

French Administrative Supreme Court expands its definition of a dependent agent constitutive of a permanent establishment

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Executive summary

On 11 December 2020,¹ the French Administrative Supreme Court (*Conseil d'Etat*) ruled that an Irish tax resident entity performing digital marketing activities had a French permanent establishment, for corporate income tax purposes, through its French affiliate, whereas contracts with clients were not formerly concluded in France by the affiliate.

Detailed discussion

Valueclick International (subsequently renamed Conversant International Ltd.), an Irish entity which carried out digital marketing activities in Europe through local entities, concluded for the French market an intercompany service agreement with Valueclick France, a French related company. The latter was paid on a cost-plus basis for marketing assistance as well as management services, back-office and administrative assistance.

The French Tax Authorities (FTA) performed a tax audit which resulted in the characterization of a taxable presence in France of the Irish enterprise through a permanent establishment constituted by the French subsidiary which was deemed to qualify as a dependent agent of the Irish entity.

By this decision, the Supreme Court, meeting in plenary session, overturned the position adopted by the Administrative Court of Appeal. It concluded, along with the FTA, that a French company, which habitually used its authority to decide on client transactions that were thereafter automatically ratified by the Irish entity, was legally binding the latter, and was therefore a dependent agent constituting a permanent establishment, even though that French entity did not formally sign contracts with clients in the name of the Irish company.

The conclusion adopted here differs from the formalistic approach most recently used by the Supreme Court for the characterization of a permanent establishment through dependent agents, which was based on the place of signature of contracts. In the case at hand, the Supreme Court considered that while the template of client contracts, as well as pricing conditions, were determined by the Irish company, the decision to conclude a contract with a client, as well as all related tasks, were actually made and performed by the employees of the French affiliate, with the Irish enterprise merely rubber-stamping the contracts.

It is worth noting that the Supreme Court explicitly grounded its decision on the Organisation for Economic Co-operation and Development (OECD) comments published after the date of signature of the double tax treaty (DTT) concluded between Ireland and France (OECD comments, paragraphs 32.1 and 33, respectively published on 28 January 2003 and 15 January 2005). This may appear inconsistent with the Court's traditional position of only allowing reference to comments already published on the date of signature of the interpreted DTT.

Implications

Consistent with the OECD Multilateral Instrument approach, this Supreme Court decision, unprecedentedly ruled in a digital economy context, seems to pave the way for a French systematic application of the broad OECD interpretation of the traditional concept of an "agent habitually exercising the authority to conclude contracts in the name of the enterprise," by extending it to situations where the agent plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise.

Endnote

1. *Conseil d'État*, N° 420174, 11 December 2020, Sté Conversant International.

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