be regarded as a fixed establishment, a certain degree of independence in terms of being equipped with sufficient resources for its own needs seems to be required. The question assessed in this section is, however, whether such an entity might perform activities independently within the meaning of Articles 9(1) and 10.

As recognized in *DFDS*, subsidiaries might constitute fixed establishments of their parents, meaning that legal persons may fall within the scope of this definition.²⁰⁴ The following discussion will, however, be based on the assumption that branches are not legal persons. Subsidiaries will instead be dealt with in section 5.

4.2 Working conditions

It has been claimed by Abdoelkariem and Prinsen that “in practice it is often the case that branches operate quite independently from their head office”.²⁰⁵ Independence in working conditions in terms of determining ones own policy and not relying on instructions from the main office could for instance consist of the

²⁰¹ Council Implementing Regulation (EU) 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, Official Journal of the European Union, L 77, 23 March 2011, p. 1-22.

²⁰² See Heydari 149 & the case law cited in foot note 4

²⁰³ Council Implementing Regulation (EU) 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, Official Journal of the European Union, L 77, 23 March 2011, para. 11(1).

²⁰⁴ Case C-396/02, *DFDS BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2004] ECLI:EU:C:2004:536, para. 29.

²⁰⁵ R. Abdoelkariem & F. Prinsen, *The Interaction between Head Office, Branch and VAT Grouping: New Challenges Ahead for the European Union*, 26 Intl. VAT Monitor 4 (2015), Journals IBFD, sec. 4.2.

branch mapping out its own business strategy. It was further emphasized that supervision from the head office is not enough to alter this conclusion.²⁰⁶

However, it is ultimately the legal person to which a branch belongs that has the final say in how the branch is to conduct its business. Although the main office might decide not to intervene in its daily operations, it still has the legal right to do so.²⁰⁷ Likewise, employers have the right to determine how the work of their employees is to be organized but might decide not to use it. Since a main office does in fact have decisive influence over how the branch operates and has authority to exercise control and give instructions,²⁰⁸ it may be argued that they are in an employer-employee relationship in terms of working conditions.

4.3 Remuneration and economic risk

In regard to the first two aspects of the remuneration condition, it is not implausible for a branch to be deemed as acting independently. It is, firstly, possible for a branch to receive its revenue from customers rather than as internal payments from the main office. Secondly, such revenue would normally depend on the supplies made rather than constituting regular fixed payments resembling a salary.²⁰⁹

The possibility for branches to meet the economic risk condition is however debatable. Abdoelkariem and Prinsen have, on the one hand, argued that a branch might carry the economic risk since its profits might depend not only on turnover but also on expenses. In their view, this feature of the economic risk assessment was ignored in *FCE*, but might be applicable to branches outside the financial sector where a “capital test”²¹⁰ is not essential. While it from an accountancy-based perspective is possible to measure profits generated by a branch, it is questionable whether doing this is enough for a branch to be considered as bearing the economic risk. Assuming the conclusion derived in section 3.2.2 is accurate, the person has to have assets of some sort that it risks losing in order for this to be the case. Since a branch is normally a non-legal person sharing assets with the rest of the legal entity, without any endowment capital on its own, it is unlikely to fulfil this condition.

²⁰⁶ R. Abdoelkariem & F. Prinsen, *The Interaction between Head Office, Branch and VAT Grouping: New Challenges Ahead for the European Union*, 26 Intl. VAT Monitor 4 (2015), Journals IBFD, sec. 4.2, reference made to Commission v. Netherlands (C-235/85), para. 14; and Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332., para. 11-12.

²⁰⁷ See discussions in sec. 2.4 & 3.1.2.2 & the wording from Art. 10 (“contract or any other *legal ties*”), suggesting that it is the legal relationship giving rise to rights and obligations that is to be in focus when assessing independence.

²⁰⁸ See sec. 3.1.2.1.

²⁰⁹ See sec. 3.1.3.

²¹⁰ See sec. 3.2.2.

This is supported by the Court's formulation in *FCE* and *Skandia* that "as a branch" the person at issue did not have any capital or assets on its own.²¹¹

An issue worth discussing is, however, whether there has to be ownership of assets in a legal sense, or if for instance funds set aside by the main establishment for the branch to use as it pleases might be enough. Branches might for instance be operating as investment centres.²¹² As such, they receive a certain sum of financial means to have at their disposal and are evaluated on the basis of the size of the profit it manages to generate in relation to this "investment". Such a unit might be compared with a wholly owned subsidiary generating return on capital invested by its parent company, and the assets put at their disposal with assets contributed by partners to a partnership.

There are, nevertheless, several problems with this notion. Firstly, it is plausible that the Court is in fact referring to ownership in legal terms. In *Gmina Wrocław*, for instance, it was observed that the budgetary entities "do not own their own property",²¹³ making it somewhat farfetched to contend that a mere internal arrangement letting the branch dispose of certain assets would be sufficient. Admittedly, it was established in the *Safe* case²¹⁴ that a supply of goods within the meaning of Article 14(1) of the VAT Directive, i.e. the "transfer of the right to dispose of tangible property as owner", might take place even without transfer of legal ownership.²¹⁵ However, this case was not about interpreting the concept of ownership as such, but dealt with determining what type of transfer that "empowers the other party actually to dispose of it *as if* he were the owner of the property".²¹⁶ Secondly, the wording in paragraph 26 of the *Skandia* ruling that "as a branch, according to the national legislation, it does not have any capital of its own and its assets belong to SAC" indicates that the Court refers to ownership in national legal terms. Thirdly, in regard to the comparison between partnerships and branches, it is to be noted that contributions of assets to partnerships are based on contracts, whereas internal arrangements do not legally tie particular assets to a branch. No contract can be concluded between main establishments and their branches since they are part of the same legal person. Finally, in contrast to the case of subsidiaries the assets of a branch are generally not separated from the assets of the legal person as a whole, creating financial co-dependency.²¹⁷

²¹¹ Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225, para. 26 & Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 para. 37.

²¹² See definition for "investment center" from *Bloomsbury Business Library - Business & Management Dictionary* n.d., n.p.: A & C Black Publishers Ltd, ePublications, EBSCOhost, viewed 3 May 2016

²¹³ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 38.

²¹⁴ Case C-320/88, *Staatssecretaris van Financiën v. Shipping and Forwarding Enterprise Safe BV* [1990] ECLI:EU:C:1990:61.

²¹⁵ *ibid.* para. 13.

²¹⁶ *ibid.* para. 7.

²¹⁷ Expression used by Merckx, see sec. 3.2.2.

It can be derived from the above discussion that branches without legal personality typically are incapable of carrying the economic risk. This conclusion assumes, however, that the applicable national legislation does not allow for branches to have capital or assets on its own, which is not always the case. While Directive 2013/36/EU prohibits Member States from requiring endowment capital for branches of credit institutions authorised in other Member States,²¹⁸ it is possible for them to oblige credit institutions established in third countries to allocate endowment capital to branches set up within the Union, both in its books and “physically” to separate bank accounts. In such cases, the branch has assets in the shape of endowment capital legally tied to it that it risks losing and that is separated from the assets of the main establishment, restricting financial co-dependency. It can therefore not be excluded that branches in some circumstances may carry the economic risk.

4.4 Liability

Not being a legal person in its own right, a branch is unable to act in its own name and on its own behalf. Rather, it is the legal person as such which bears the contractual liability and liability to third party damage. Based on this, it seems improbable that a branch would be deemed to bear the liability for its activities.

In contradiction to this notion, Abdoelkariem and Prinsen have held that

[T]he fact that a head office is ultimately liable for the activities performed by its branch (or vice versa), when things go wrong does not mean that the branch cannot exercise a degree of responsibility of its own.[reference made to *Commune of Seville/EÖ*]²¹⁹

Admittedly, the *Commune of Seville* ruling confirmed that a person might be seen as liable even if its principal bears the responsibility for activities carried out on its behalf. Nevertheless, it was maintained that the person at issue must still be able to bear liability for its contractual relations as well as towards third parties when not acting on behalf of its principal.²²⁰ A branch without legal personality is incapable of entering contractual agreements and it is the legal entity as such that is liable for the actions of a branch.

²¹⁸ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Official Journal of the European Union, L 176, 27 June 2013, art. 17.

²¹⁹ R. Abdoelkariem & F. Prinsen, *The Interaction between Head Office, Branch and VAT Grouping: New Challenges Ahead for the European Union*, 26 Intl. VAT Monitor 4 (2015), Journals IBFD, sec. 4.2(c) & Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 14-15.

²²⁰ Case C-202/90, *Ayuntamiento de Sevilla v. Recaudadores de Tributos de La zone primera y segunda* [1991] ECLI:EU:C:1991:332, para. 14-15.

4.5 Overall assessment

It can be derived from the above reasoning that it appears implausible for branches without endowment capital to fulfil the Article 10 criteria, essentially due to their lack of legal personality. Admittedly, they might operate with a certain degree of independence in practice. It is submitted that the argument put forward by Abdoelkariem and Prinsen that branches often operate independently in practice is partially supported by the Court's conclusion that partnerships having de facto independence might be regarded as acting independently, despite lack of legal personality.²²¹ However, as observed in section 3.5, partnerships normally have assets at their disposal contributed by the partners, enabling them to meet the economic risk criterion. Moreover, the fact that a partnership is governed by at least two persons imply that it might be complicated to decide who is the taxable person in every single transaction, whereas in the case of a branch, there is only one main establishment to whom the transaction may be attributed.

Nevertheless, the assumption that a branch does not have endowment capital might not always be accurate. For instance, branches belonging to credit institutions established outside the Union may be required by Member States to have endowment capital allocated to them and therefore might be deemed to carry the economic risk. The question then arises whether carrying the economic risk is enough to be regarded as independent. In *FCE* the fact that FCE IT did not carry the economic risk was sufficient to preclude them from independence, but no ruling from the Court has concluded the opposite. Considering, however, that this criterion appears essential when assessing the independence of banks,²²² it is possible that the Court would consider these types of branches independent.

5 Wholly owned subsidiaries and independence

5.1 Introduction

Though not explicitly referring to Articles 9(1) and 10, the *Saudaçor* and *DFDS* rulings imply that wholly owned subsidiaries are not necessarily to be viewed as independent.²²³ As established in section 3.5, the legal form as such is not decisive when assessing independence but might entail material implications affecting the classification. In this section the features of a wholly owned subsidiary will be investigated in the light of the Article 10 criteria in order to assess whether such

²²¹ See sec. 3.5 & Case C-23/98, *Staatssecretaris van Financiën v. J. Heerma*, [2000] ECLI:EU:C:2000:46 para. 8.

²²² See Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 para. 35.

²²³ See sec. 3.5 & 2.2.9.

persons might be precluded from independence within the meaning of Article 9(1), in spite of their legal independence.

5.2 Working conditions

In *Saudaçor* as well as in *DFDS*, the Court found that the contractual obligations imposed on the subsidiaries by their parent companies limited their independence.²²⁴ Such obligations restrict the way a subsidiary is able to operate on a daily basis and, in combination with the decisive influence of the parent, indicates that the control the parent company has over the working conditions of a subsidiary is similar to that an employer has over its employee.²²⁵

The fact that a parent company has decisive influence does, however, not necessarily mean that wholly owned subsidiaries in general are dependent in terms of working conditions. It is normally the Chief Executive Officer (“the CEO”) and management team of a subsidiary that governs the way its daily operations are organized. The owners only have an indirect influence through the appointment of board of directors, which in turn appoints the CEO. What made *Saudaçor* and *DFDS Ltd.* special in this respect was that their parent companies were able to control the daily operations through contractual agreements.²²⁶

5.3 Remuneration and economic risk

The first aspect to consider in regard to the remuneration criterion is from whom it is received.²²⁷ In this regard, the subsidiary might receive payments directly from clients but it is also possible to imagine a scenario where the parent company treats its subsidiary as a subcontractor, receiving emoluments from clients and then paying the subsidiary.

Secondly, it is to be taken into account how the remuneration is determined.²²⁸ A subsidiary is normally paid based on the work it carries out, whether in accordance with prices set externally or internally. The fact that the price is fixed by the parent company rather than being a result of negotiations should not be regarded as precluding independence in regard to remuneration, considering the *Commission v.*

²²⁴ Case C-396/02, *DFDS BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2004] ECLI:EU:C:2004:536, para. 26, Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 64.

²²⁵ See sec. 3.1.1.

²²⁶ Case C-174/14, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores S.A. v. Fazenda Pública* [2015] ECLI:EU:C:2015:733, para. 65.

²²⁷ See sec. 3.1.3.

²²⁸ *ibid.*

Netherlands ruling.²²⁹ It is, however, not inconceivable that a parent company might pay its subsidiary a fixed fee on a regular basis. Imagine for instance a subsidiary created with the sole aim to provide the parent company with IT support and in return receives a fixed payment every month.

In regard, thirdly, to the economic risk it is a fact that a subsidiary, though wholly owned, is a legal person and thus capable of owning assets and having endowment capital. Its legal personality also implies that the economic risk borne by the parent company is limited. If the subsidiary becomes bankrupt, the parent company will at most lose the capital it has invested, unless it has signed guarantees for loans taken by the subsidiary.

While it is possible for a subsidiary not to own any premises or equipment by for instance utilizing the assets of its parent company, it is nevertheless questionable whether it would be able to operate completely without assets. Firstly, some countries require a minimum amount of capital to be invested in order to establish a limited company.²³⁰ Moreover, even if not mandatory, it is difficult to imagine a subsidiary operating without any assets whatsoever. For instance, the mere existence of a balance sheet validates the presence of assets, as it would be impossible to construct such a statement without this element.

A second aspect of the economic risk condition concerns whether the profit depends only on remuneration received or also on the expenses related to the activity. In this regard, it is possible for wholly owned subsidiaries to operate in both ways. Whereas many subsidiaries incur their own expenses, some might operate as revenue centres devoted to raising revenue without responsibility for costs, such as sales centres.²³¹

5.4 Liability

As a legal person in its own right, it is possible for a wholly owned subsidiary to act in its own name. As shown in *DFDS*, however, such an entity might also act as an intermediary for its parent and hence not in its own name.²³² It has moreover been argued by Abdoelkariem and Prinsen that in parent-subsidiary relationships, it is

²²⁹ Case 235/85, *Commission of the European Communities v. Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161 para. 14.

²³⁰ For instance, German law requires a *GmbH* to have a minimum legal capital of € 25,000. See W. Ebke, 2015, *Conflicts on corporate laws in Europe – “Utopia limited; or: The Flowers of Progress”*, SMU Law Review, 68, 4, p. 1021, reference made to Reichsgesetzblatt [RGL] [Limited Liability Companies Act], 20 April 1892, GmbHG at 846, § 5(1). See also the Swedish act on limited liability companies (Aktiebolagslag (2005:551) 1:5), specifying a minimum capital of 50 000 SEK.

²³¹ See definition of “revenue center” from *Bloomsbury Business Library - Business & Management Dictionary* n.d., n.p.: A & C Black Publishers Ltd, ePublications, EBSCOhost, viewed 3 May 2016

²³² Case C-396/02, *DFDS BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2004] ECLI:EU:C:2004:536, para. 15.

often the parent as a shareholder that bears the third-party liability, either contractually through for instance providing a guarantee or due to mandatory legal provisions.²³³

5.5 Overall assessment

It is evident from the above considerations that wholly owned subsidiaries might carry out their businesses in a variety of ways. Although wholly owned, such an entity may be independent in regard to working conditions, at least in its daily operations, and carry the economic risk as well as the liability entailed in its activities. Wholly owned subsidiaries with these characteristics do not fall under Article 10 and carry out their activities independently within the meaning of Article 9(1). On the contrary, the parent company might, by means of contracts, exercise control over the daily operations, pay the subsidiary in a way similar to salary payments and bear the liability for its behaviour. It appears that a wholly owned subsidiary might fulfil the criteria of working conditions and liability, whereas its ability to be deemed to carry the economic risk is questionable.

While the economic risk can be borne partly by the parent company through guarantees, and the subsidiary might not necessarily incur the costs of its business, it is questionable whether a subsidiary can exist without any type of assets which it risks losing. In *DFDS*, for instance, the way DFDS Ltd. carried out its work was controlled by DFDS and it did not act in its own name²³⁴ but nevertheless owned its own premises. Merckx has argued that even though DFDS Ltd. was to be seen as acting as a mere auxiliary organ to DFDS, the supplies between them should be subject to VAT due to their separate legal personalities precluding them from financial co-dependency, implying that DFDS Ltd. did carry its economic risk.²³⁵ In this regard, it must however be submitted that while the criterion of economic risk has been used by the Court as the sole basis for precluding independence,²³⁶ the same is not true for the opposite.

It is therefore unclear whether an entity can be deemed independent exclusively on the ground that it carries economic risk. The *Saudaçor* ruling does, however,

²³³ R. Abdoelkariem & F. Prinsen, *The Interaction between Head Office, Branch and VAT Grouping: New Challenges Ahead for the European Union*, 26 Intl. VAT Monitor 4 (2015), Journals IBFD, sec. 4.2 (c).

²³⁴ See sec. 3.5.

²³⁵ M. Merckx, *Establishments in European VAT*, Wolters Kluwer International BV, The Netherlands 2013, p. 126-127. See section 3.2.2 where Merckx' reasoning on financial co-dependency was discussed.

²³⁶ See Case C-210/04, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v. FCE Bank plc.* [2006] ECLI:EU:C:2006:196 & Case C-7/13, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, [2014] ECLI:EU:C:2014:2225.

indicate that this factor is insufficient to establish independence.²³⁷ Assuming that this is the case, it is possible for wholly owned subsidiaries to fall within the scope of Article 10 and thus be excluded from carrying out its activities independently, with the consequence of not being regarded as taxable persons. As neither *Saudaçor* nor *DFDS* concerned Articles 9(1) and 10 directly, the case law in this area is nevertheless insufficient for drawing any conclusions.

6 Conclusion

In order to be regarded as taxable within the meaning of Article 9(1) of the VAT Directive, a person has to carry out its activities independently. Article 10 defines the term “independently” negatively by excluding employees. The article has however been applied not only to natural persons, but to situations involving entities such as branches and public bodies as well. The purpose set out for this thesis was, firstly, to assess the meaning of the term “independently” within the context of Articles 9(1) and 10 and, secondly, to examine whether branches and wholly owned subsidiaries are to be treated as persons carrying out their activities independently.

In regard to the first part of the purpose, the aspects taken into account in case law seem to originate from the three factors stated in Article 10. The first factor mentioned, working conditions, appears to have a limited impact on the independence assessment. In contrast, several aspects of importance have been derived from the remuneration criterion: from whom the remuneration is received, how it is determined and who carries the economic risk. The latter has had a significant impact in case law and seems to consist of two major components. Firstly, it is to be assessed whether the person at issue incurs its own expenses or if its income solely depends on revenues. Furthermore, a capital test is to be applied, examining the existence of endowment capital and assets. It appears that there has to be assets of some kind that the person risks losing in order for it to be considered to carry the economic risk. The last factor, “employer’s liability”, has seldom been explicitly dealt with in case law. However, the Court has repeatedly considered whether the person at issue acts in its own name, on its own behalf and under its own responsibility, which appears to be connected to this criterion.

Seemingly, what is to be taken into account when assessing independence are the conditions derived from Article 10, whereas other factors matter only if affecting these conditions. Possessing legal personality has for instance shown not to be required, but lack of legal form might prevent a person from fulfilling the economic

²³⁷ Even though *Saudaçor* was a limited liability company with its own assets and equity, the Court found that it was not necessarily independent from the public administration. While this was a case about Art. 13 of the VAT Directive, it was indirectly connected to *Saudaçor* independence within the meaning of Art. 9(1) and 10 (see sec. 2.2.9 & 2.3).

risk and liability criteria. Likewise, the aspect of subordination does not seem to have any impact unless it can be related to the Article 10 conditions.

Concerning the second part of the purpose it is concluded, firstly, that branches without legal personality normally seem to fall within the scope of Article 10 and are thus precluded from independence. It must, however, be noted that branches may under certain circumstances have assets allocated to them and thus be regarded as carrying the economic risk and possibly be deemed independent. Secondly, in respect of wholly owned subsidiaries, the possibility that such entities under certain circumstances might be precluded from independence cannot be ruled out. Admittedly, it is hard to envisage a subsidiary operating entirely without assets, but partially carrying the economic risk does not necessarily mean that the independence criterion is met. It can therefore not be precluded that wholly owned subsidiaries might be considered as dependent on their parent companies. There is, however, no case explicitly dealing with Articles 9(1) and 10 confirming this possibility. Further case law is thus required in order for this issue to be properly investigated.²³⁸

This thesis has been focused on private entities. However, it is also relevant to consider the treatment of public persons in regard to independence, especially after *Gmina Wrocław*. The Court did in this case establish that the criteria used when assessing the independence of private persons also are applicable to situations involving public ones.²³⁹ This raises the question of what kind of public entities are to be considered as performing activities independently and consequently might be regarded as taxable persons, which is a relevant topic for future research.

²³⁸ It remains to be seen whether the upcoming ruling in the MVM case (Case C-28/16, *Magyar Villamos Művek Zrt. (MVM) v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*) will shed any light on this issue. This case deals with the issue of whether the right to deduct input VAT of a holding company managing group companies without charging any fees for their services is to be limited. Possibly, the Court will deem these group companies dependent on the holding company and transactions between them as mere internal transactions that are to be disregarded.

²³⁹ Case C-276/14, *Gmina Wrocław v. Minister Finansów* [2015] ECLI:EU:C:2015:635, para. 35.

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