The Concept of a Group for Common Consolidated Corporate Tax Base Purposes

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I. Introduction

The purpose of this paper is to discuss the requirements to form a group under a possible future Common Corporate Consolidated Tax Base (CCCTB). The perspective of Danish law is especially in focus. The point of departure of this paper is taken from the working document of the Common Consolidated Corporate Tax Base Working Group (CCCTB WG): CCCTB: possible elements of a technical outline, Brussels, 26 July, 2007 (CCCTB/WP057\doc\en).

The structure of the paper includes the following sections. First, in section II, the possible elements of the definition of a group proposed by the CCCTB WG are presented. In order to assess the proposed outline of the concept of a group for CCCTB purposes, the subsequent section III describes the developments in and the present version of the concept of a group for Danish joint taxation purposes. Section IV highlights and discusses some of the remaining

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issues regarding the concept of a group for CCCTB purposes. Section V contains conclusions and recommendations.

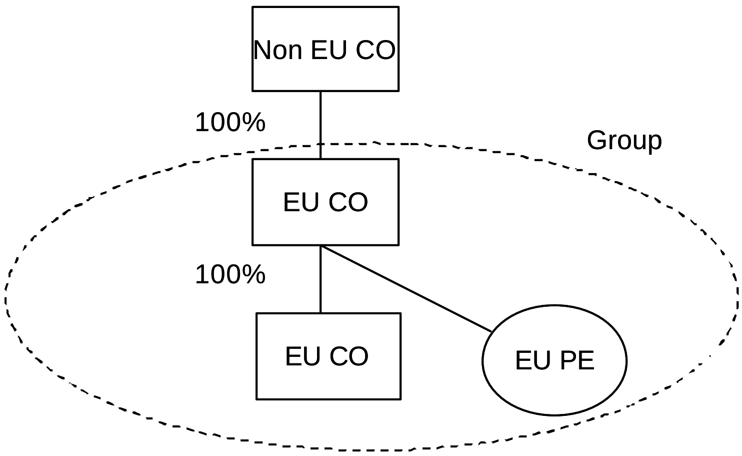
II. Possible elements of a technical outline as presented by the CCCTB WG

It is considered that some of the main benefits of the CCCTB project arise from consolidation, i.e. freeing companies from compliance with intra-group transfer pricing rules and allowing loss compensation[3].

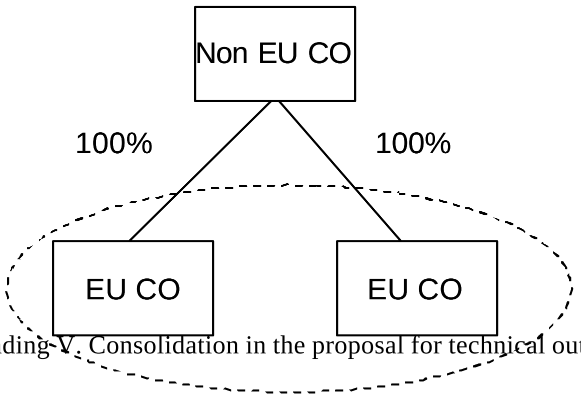
At the present stage, it is a prerequisite to opt for the tax consolidation under the CCCTB that a group exists. Thus, it is question of utmost importance which requirements should be met in order to qualify as a group.

It is proposed in the technical outline, that consolidation would be mandatory for all companies opting for CCCTB which have qualifying subsidiaries or PEs in other Member States[4]. This is called the "all-in" or "all-out" principle. Moreover, the consolidation would extend to the entire tax base of all taxpayers of a group, which implies consolidation of 100% of the tax base of all entities belonging to the group.[5] Based on this statement, the notion of a group thus includes companies that have qualifiying subsidiaries or PEs in other Member States. For this purpose, a "qualifying subsidiary" is defined in par. 89 of the technical outline as a company in which the voting rights are owned directly or indirectly (i.e. through a chain of participation) as to 75% or more by a parent company. Based on this, examples are provided in the proposal for the technical outline par. 87 et seq. as follows:

1. A group would comprise an EU-resident parent and its EU-resident subsidiaries (including PEs), whether or not the EU-resident parent were controlled by a non-EU parent.

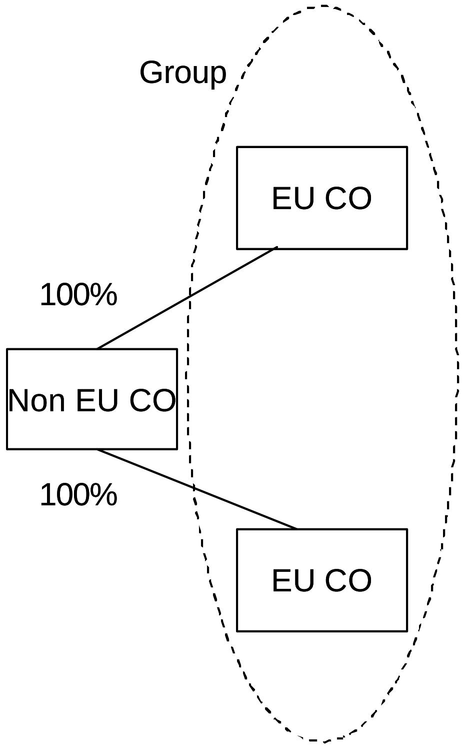


2. It would also cover a group of EU-resident subsidiaries under the common control of a non-EU-resident parent.

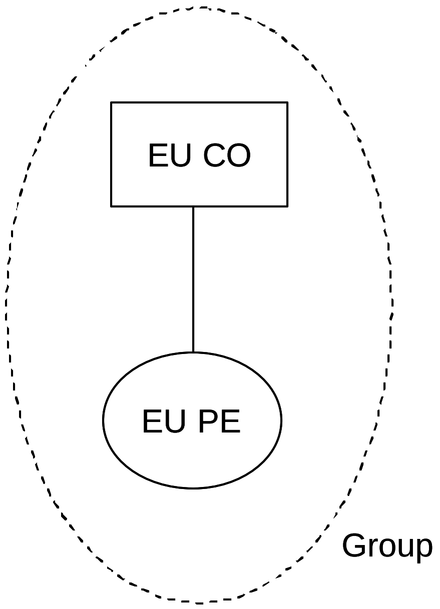


[3] See regarding this statement under heading V. Consolidation in the proposal for technical outline, p 21.
[4] See par. 85, id.
[5] See par. 86, id.

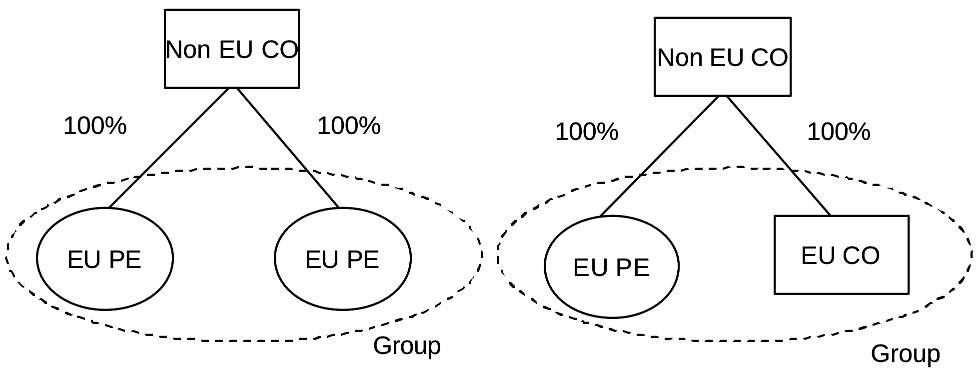
3. It is stated that this so-called "sandwich situation" does not break the chain, because taxpayers could otherwise split groups into multiple groups.



4. An EU taxpayer with an EU PE is also deemed to be a group for the purposes of the consolidation rules.



5. Finally, a group is said to exist when PEs exist in two Member States of a non-EU-resident company or a PE and subsidiary in two Member States of a non-EU-resident company or group.



Calculating the ownership of voting rights

For the purpose of calculating the parent company's level of indirect ownership, each respective holding percentage would have to be multiplied. When a *direct holding* is more than 75%, it would count as 100%. According to par. 89 of the technical outline, this ensures that all subsidiaries in which the parent directly or indirectly *controls*[6] 75% of the voting rights are included in the consolidation. Without this, a chain held at 75% through a number of tiers would fragment into a number of overlapping groups. When a direct holding is 50% or less, it would count as zero. This should ensure group control of any companies in the indirect 75% ownership chain.

The principles regarding the calculation of voting rights are not fully clarified, whereby planning opportunities may arise. See for discussion infra section IV, 3.

In order to assess the proposed technical outline of the concept of a group for CCCTB purposes, the subsequent section describes the developements in and the present version of the concept of a group for Danish joint taxation purposes.

III. Danish experiences regarding the concept of a group for joint taxation purposes

1. The historical development in brief

Similarly to many other countries, there is no uniform concept of a group for Danish tax purposes. As a result, a large number of group definitions are applied with a different meaning depending on the situation involved. At one end of the spectrum, a group is recognized with as little as 10% of the ownership of shares, and at the other end of the spectrum, there is the requirement of full ownership. In between a variety of definitions involving common control

[6] The notion of *control* is not defined in the CCCTB technical outline.

based on voting rights and/or ownership of shares are seen, and, most recently, the concept of a group has been extended to include agreements regarding the exercise of decisive influence[7].

Historically, the Danish joint taxation regime required full ownership of all shares in a subsidiary (i.e. a 100 % ownership requirement). Some minor exceptions existed[8]. The companies that could opt for joint taxation were referred to directly in the provision. Foreign subsidiaries should be organized in a corporate form similar to that of the included Danish companies. The now historic joint taxation regime was voluntary.

For a long time, it was formally required that an economic integration of the subsidiary existed. In administrative practice, however, this requirement usually did not prohibit joint taxation, and as a consequence the formal requirement was abolished from the tax year 1983/84.[9]

The Danish parent company was on an annual basis free to choose which foreign and Danish subsidiaries should be included in the Danish joint taxation. A compulsory "all-in" or "all-out" principle introduced in 1962 was abolished from the tax year 1983/84 with reference to the fact that a system with a 100% ownership requirement is easy to circumvent by simply selling one share in the subsidiary.[10]

This strict ownership ownership requirement has been criticized for resulting in lack of flexibility in the joint taxation regime.[11] Some of the issues raised concerned the acquisition of innovative companies where it may be considered beneficial from a business perspective to maintain an ownership interest of the management of the company. This would not be permissible under the historic joint taxation regime. Moreover, stock option plans for the employees in a subsidiary could not be carried out without excluding the subsidiary from the joint taxation. Finally, it was stated that the group structures in many Danish groups may be a creation influenced by the tax legislation.

2. The present joint taxation regime

In 2005, the Danish joint taxation reform was passed through the Parliament. Following the amendment, income from a foreign permanent establishment or foreign immovable property is kept out of the statement of taxable profit from a Danish company.[12] Consequently, profits from a foreign permanent establishment or from foreign immovable property are tax-exempt in Denmark, while, inversely, a loss cannot be set off against taxable income in Denmark. Income from consolidated foreign companies is kept out of the Danish income statement in the same manner.

Following the 2005 reform, a mandatory national joint taxation regime was introduced. The mandatory national joint taxation reqiurement is applied to Danish consolidated companies (not including foreign permanent establishments and immovable property) and foreign

[7] See for an overview Bundgaard, Skatterettens koncernbegreb, in *Festskrift til Ole Bjørn* (2004)pp 61 et seq. and regarding the most recent developments Bundgaard, Private Equity Funds & Leveraged Buyouts – Danish attack on transparent entities and other controlling entities, *Journal of Derivatives & Financial Instruments* 2006/5, pp 223 et seq.
[8] Cf. § 31 of the then applicaple Corporation Tax Act.
[9] See Rapport fra Sambeskatningsudvalget, Betænkning nr. 1452, 2004, p 33.
[10] See Rapport fra Sambeskatningsudvalget, Betænkning nr. 1452, 2004, p 34.
[11] See Rapport fra Sambeskatningsudvalget, Betænkning nr. 1452, 2004, p 225.
[12] Cf. Corporation Tax Act, section 8, subsection 2.

companies' permanent establishments and immovable property in Denmark.[13] Simply put, the mandatory national joint taxation includes, as a starting point, business on Danish territory. Consequently, group losses in Denmark are automatically deducted from the group profit in Denmark.

The mandatory national joint taxation is supplemented with the option of choosing international joint taxation. Choosing international joint taxation is voluntary, but the all-in or all-out principle has extensive consequences.[14]

3. The present concept of a group for joint taxation purposes

3.1. In general

As a consequence of the introduction of the mandatory national joint taxation and the all-in or all-out principle regarding international joint taxation, the previous 100% ownership requirement was reduced considerably. The starting point today is the definition of consolidated companies in The Danish Financial Statements Act.[15] The accounting definition of a group includes several objective elements and some subjective elements in order to prevent circumvention.

The Danish Minister of Taxation has confirmed that the interpretation of the tax law definition of a group and the accounting law definition of a group are identical, whereby the interpretation of the notion of a group for accounting law purposes is of relevance for tax law purposes with respect to the interpretation of the Corporation Tax Act, section 31 C.[16] The tax authorities are, however, not bound by the interpretation of the Danish Commerce and Companies Agency (being the competent authority regarding the interpretation of the accounting law definition of a group) regarding the concept of a group and may consequently come up with a diverging result based on the same facts and circumstances[17].

It is commonly acknowledged that the concept of a group for accounting purposes consists of five indicators of a parent company. In principle, these indicators are of equal value and interchangeable, whereby the fulfillment of one of the criteria excludes the other criteria.

The indications in Corporation Tax Act, section 31 C, subsection 2, no. 1-4 are considered de jure indications, whereas the indication in no. 5 expresses a de facto group indication[18]. The indications are commented separately infra.

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[13] Cf. Corporation Tax Act, section 31.

[14] Cf. Corporation Tax Act, section 31 A. In the choice of international joint taxation, all Danish and foreign consolidated companies including all their Danish and foreign permanent establishments and immovable property are included in the Danish joint taxation (the global pooling principle). Even if the ultimate parent company is not established in Denmark, the global pooling principle results in the inclusion of all consolidated companies in the Danish joint taxation. The real consequence of the choice of international joint taxation is that the company must accept that all income in the group companies – from loss making as well as profitable activities – is taxed according to the Danish rules on income statements and with the Danish rates of company taxation (25%).

[15] Cf. Corporation Tax Act, section 31 C.

[16] See enclosure 16 to act no. 426, June 6th 2005 (Bill L 121).

[17] See Gulmand/Vinther/Werlauff, *Sambeskatning: 2007/08*, 2nd edition (2007) p 20, who also reject the possibility of obtaining a preliminary ruling from the Europan Court of Justice regarding the concept of a group based on the underlying 7th company law Directive.

[18] See e.g. Gulmand/Vinther/Werlauff, *Sambeskatning: 2007/08²* p 21.

3.2. Majority of shareholders' voting rights

Firstly, a parent company is a company that has the majority of the voting rights in another company. This criterion is the most objective and the most important of the five criteria. Based on this, more than 50% of the voting rights should be held. The criterion is not met if a majority is present on a regular basis on the shareholders meeting, whereby it may be expected that a majority is present. Accordingly, a so-called practical majority, whereby a lower percentage of the total number of voting rights is sufficient to reach decision at the shareholders meeting, does not fulfill the criterion.

For practical purposes, the voting rights and the formal ownership of the shares accompany each other. Voting rights based on agreements regarding transfer of voting rights are, however, sufficient to fulfill the requirement. Also, voting rights transferred on the basis of a pledge are included under the assumption that voting rights are permanently transferred to the pledgee[19].

This group indication may result in a situation where a company owns the majority of shares in the other company without fulfilling the requirements for a parent company.

Voting rights held by the parent company and its subsidiaries should be included in the calculation of voting rights[20].

3.3 Shareholding combined with the right to appoint or remove the majority of the members of the top management of a company

A parent company is moreover constituted if a company is a shareholder of another company and has the right to appoint or remove the majority of the members of another company's supreme management organ. As regards Danish public limited liability companies, this organ is represented by the board of directors.

This criterion has only little practical impact due to the fact that this particular right is granted the majority of the voting rights at the shareholders meeting.[21] Some importance may be given to the criterion if a minority shareholder is granted the right to appoint or remove the majority of the top management of a company[22]. However, this has to be a legal right supported by ownership, shareholders agreement, articles of association or another form of binding agreement.[23]

3.4. Shareholding combined with the right to exercise a dominant influence over a subsidiary pursuant to a contract, memorandum or articles of association

A parent company is constituted if a company, a foundation, a trust or an association is a shareholder and has the right to exercise a dominant influence over a subsidiary pursuant to a contract, memorandum or articles of association. This criterion most likely refers to group

[19] See Guldmand/Vinther/Werlauff, *Sambeskatning: 2007/08*^{2} p 23.
[20] Cf. Corporation Tax Act, section 31 C, subsection 4.
[21] Cf. regarding Danish law section 49, subsection 6 and section 77 of the Danish Act on Public Limited Liability Companies.
[22] See to this effect Ramskov/Kusk/Buur, *Sambeskatning* (2005) p 80.
[23] The criterion in question has been applied on a few occations in case law. One example is found in TfS 2007, 608 SR where one company owned 90% of the shares of another company and had the right to appoint all members of the board exept one. In this situation, the National Tax Board found the criterion in Corporation Tax Act section 31 C, section 2(2) applicable. See also similarly the case TfS 2006, 267 SR.

agreements known in German law ("Beherrschungsvertrag"). Such agreements resulting in a dominant influence over a subsidiary can hardly be made under Danish law. However, the criterion may be relevant with respect to foreign subsidiaries.

3.5 Controlling shareholding pursuant to an agreement with other shareholders

Moreover, a company is considered a parent company if the company is a shareholder and pursuant to an agreement with other shareholders controls a majority of shareholders' voting rights in another company (the subsidiary).

This criterion inter alia includes shareholders agreements regarding the exercise of voting rights. Under this criterion it is not sufficient to hold a dominant influence. The influence has to be based on the majority of voting rights and must in addition be based on agreement with the other shareholders[24].

3.6 Shareholding combined with the exercise of dominant influence over the management of the other company

The four criteria mentioned above are all considered de jure criteria. In contrast, the fifth criterion is a de facto criterion. According to this criterion, a company is considered a parent company if it is a shareholder and exercises the dominant influence over the operational or financial management of the other company (the subsidiary). Accordingly, subjective criteria may be included in the assessment of whether a group of companies exist.

Under this criterion, it is sufficient that the shares in the subsidiary are "held" including any form of disposal of the shares including pledge, right of use etc. The criterion requires that a dominant influence is in fact exercised.

It is often said that this fifth criterion includes so-called "practical majority", which refers to a situation where a dominant influence is fact obtained without holding the majority of the voting rights if all shareholders met a the general assembly[25].

It is not entirely clear what is meant by the reference to the "operational and financial management" of a company in the wording of the provision.[26]

[24] There is a possibility to fall under the scope of the criterion in no. 1 and no. 4. The difference between theese criteria lies in the use of the phrases "has" and "has the right", where the first refers to a more permanent right to dispose over the voting rights, whereas the latter refers to a more loose right to dispose over the voting rights. See Werlauff, *Werlauff's kommenterede aktieselskabslov*(2002) p 17 et seq. Moreover, there is no ownership requirement under no. 1.

[25] See e.g. Guldmand/Vinther/Werlauff, *Sambeskatning: 2007/08*[2] p 26.

[26] See Ramskov/Kusk/Buur, *Sambeskatning*, p 82. In case law, the criterion was considered to be fulfilled in TfS 2007, 608 SR. The National Tax Board found that a company that holds 90% of the shares (all so-called B-shares) of another company exercised a dominant influence due to the following circumstances:
- The majority of the members of the board were appointed by the company.
- The board appoints the chairman, who would have the decisive vote in cases of equal votes.
- The board would hold the competence to hire and lay off the directors of the company.
- The board signed for the company.
- The company (or any other person appointed by the company) had a call option regarding all existing ordinary shares (subject to a 6 months notice).

3.7 Companies quoted on a stock exchange and preparing consolidated accounts under IFRS

Some groups should apply the definition of a group as defined in article 4 of the EU regulation regarding the application of IFRS (regulation 1606/2002). This applies to parent companies that prepare consolidated accounts according to IFRS.[27]

As regards companies quoted on a stock exchange, it is stated in EU regulation 2238/2004, dated 29 September, 2003 as amended by regulation 2238/2004 dated 29 December, 2004 that IAS 27 should be applied. According to IAS 27, a group of companies is defined as:

> *12 Consolidated financial statements shall include all subsidiaries of the parent.*
> *13 Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than half of the voting power of an entity unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control. Control also exists when the parent owns half or less of the voting power of an entity when there is:*
> *(a) power over more than half of the voting rights by virtue of an agreement with other investors;*
> *(b) power to govern the financial and operating policies of the entity under a statute or an agreement;*
> *(c) power to appoint or remove the majority of the members of the board of directors or equivalent governing body and control of the entity is by that board or body; or*
> *(d) power to cast the majority of votes at meetings of the board of directors or equivalent governing body and control of the entity is by that board or body.*
> *14 An entity may own share warrants, share call options, debt or equity instruments that are convertible into ordinary shares, or other similar instruments that have the potential, if exercised or converted, to give the entity voting power or reduce another party's voting power over the financial and operating policies of another entity (potential voting rights). The existence and effect of potential voting rights that are currently exercisable or convertible, including potential voting rights held by another entity, are considered when assessing whether an entity has the power to govern the financial and operating policies of another entity. Potential voting rights are not currently exercisable or convertible when, for example, they cannot be exercised or converted until a future date or until the occurrence of a future event.*
> *15 In assessing whether potential voting rights contribute to control, the entity examines all facts and circumstances (including the terms of exercise of the potential voting rights and any other contractual arrangements whether considered individually or in combination) that affect potential voting rights, except the intention of management and the financial ability to exercise or convert.*

So far, only one case has been published regarding the application of the international financial reporting standards as a basis for Danish mandatory joint taxation. See TfS 2006, 745 SR, where a foreign company owned 65% of the shares in a Danish company and based on IAS 27.12 was assumed to control the Danish company. The company was unable to demonstrate whether another shareholder organized as a foundation exercised de facto control over the Danish company. Based on the information presented, the National Tax Board stated that is was not possible to clearly demonstrate that the significant ownership of the foreign company did not result in control.

3.8 Companies outside the scope of the definition of a group

Certain optional possibilities exist to keep subsidiaries outside the group, according to section 31 C, subsection 6 of the Corporation Tax Act. The scope of these possibilities is, however, narrow. A subsidiary may be kept outside the group if:

1) Important and permanent impediments exist regarding the exercise of the parent company's right over the assets or management of the subsidiary.

[27] Cf. Corporation Tax Act, section 31 C, subsection 7.

2) The necessary information cannot be obtained within a reasonable time or without incurring disproportionate costs, or

3) A subsidiary has not previously been a part of the joint taxation and the parent company exclusively own the shares/voting rights in the subsidiary with the sole objective of selling the shares[28]. If losses on claims are deducted or will be deductible according to section 4, subsection 5 of the act on taxation of gains on debt and claims, the subsidiary must be held outside the tax consolidation.

IV. Identification and discussion of some remaining issues

1. The relation between the consolidation and the group definition

Since the group definition also includes participations below 100%, it is necessary to deal with the problem that external shareholders co-own the subsidiary and that their profit claims must be considered.[29]

According to the proposal for technical outline, the consolidation under the CCCTB regime would extend to the entire tax base of all taxpayers of a group. In other words, consolidation implies consolidation of 100% of the tax base of all entities belonging to the group. If a company owns 95% of a subsidiary, it will consolidate 100%.[30] In a footnote it is stated that there seems to be no need for compensation of minority shareholders:[31]

> "There seems to be no need for compensation of minority shareholders under the CCCTB system as a group member receives a share in all the profits and all the losses of the group. All the group members receive reciprocal advantages and disadvantages. The system differs therefore from e.g. a system of group relief where compensation may be necessary because there is one way advantage where a group member surrenders a loss to the company claiming the tax relief."

We do not find this reasoning convincing. The following example illustrates that the problems concerning disadvantages for the minority shareholders in a lossmaking company are not solved under the suggested CCCTB regime:

Company A owns 80% of the shares and 80% of the voting rights of Company B. Company A opt for the CCCTB. Company B has made some investments and creates losses of 50 per year, whereas company A has income of 100 per year. Under the CCCTB regime, losses from company B is consolidated with income from company A. If company A sells the shares (or, say, 10% of the shares and voting rights) in company B after a few years, no losses would be attributed to company B.[32] Similarly, it is hard to see that the minority shareholders of company B receive any advantage if company A after 5 years with losses in company B opts not to continue the CCCTB.

Since only the ownership of the voting rights is relevant, the same result occurs if company A owns, say, 20% of the shares, but 80% of the voting rights.

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[28] As regards the first part of this exception, it is required that the shares in the subsidiary are only held for a relatively short period and that serious activites in order to sell the shares are carried out. See Hasselager et al., *Kommentar til årsregnskabsloven*, p 700 et seq., Ramskov/Kusk/Buur, *Sambeskatning*, p 94 and Guldmand/Vinther/Werlauff, *Sambeskatning: 2007/08*[2], p 31.
[29] See Schön, Group Taxation and the CCCTB, *Tax Notes International* 2007, p 1073.
[30] See CCCTB WG 26 July 2007 (CCCTB/WP057\doc\en), paragraph 86.
[31] See CCCTB WG 26 July 2007 (CCCTB/WP057\doc\en), footnote 30.
[32] See CCCTB WG 26 July 2007 (CCCTB/WP057\doc\en), paragraph 103.

In the Danish national joint taxation system, a group company that utilizes the loss of another group company is obliged to pay the tax value (presently 25%) of the utilized loss to the lossmaking company. This system secures the compensation of the minority shareholders under many, although not all, practical circumstances. A similar system under the CCCTB regime would supposedly be more difficult to accept for the Member States.

Another possible solution is to consolidate on a pro rata basis instead of 100% of the tax base of all entities belonging to the group. This solution, however, raises other problems[33].

The problem concerning minority shareholders would not arise if only 100% owned subsidiaries were to be included in the CCCTB. As the Danish experience under the joint taxation regime before the tax year 1983/1984 shows, this would, however, make it easy to circumvent the requirement to include all subsidiaries under the CCCTB. As stated by Schön, the participation threshold should depend on whether the consolidation is made mandatory or optional.[34]

It is hardly possible to find an easy way to solve this problem regarding the minority shareholders[35]. In our opinion, the problem of protecting the rights of the minority shareholders, however, has to be addressed.

2. The voting rights

It is seen that according to the proposal for a technical outline, the concept of a group is based purely on the ownership of voting rights. This will lead to the use of different criteria regarding the concept of a group for EU corporate tax law purposes. Thus, the Parent-/Subsidiary Directive and the Interest-/Royalty Directive apply a criterion regarding ownership of the shares of the dividend or interest paying company.[36]

Nevertheless, in our opinion, it seems reasonable to choose the voting right concept for the CCCTB regime.

However, the definition of voting rights has to be further developed, as shown e.g. in the definition of a group in the accounting rules, including IAS 27, and group definition in the Danish joint taxation rules, cf. supra. Especially lossmaking companies might give rise to problems. The following example illustrates this:

Company A owns (100%) the shares in company B. Company B plans to make some investments and is expected to create losses for the following year. Given the circumstance that company A and B cannot offset those losses for tax purposes based on the actual facts,

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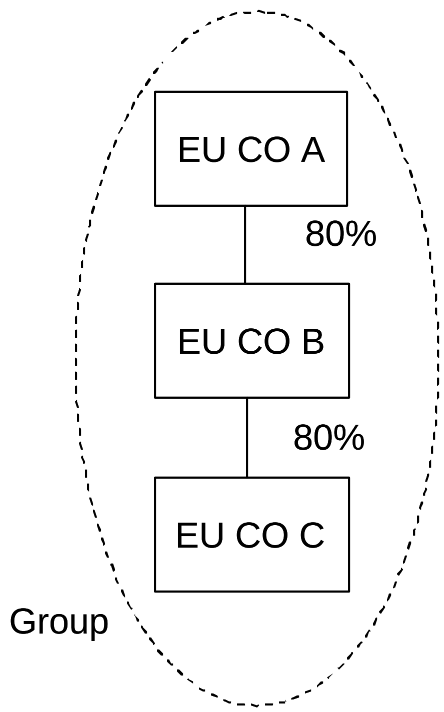
[33] See e.g. Rapport fra Sambeskatningsudvalget, Betænkning nr. 1452, 2004, p 230 et seq..
[34] See Schön, *Tax Notes International* 2007, p 1074.
[35] See Schön, *Tax Notes International* 2007, p 1073, stating that a system of split income determination would be counterproductive, since it would cumulate for the subsidiary all income determination problems of the separate accounting method, including the questions regarding common base taxation.
[36] A question regarding the ownership requirement in the parent-/subsidiary has been lodged before the ECJ in Case C-48/07 *Les Vergers du Vieux Tauvers SA* for a preliminary ruling: "*Is the Law of 28 December 1992, which amended the wording of Art. 202 of the 1992 Code of Taxation on Income by referring to Directive 90/435/EEC (1) and required that the beneficial owner of dividends had a holding of capital in the Company which distributed such dividend, in as much as that Law does not explicitly specify that the holding must be as full owner and therefore implicitly permits the interpretation made by the respondent, that the mere holding of a right of usufruct of shareholdings in the capital carries the right to tax exemption on such dividends, compatible with the provisions of that Directive concerning holdings in capital, and in particular with its art. 3, 4 and 5?*"

company A transfers, say, 80% of the voting rights to company C (not a group company) combined with an option to repurchase the voting rights after one year. Company C opts for CCCTB and can therefore utilize the losses of the year in question of company B for tax purposes.

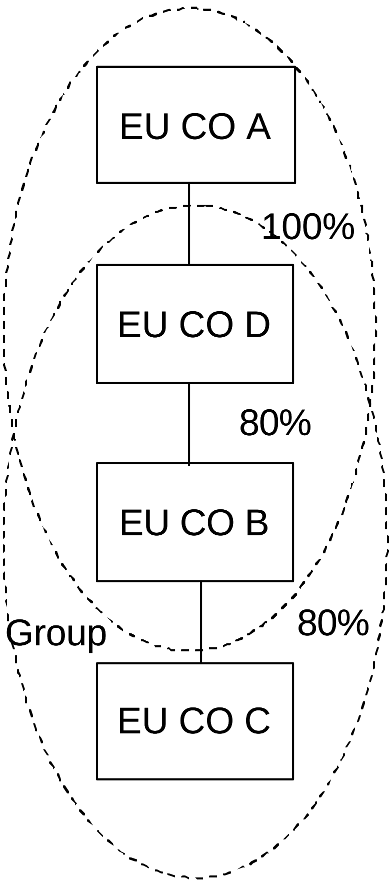
3. Calculating the ownership of voting rights

For the purpose of calculating the parent company's level of indirect ownership under the CCCTB, each respective holding percentage would have to be multiplied. When a direct holding is more than 75%, it would count as 100%. According to par. 89 of the proposal for technical outline, this ensures that all subsidiaries in which the parent directly or indirectly controls 75% of the voting rights are included in the consolidation. Without this, a chain held at 75% through a number of tiers would fragment into a number of overlapping groups. When a direct holding is 50% or less, it would count as zero. This should ensure group control of any companies in the indirect 75% ownership chain.[37]



If we change the example by interposing a holding company between A and B, A no longer has a direct holding in B:

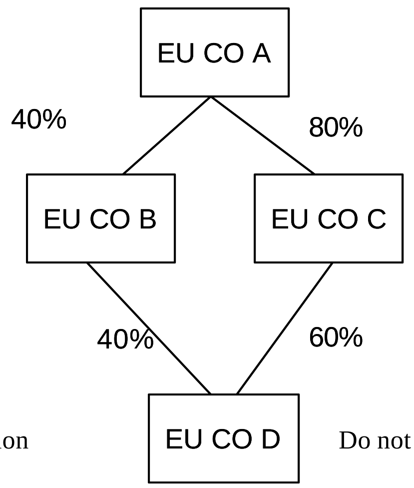
[37] See regarding this statement under heading V. Consolidation in the CCCTB WG document, par. 89.



According to paragraph 89 of the technical outline, only direct holdings of more than 75% should count as 100%. By multiplying D’s and B’s holding percentage for the purpose of calculating A’s level of indirect ownership of voting rights in C, A does not meet the ownership level of more than 75% (80% x 80%= 64%). In this example, overlapping groups are not avoided (A, D and B as well as D, B and C would form a group).

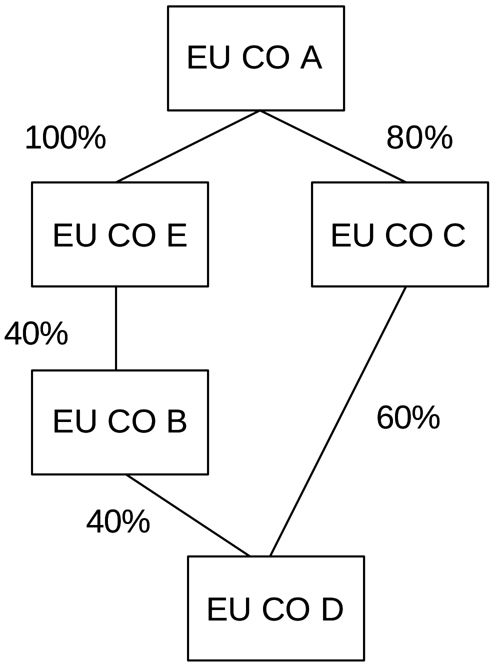
The example illustrates that it should be taken into consideration counting indirect holdings of more than 75% as 100% as well. Otherwise, unforeseen disadvantages or planning opportunities may occur.

Likewise, counting not only direct holdings of less than 50%, but also indirect holdings of less than 50% as zero should be considered. In paragraph 90 of the proposal for technical outlines, the following example is given:



According to the proposal for technical outline, the rationale behind the rule for counting voting rights less than 50% as zero is that A's participation in B is a minority participation, and that B's 40% in D cannot be controlled by A, as this company only has 40% of the voting rights of B.

With the 50% rule, D is not considered a part of the group, because A's indirect holding through C is calculated as 100% x 60%= 60%, whereas A's indirect holding through B is calculated as 0% x 40%= 0%. If a holding company is interposed between A and B (e.g. A owns 100% of the voting rights of the holding company, and B owns 40% of the voting rights of B), A has an indirect holding of B and should therefore count the indirect ownership though the holding company and B as 100% x 40% x 40%=16%. In this case A indirectly owns 60% + 16%= 76% of the voting rights in D, and, accordingly, D is a part of the group.



In general, the use of a dual participation threshold (i.e. 50% and 75%) makes the concept of a group more complicated. A more simple system may be accomplished if only one threshold is applied, e.g. by using a requirement referring to the majority of voting rights. Such a requirement could be combined with other forms of legal or factual control, as is seen in legislation regarding financial accounts and the Danish legislation on joint taxation.

If the present proposal is designed to meet a desire to keep out of the consolidation subsidiaries in which the parent only directly or indirectly owns 50-75% of the voting rights, a similar result could be reached by making it possible on a case by case basis to grant an exemption or alternatively making the number of companies included under the consolidation optional.

4. Companies that may opt for consolidation

In accordance with the proposal for the technical outline, the CCCTB Directive would apply to EU companies listed in an annex that are subject to corporate income taxes (or similar subsequently introduced taxes) in an EU Member State[38]. It is stated that the Directive would also apply to EU PEs of third country companies with a similar form to EU companies that are subject to one or more of the mentioned Member State taxes.

It should be welcomed that the technical outline proposes the creation of a list of third country corporate forms, which would be updated annually in the light of the experience gained by tax authorities in applying the foregoing rules. Such a list would clearly enhance legal certainty. This issue should, in our opinion, be given more consideration before drafting a Directive. Based on the present wording of the technical outline, it may be the case that the classification of entities to a large extent should be based on principles of domestic tax law. In our experience, such a system would lead to legal uncertainty, since Member States do not apply identical principles regarding entity classification for tax law purposes. Based on the risk of legal uncertainty, it may be considered to introduce common EU principles of classification regarding third country companies.

The position of *foundations* should be carefully considered. In Danish tax law, for instance, foundations are included when considering a group of companies but excluded for actual joint taxation purposes[39].

Finally, the notion of a *permanent establishment* should be clarified. Similarly to the existing corporate tax law Directive, it should be clarified whether the notion as defined in tax treaties will be applied for the purpose of CCCTB or whether a specific notion of a permanent establishment is applied with in an EU meaning.

V. Conclusion and recommendations

The purpose of this paper has been to discuss the requirements to form a group under a possible future Common Corporate Consolidated Tax Base (CCCTB). The perspective of Danish law has especially been in focus.

Based on the analysis, our overall conclusion is that a concept of a group based on voting rights seems reasonable to apply for CCCTB purposes. However, there are several issues that have to be thoroughly analysed before moving on in the process. In this paper, we have highlighted and discussed only some of these issues.

One issue raised in the analysis is that of the position of minority shareholders, which, in our opinion, has to be adressed.

Further, it has been discussed whether formal transfers of voting rights may be used for tax planning purposes in order to reduce taxable income, which may not be in line with the overall purpose of CCCTB.

The underlying rationale behind the application of a 75% threshold may be considered. Moreover, the calculation of voting rights based on indirect holdings may give rise to some unforeseen consequences in the present form. Based on the experiences from Danish law, it

[38] See par. 10 of the technical outline.
[39] See section 31, subsection 1 and section 31 C, subsection 1 of the Corporation Tax Act.

may be recommended to consider application of the same concept of a group as the one used for IFSR and consolidated accounts purposes.

Finally, an issue may arise regarding the classification of third country companies with EU PEs. In this respect, it may be considered to provide uniform principles of classification in order to reduce legal uncertainty.

In conclusion, in our view, the concept of a group for CCCTB purposes needs to be further analysed and adjusted before finalizing the proposal for a Directive.