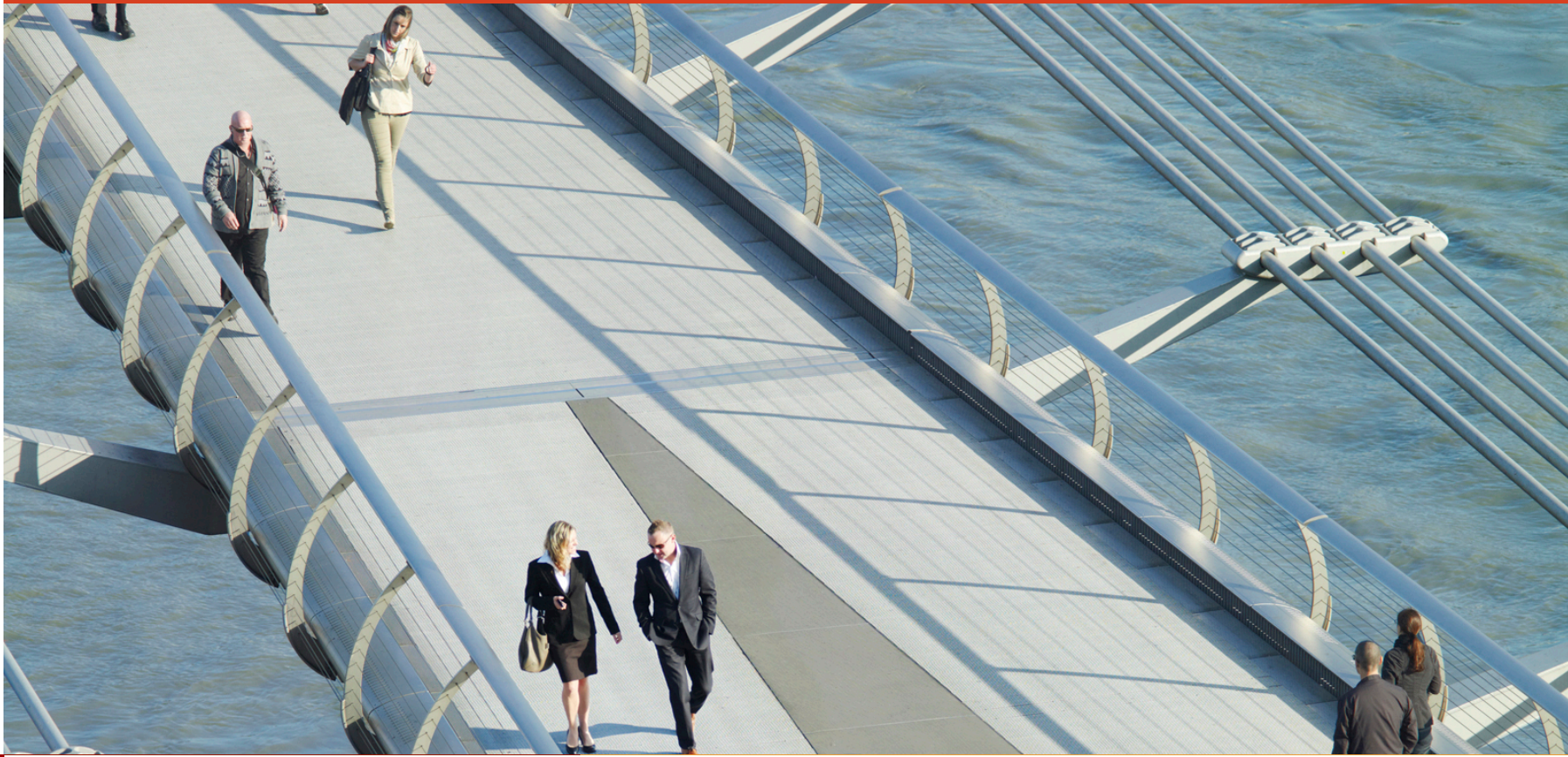


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# ***EMEA ITS PE Webcast Series***

## **Episode 4: VAT Consequences of a Corporate Tax Permanent Establishment**

*April 2018*



**pwc**

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# *Speakers*



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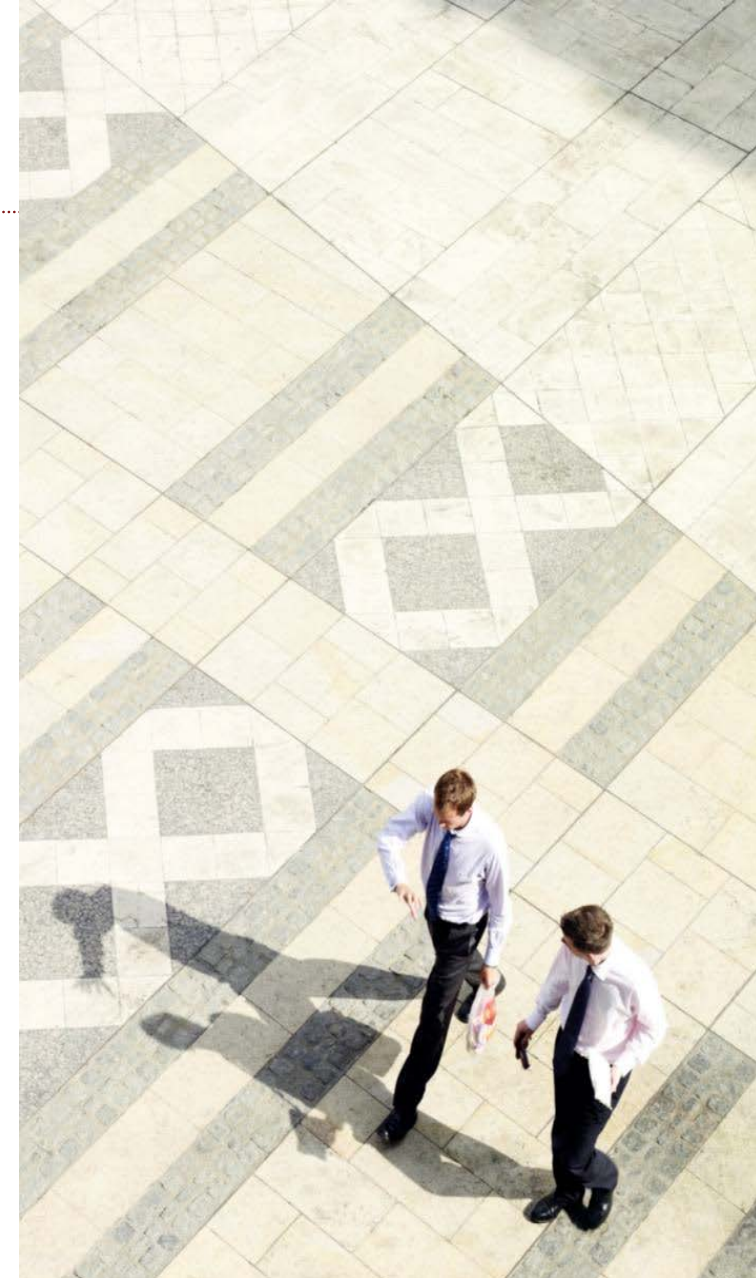
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# ***EMEA ITS PE Webcast Series***

## ***Guiding you through key tax topics***

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- I. The current PE and FE climate in Europe
- II. A comparison of the PE and FE concepts
- III. Practical examples of the interaction between FE and PE
- IV. Conclusions: key trends and how to identify a potential FE



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## ***I. The current PE and FE climate in Europe***

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- A survey was held in the European Union within the PwC network in March and April 2018 (see in appendix the outcome of the thorough analysis)
- Key findings:
  - Tax authorities are more frequently / aggressively claiming the presence of a PE/FE;
  - Commissionaire arrangements / toll manufacturing arrangements can be at risk (often in France, Poland, Italy & Spain);
  - France, Poland, Italy & Spain: more generally, high level PE / FE challenges.

## ***II. A comparison of the PE and FE concepts***

### ***Why a concept of FE or PE?***

#### **Fixed establishment (VAT)**

**The overall aim:** to allocate taxing rights on cross border services (to tax final consumption at destination eventually).

**Methods:** The tax is collected by businesses and borne by the final consumer. FE to determine 1) the place of supply of services in a B2B or B2C context (2) whether reverse charge method is applicable (3) whether foreign input VAT can be refunded.

**Risks:** different views on whether FE exists - penalties if no filing of VAT return?

#### **Permanent establishment (CIT)**

**The aim:** to allocate profit and taxing rights to territory of source.

**Method:** Profit is typically allocated following the authorized OECD approach. Corporate income tax is applied to the profits of the PE and the tax is collected and borne by each individual establishment of a business that participates in the supply chain.

**Risks:** taxing jurisdictions, tax filing penalties.

## ***II. A comparison of the PE and FE concepts***

### ***Different concepts***

#### **Fixed establishment (VAT)**

**Two concepts** (in Implementation Regulation):

##### ***Sales (active) fixed establishments***

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

##### ***Purchase (passive) fixed establishments***

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*

#### **Permanent establishment (CIT)**

**General concept:**

*A fixed place of business through which the business of an enterprise is wholly or partly carried on* (Art. 5(1) OECD)

##### **Extensions**

In UN Model/OECD Commentary: *Service PE*

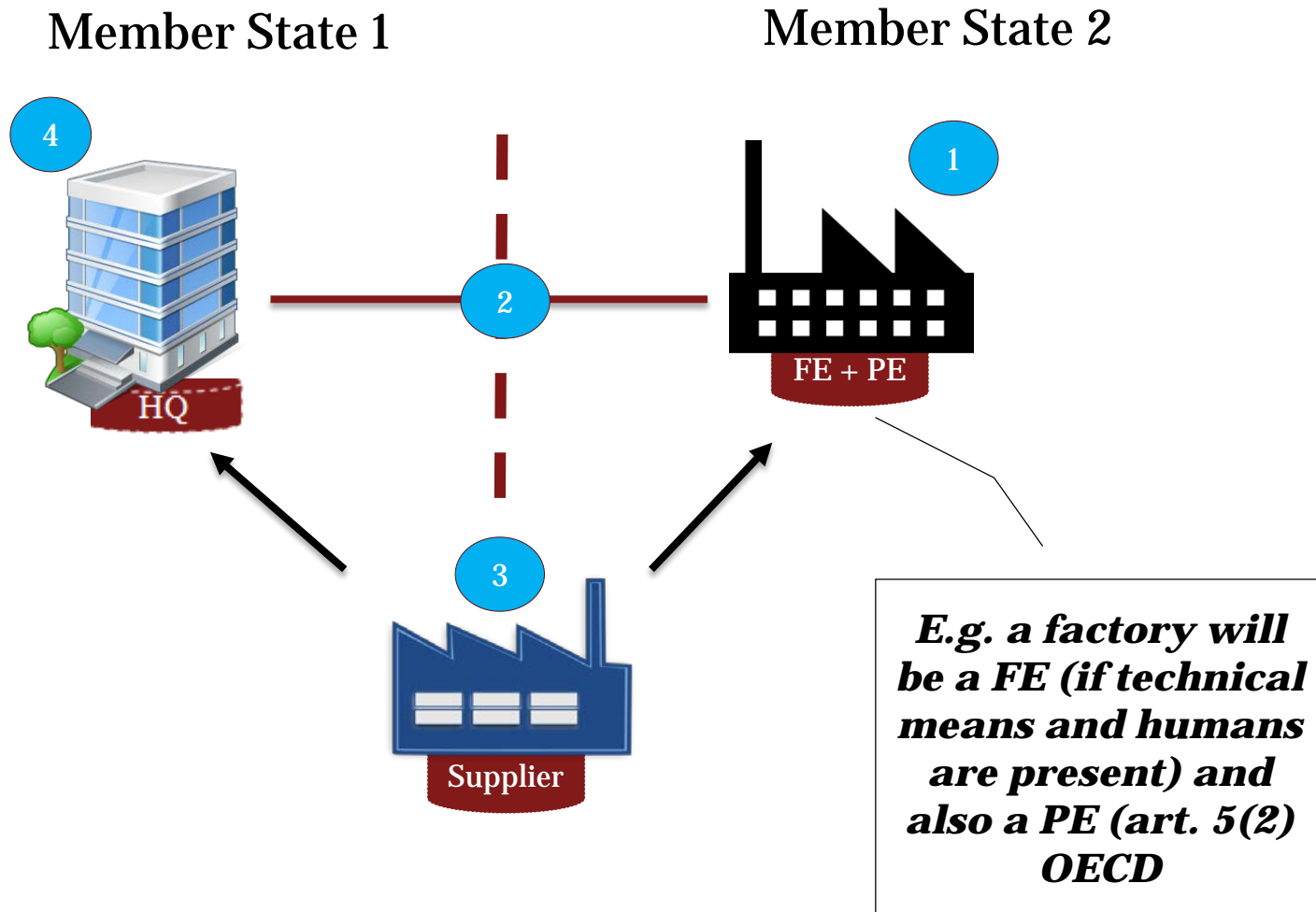
In BEPS Action 7 and multilateral instrument 2016: *commissionaire structures* (Art. 12 MLI)

Limiting exemptions in preparatory/auxiliary activities, e.g. *storage* (Art. 13 MLI)

*Aggregating connected activities* for the permanence criterion (Art. 14 MLI)

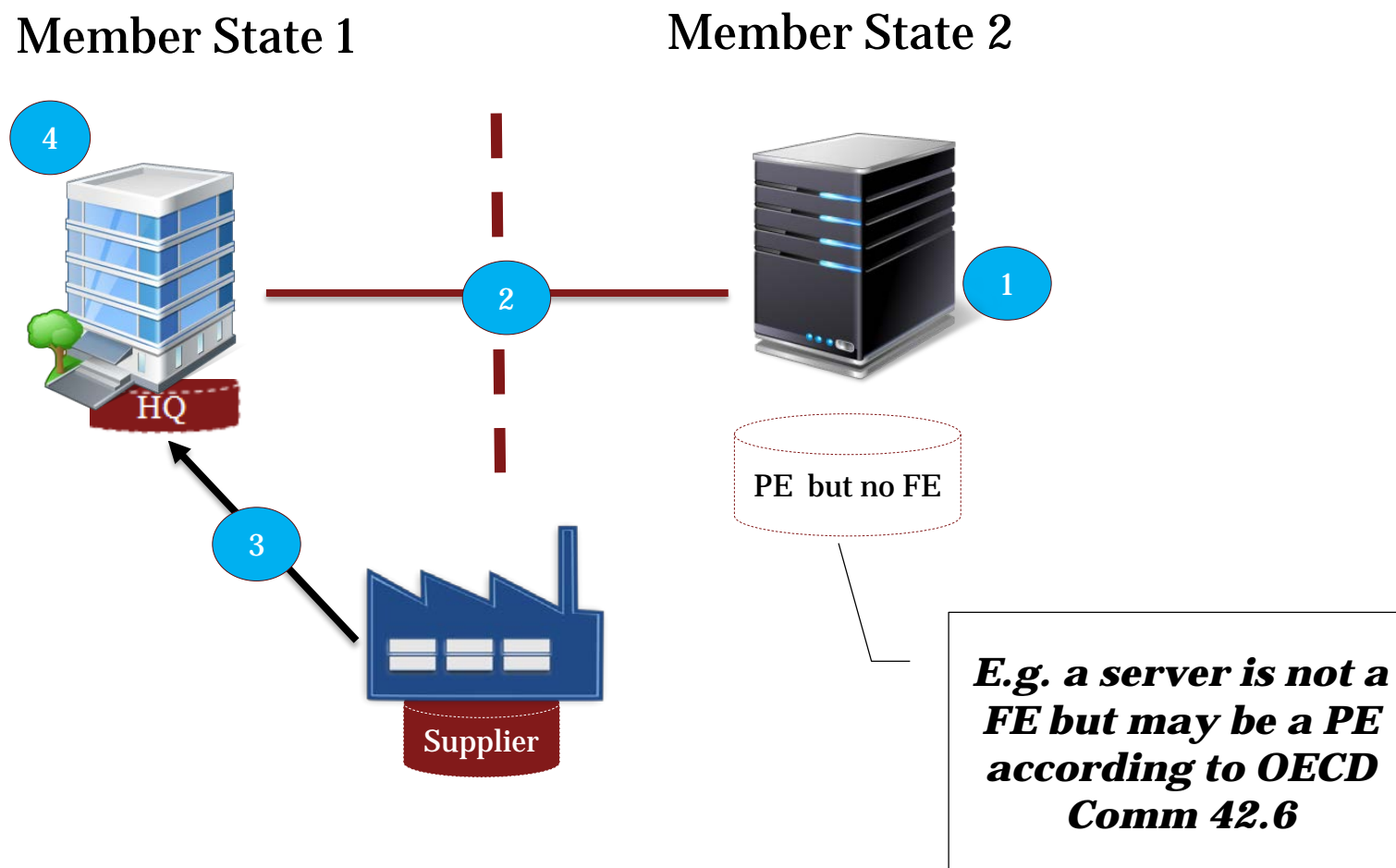
### III. *Practical examples of the interaction between FE and PE*

*If the branch is both a FE and a PE*



<i>What is the impact on VAT?</i>	
<i>FE/PE needs to register as a local taxable person for VAT purposes in Member State 2.</i>	1
<i>At least in EU context: No taxable transactions between HQ and FE/PE (FCE-Bank, but Skandia America). No impact of TP adjustments for direct tax purposes.</i>	2
<i>Supplier needs to determine whether HQ or FE/PE is the beneficiary/customer of its supply (Art. 21 and 22 IR).</i>	3
<i>Check whether reverse charge mechanism is applicable (not if FE/PE intervenes in carrying out the supply).</i>	4

### III. *Practical examples of the interaction between FE and PE* *If the secondary establishment is a PE but no FE*



#### *What is the impact on VAT?*

*PE does not need to register as a local taxable person for VAT purposes in Country 2 (transparent for VAT purposes).*

1

*No VAT-supplies as PE is no relevant entity for VAT purposes. No VAT consequences of TP/ Year-end-adjustments either.*

2

*Only HQ is the recipient/customer of the supply. Check place of supply, different for goods and services.*

3

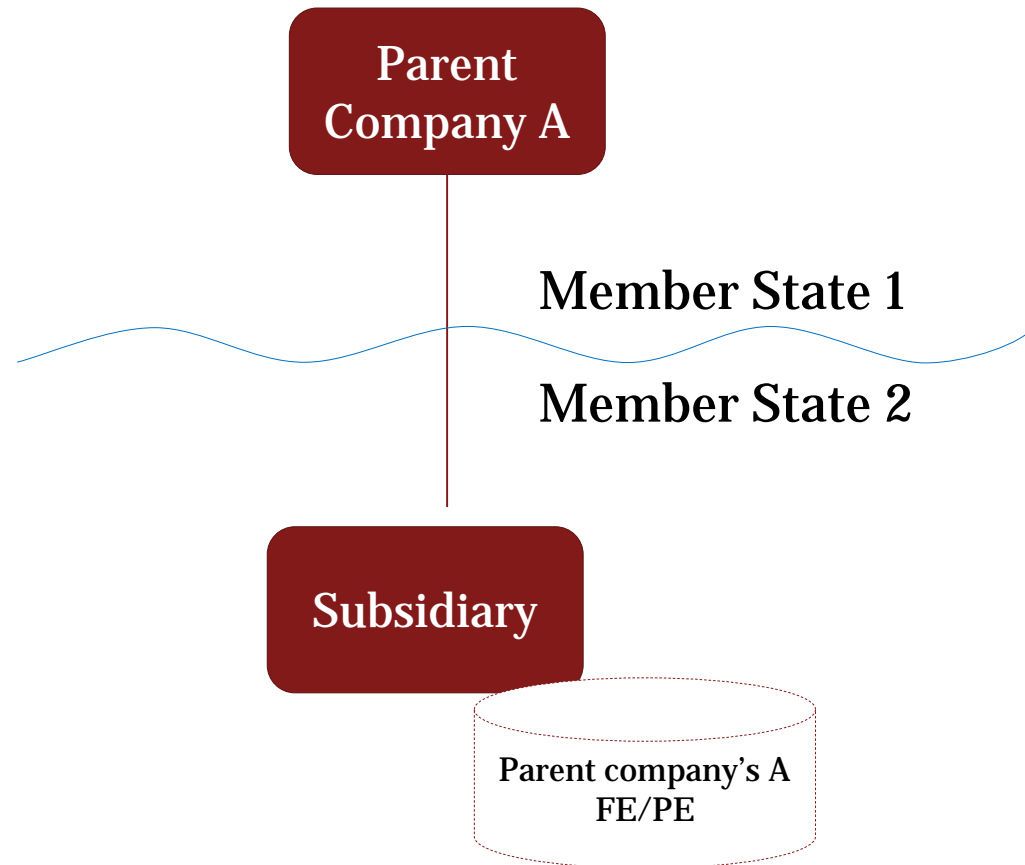
*As no FE exists (that is able to intervene in the supply) the reverse charge mechanism is applicable.*

4



### **III. Practical examples of the interaction between FE and PE**

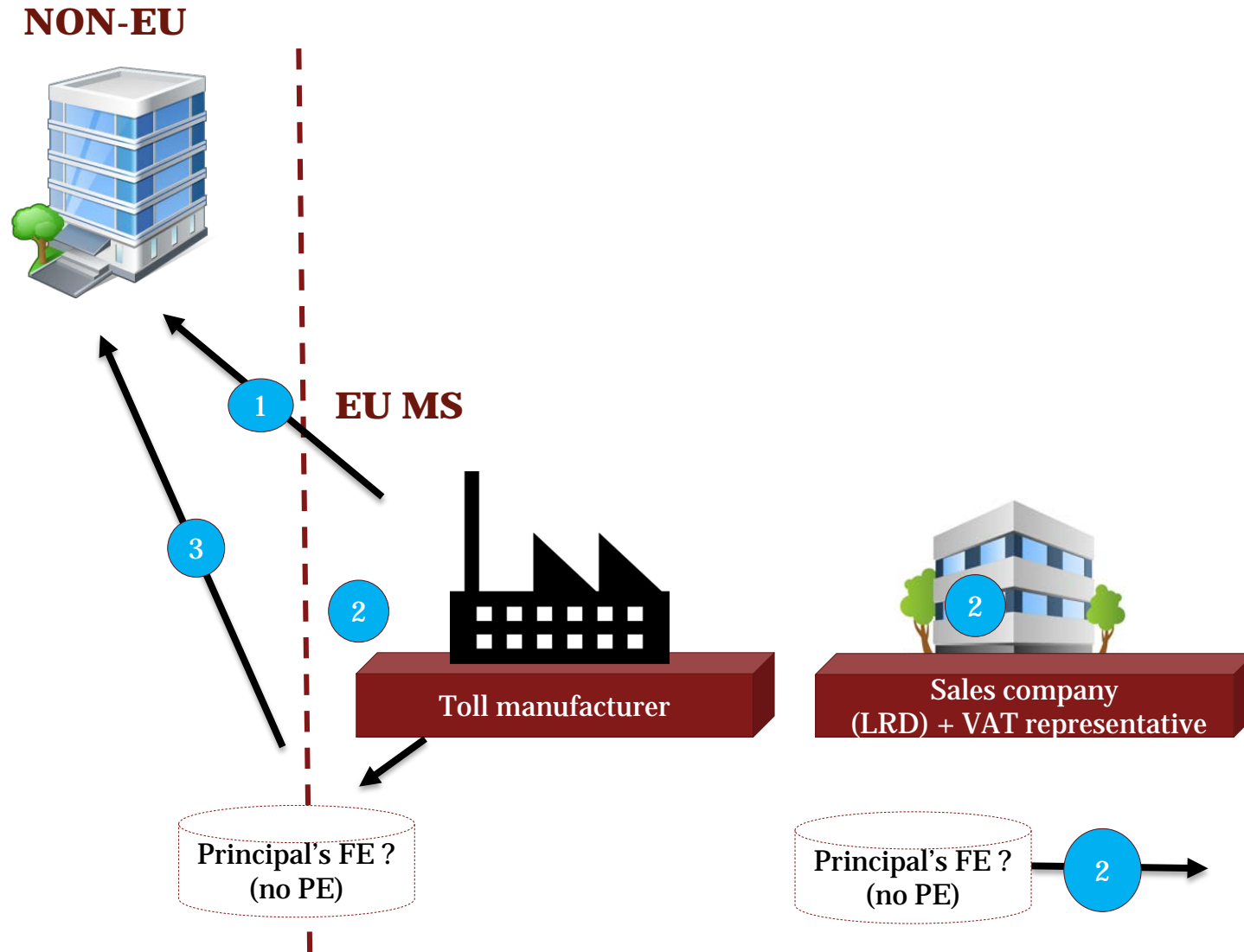
#### **Level of control to subsidiaries' resources**



#### *What is the impact on VAT?*

*Under EU law, the open access to the sub's resources might create a FE (and PE?) (Welmory) or based on post BEPS rules (commissionaire) a PE (and FE?) is assumed to be present next to the subsidiary.*

### III. Practical examples of the interaction between FE and PE Level of control to subsidiaries' resources



What is the impact on VAT?

According to PwC a tolling service taking place in NON-EU country (reverse charged) 1

According to EU MS' tax authorities Principal has a FE (open access to resources of its sub). Tolling services are a local transaction and trigger local VAT

According to EU MS' tax authorities the open access to resources of the sales company (VAT rep) creates an intervening FE (no PE) for the supply of goods, which is denied by PwC 2

PwC, if (quod non) a FE exists then supply takes place between FE and Principal (non-taxable) 3

## ***IV. Conclusions: key trends and how to identify a potential FE***

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- *Overall aim* is comparable: allocation of taxing rights
- VAT has *different concepts of FE* (structure – humans and technical means – enables to provide or receive). Direct tax has (more or less) *one concept* which has been extended over time (structure through which the business is wholly or partly carried on)
- The open access to *resources of (affiliated?) companies might create issues with tax authorities and trigger* the attention of the tax authorities involved in taxing profits
- Be aware of:
  - Increased focus by tax authorities on FE and high potential penalties
  - Aligning of the PE and FE tests? Even if not in theory, do we see this in practice e.g. corporate tax inspector also being asked to assess VAT FE?
  - How should you risk assess where a FE might have been accidentally created, what are the hallmarks to be aware of?
  - Extension of the deduction period? (*Biosafe*)

# Questions?

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# *Thank you!*

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# *Appendix*

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# The current climate for permanent establishments in Europe

Source: Survey held with PwC offices in April 2018

Country	Are PE challenges increased compared to 3 years ago?	Any major PE cases in your country?	Are there frequent PE challenges?	PEs actively searched for as part of the tax audit process?	Country still pursues PE challenges even if the TP policy is considered arm's length for the activities concerned?	Taxation of all turnover if PE or deductions/costs attributable?	Any disputes regarding virtual PEs?	Always
								Often
Austria	✓	X	●	●	●	●	●	
Belgium	✓	X	●	●	●	●	●	
Finland	X	✓	●	●	●	●	●	
France	✓	✓	●	●	●	●	●	
Germany	✓	✓	●	●	●	●	●	
Italy	✓	✓	●	●	●	●	●	
Netherlands	X	X	●	●	●	●	●	
Norway	X	X	●	●	●	●	●	
Poland	✓	✓	●	●	●	●	●	
Portugal	✓	X	●	●	●	●	●	
Romania	✓	X	●	●	●	●	●	
Spain	X	✓	●	●	●	●	●	
Sweden	X	X	●	●	●	●	●	
Switzerland	X	X	●	●	●	●	●	
UK	✓	X	●	●	●	●	●	

# The current climate for permanent establishments in Europe

Source: Survey held with PwC offices in April 2018

Country						Always
	Tax authorities deem a FE is available in case of a PE (or vice versa)?	Are commissionaire arrangements/agency arrangements/ LRD considered as FE?	Are contract manufacturing/toll manufacturing considered as FE?	Is FE taken into account for determination of place of taxation?	Is FE taken into account for place of intervention?	Often
						Occasionally
						No
Austria	●	●	●	●	●	
Belgium	●	●	●	●	●	
Finland	●	●	●	●	●	
France	●	●	●	●	●	
Germany	●	●	●	●	●	
Italy	●	●	●	●	●	
Netherlands	●	●	●	●	●	
Norway	●	●	●	●	●	
Poland	●	●	●	●	●	
Portugal	●	●	●	●	●	
Romania	●	●	●	●	●	
Spain	●	●	●	●	●	
Sweden	●	●	●	●	●	
Switzerland	●	●	●	●	●	
UK	●	●	●	●	●	