Fédération des
Experts Comptables
Européens

SURVEY ON GROUP TAXATION DOMESTICALLY AND ACROSS BORDERS WITHIN EUROPE

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Part I: Summary Conclusions
Part II: Answers by Country

A paper issued by the Direct Tax Working Party of the European Federation of Accountants (FEE)

The Fédération des Experts Comptables Européens (FEE) is the representative organisation for the accountancy profession in Europe, currently grouping together the 38 leading institutes in 26 countries, including the 15 Member States, Cyprus, Czech Republic, Hungary, Iceland, Israel, Malta, Monaco, Norway, Romania, Slovenia and Switzerland. Between them these bodies have a combined membership of approximately 400.000 individuals of whom about 45% work in the public practice, providing a wide range of services to clients, whilst the other 55% work in various capacities in industry, commerce, government and education.

PART I

SUMMARY CONCLUSIONS

I. INTRODUCTION

FEE Direct tax Working Party has analysed the concept of *group taxation* in EU Member States, both domestically and across borders within Europe.

II. FEE RECOMMENDS

DOMESTIC GROUPS

- All Member States should implement the concept of domestic group taxation in general.

  In order to avoid unfair competition between companies in different EU-memberstates, FEE urges the EU for setting minimum standards for group taxation. As a minimum, loss transfer between group companies whole owned subsidiaries within all countries should be made possible. At second, elimination of taxation of intragroup transfers within all memberstates would be welcomed.

- To assist further cross-border trade within the EU and in order to conform to the EU-principle of freedom of establishments, FEE urges the member states (except Austria (strikethrough), Germany, the UK and France) to recognise permanent establishments as head of fiscal unity. Furthermore, requirements of direct shareholdership need to be extended to include indirect shareholdership, in order to allow companies not being in direct line to set-off their losses within one country.

  The tax system of Member States should allow group taxation to apply with respect to all subsidiaries in that territory.

  In order to avoid discrimination, permanent establishments of the same foreign parent should be capable of inclusion in the local tax group.

  Group taxation should apply also as a 100% subsidiaries whether directly or indirectly owned.

- Elimination of taxation of intragroup transfers within all Member States should be implemented to achieve tax neutrality. There should be no precondition even though there was no accounting consolidation.

CROSS BORDER GROUPS

Some countries accept permanent establishments of foreign EU-companies as 'head' (Organträger, moedermaatschappij) of a group (Austria, France, Germany, UK). Others don't, or have pending proposals on legislative change (The Netherlands). Referring to recent cases of the European Court of Justice on the ground of freedom of establishment (Commerzbank[1], ICI[2] and St. Gaubain[3]), it is at least questionable if a non-acceptance of permanent establishments as head of a group can be maintained by the countries involved. As a consequence, foreign companies with permanent establishments in memberstates will otherwise be treated different from foreign companies having a local corporation in the other memberstate.

Only Denmark and the UK allow two national sistercompanies being held by a foreign company as forming a group for tax purposes. Other memberstates do *not* recognise a group or a fiscal unity in these circumstances (requirement of direct shareholderhip between sistercompanies). It is not clear whether this is in line with the EU Treaty.

III. PURPOSE OF THE SURVEY

The purpose of this survey is two-fold:

1. To identify differences in the treatment of the concept of 'group taxation' in FEE memberstates from a *national* point of view. Differences in systems might lead to 'hidden competition' between EU memberstates and therefore *create unfair competition* between companies within the EU.

2. To identify, from a cross-border point of view, if certain rules prevent foreign EU companies to 'join' or set-up a fiscal unity in a specific country. This would immediately lead to *distortions in cross-border trade* within the EU.

IV. WORK CARRIED OUT

The member organisations of FEE have answered 14 questions regarding *fiscal unity* in the national systems and cross border situations. It appeared from this first set of answers that the concept of fiscal unity is interpreted in different ways among the countries involved. Therefore, a second set of questions focussed on the concept of *group taxation* and differed between *loss compensation* on the one hand and *elimination of intragroup profits* on the other hand. Answers on these questions have been integrated in our conclusions. These conclusions have been drawn upon answers received until 24 February 2001.

[1] Commerbank Case nr. 330/90
[2] ICI Case nr. C-264/96
[3] St. Goubain Case nr.C-307/97

V. SUMMARY

NATIONAL GROUPS

The survey shows that nearly every memberstate (except for Belgium and Italy) recognises the concept of *group taxation*. However, a difference should be made between countries recognising *profit-loss transfer* between separate legal entities and countries recognising *elimination of intragroup-profits*.

Countries using the concept of *fiscal unity* (The Netherlands, France, Spain and Portugal) allow groups filing just one tax return by the group-mothercompany. As a consequence, this type of group taxation leads to both profit-loss transfer between group companies *and* elimination of intragroup transfers.

Profit-loss transfer between separate legal entities:

Austria, Denmark, Finland, France, Germany, The Netherlands, Portugal, Spain, Slovenia, Sweden, UK

NO profit-loss transfer between separate legal entities:

Belgium, Italy

Elimination of intragroup transfers:

France, The Netherlands, Portugal, Spain, UK

NO elimination of intragroup transfers:

Austria, Belgium, Denmark, Finland, Germany, Italy (except if business is transferred), Slovenia, Sweden

Differences exist within the requirements between memberstates. Most countries only require shareholdership; Austria requires shareholdership *and* joint management and control.

The percentage of shareholdership differ from 51% (Germany), 75% (Austria and UK), 90% (Spain and Finland), 95% (France), 99% (The Netherlands) to 100% (Denmark).

Some memberstates require prior approval (The Netherlands and Portugal), some countries even require special agreements between the companies involved (Germany and Austria: the ‘Ergebnisabführungsvertrag’ and the ‘Gewinnabführungsvertrag’).

Every country has specific *anti-abuse clauses* within their legislation on fiscal unity. Punishment differs from recapture of set-off losses to taxation of hidden reserves on assets being transferred intragroup (France, UK and The Netherlands).

Carry forward of losses incurred in the pre-fiscal unity period is being dealt with equally in the memberstates: carry forward is only permitted if and as far as the originating company makes profit.

PART II

ANSWERS BY COUNTRY

QUESTIONNAIRE ON GROUP TAXATION DOMESTICALLY AND ACROSS BORDERS WITHIN EUROPE

Domestically/all taxes

1. ***Does the tax system recognize groups of resident companies as taxable persons (i.e. fiscal unity)?***

If yes, state the type of tax law and state the requirements for a group to be recognized. (e.g. 95% of share capital)

Austria

Yes ("Organschaft")

Only between parent company and subsidiary; the following conditions have to be fulfilled cumulatively:

(i) Parent company must own at least 75% of the share capital of subsidiary ("financial integration").

(ii) Subsidiary must effectively be managed and controlled by parent company ("organisational integration"); general requirement that at least one executive officer of parent company ("Geschäftsführer", "Vorstand") is also an executive officer of subsidiary ("Geschäftsführer", "Vorstand"); parent company assumes certain organisational tasks for sub (e.g. accounting, marketing, HR etc).

(iii) Subsidiary is integrated into the business of the parent company, i.e. supports and furthers the business of the parent company ("business integration"); this usually requires that the subsidiary is buying from or selling to the parent company. A holding company is deemed not to have a business of its own: if the parent company is a mere holding company (even if it manages several subsidiaries) no "Organschaft" is possible with its subsidiaries.

(iv) There must be a profit and loss assumption agreement ("Ergebnisübernahmevertrag") between the parent and the subsidiary; under such agreement the parent company would assume the statutory income or cover any statutory loss of the subsidiary so that the subsidiary has a zero income for statutory purposes; the profit and loss assumption agreement must be concluded for a period of at least 5 years.

Conditions (i), (ii) and (iii) must be met as of the beginning of the subsidiary's fiscal year for which "Organschaft" is to be applied for the first time; condition (iv) has to be met before the end of the subsidiary's fiscal year for which "Organschaft" is to be applied for the first time. If one of the conditions (i) – (iii) is not fully met then this can be compensated by the other conditions being very strongly met (i.e. if business integration is weak then this can be compensated by say 100% financial integration).

Belgium

No. Although present in Belgian accounting law, which requires the consolidation of connected companies' annual accounts, if some thresholds are exceeded, the concept of group in fiscal law only exists within the framework of co-ordination centres and service centres.

Czech Republic

No, the tax legislation of the Czech Republic does not recognize the groups of resident companies as taxable persons for corporate tax purposes. All the companies that are involved in the group of companies have the obligation to deal with their tax issues (tax returns, losses carried forward and back, etc.) separately. The above information refers both to direct and indirect taxation.

Denmark

Group taxation is allowed for corporate tax purposes under the joint taxation scheme. The basic conditions are:

- All companies participating in joint taxation with the parent company should be owned 100% by the parent company or indirectly owned 100% by the parent company through subsidiaries participating in the joint taxation.
- All companies must have the same income year (fiscal year, accounting year) and should generally be owned by the parent company directly or indirectly for the whole income year.

Furthermore joint registration for VAT purposes is allowed for a parent company and its 100% owned subsidiaries.

Finland

Direct taxation

There is no group taxation (fiscal units of resident group companies) in Finland. All the group companies are taxed separately.

Group contribution is, however, available, between a Finnish parent company and a Finnish subsidiary when the parent company owns at least 90 % of the share capital of the subsidiary and when both companies carry on business activity as defined in the Business Income Tax Act. Group contribution is available also between two Finnish subsidiaries, if the ownership requirement is met through the parent company. In the latter case the parent company may also be a foreign company situated in a tax treaty country.

It is also required, that the accounting periods of both the contributing company and the recipient company end at the same date and that the required ownership has come into being before the beginning of the accounting period in question.

The group contribution given by either a parent company or a subsidiary is deducted from the taxable income of the contributing company and added to the taxable income of the recipient company.

Group contribution is not available if either the contributing company or the recipient company is a bank, other credit institution, insurance institution or pension institution.

The provisions of group contribution are applicable only to limited liability companies. They are not applicable to partnerships.

Indirect taxation

Group registration for value added tax purposes is available for such groupings of entrepreneurs that mainly supply tax-exempt financial or insurance services.

The group may include several financially, economically and organisationally closely related companies involved in financial or insurance activities. In addition, the group may include companies over which a company involved in financial or insurance activities exercises either direct or indirect control. A company is considered to exercise control over another company when it holds more than half of the voting stock of the other company or is entitled to appoint the majority of the members of the board of directors or other corresponding body of the other company.

The group registration may take place only upon application of the companies concerned.

France

Yes, the French tax system recognizes groups of companies as taxable persons for corporate tax purposes.

Main requirements :

- Corporations must be located in France
- Mother company must hold directly or indirectly 95% of the dividend and voting rights in the companies members of the tax group.
- Mother company of the group is not allowed to be a 95% daughter company of another French Company.
- Election of a group tax rules must be for a 5 year period.
- All companies included in the group must have the same tax year.
- Mother company may choose to exclude certain companies that would be theoretically includible.

Germany

The German tax system recognizes different kinds of group taxation (fiscal unity). A group taxation (fiscal unity) is possible for corporate tax, municipal trade tax and value added tax purposes.

– ***Corporate tax (sec. 14 German Corporation Income Tax Code)***

A group taxation (fiscal unity) for corporate tax purposes requires a profit transfer agreement (sec. 291 para. 1 German Stock Corporation Act) between the controlled company (“Organgesellschaft”) and the controlling company (“Organträger”) and the financial integration. A profit transfer agreement must be concluded for at least five years.

Under sec. 14 and sec 17 German Corporation Income Tax Code the controlled company must have the legal form of a corporation. The controlling company can be a corporation as well as a natural person or a partnership.

Financial integration under sec. 14 German Corporation Income Tax Code has the meaning of the majority of voting rights of the controlling company over the controlled company.

– ***Municipal trade tax (sec. 2 para. 2 German Municipal Trade Tax Code)***

A group taxation (fiscal unity) for municipal trade tax purposes requires under sec. 2 para. 2 German Municipal Trade Tax Code the financial, operational and economical integration of the controlled company and the controlling company. The terms of financial, operational and economical integration correspond to the aforementioned statements of the group taxation (fiscal unity) for corporate tax purposes.

As derogation from the group taxation (fiscal unity) for corporate tax purposes, the group taxation (fiscal unity) for municipal trade tax purposes does not require a profit transfer agreement.

The forthcoming reform of company taxation will not have any impact on the requirement of the financial, operational and economical integration of the controlled company and the controlling company for a group taxation (fiscal unity) for municipal trade tax purposes.

– ***Value added tax (sec. 2 para. 2 German Value Added Tax Code)***

The requirements of a group taxation (fiscal unity) for value added tax purposes correspond to the requirements of a group taxation (fiscal unity) for municipal trade tax purposes, e.g. a financial, operational and economical integration of the controlled company and the controlling company must exist. A profit transfer agreement is not required.

Italy

No, the Italian tax system doesn't recognize groups of companies as taxable persons for corporate tax purposes.

Only for VAT purposes companies belonging to the same group have the right of compensating their monthly (or quarterly) debt/credit results in order to avoid the payment of VAT by some companies and – at the same time – the request of VAT refund by other companies.

Luxembourg

Corporate tax
Law = Article 164bis of "Loi de l'impôt sur le revenu" (Income tax law)
Requirements
A fully taxable resident company mother company
Fully taxable resident subsidiaries
Economic and organizational integration
Approval by the Minster of Finance
Direct or indirect shareholding of at least 99%
If indirect shareholding intermediate companies need to be fully taxable resident companies
In exceptional cases, if the activity is of structural economic interest a shareholding of at least 75% is sufficient
Application has to be made by the mother company and the subsidiaries

Municipal business tax
Law = paragraph 2 GewStDV
Requirements
Fully taxable resident companies
Mother company has majority of votes
Economic and organizational integration

Integration for municipal business tax is applied automatically if conditions are met.

The Netherlands

Yes, the Dutch Tax system recognizes groups of companies as taxable persons for corporate tax purposes (art. 15 Dutch CTA).

Main requirements:

- at least 99% legal and beneficial ownership of shares of one company ('Mothercompany') in another company ('Daughtercompany');
- companies involved must be BV or NV;
- fiscal unity only commences at the beginning of the tax-year;
- application procedure tax inspector.

Portugal

Yes.

Groups of resident companies are recognized as a fiscal unity only for Corporate Income Tax (IRC) purposes.
- 90% of share capital is required.

Slovenia

Yes. Conditions: more than 90% of share capital. Group must have permission of tax authorities and group tax return must be worked out at least 3 years. If group tax return is worked out only 2 years and 3rd year firms in group are taxed according to individual tax returns, also for previous two years tax must be paid according to individual tax returns.

Spain

The Spanish tax system acknowledges corporate groups as taxpayers of the corporate income tax.

The main requirements for a group to be acknowledged are:

- Group Companies must be resident in Spain.
- The dominant company must not be subject to fiscal transparency and must own, at least, 90% of the corporate capital of the group's companies.
- 90% or more of the dominant company's corporate capital must not be held by another resident company which meets the requirements to be a dominant company.
- All companies must pay the same tax rate and have the same corporate year as the dominant company.
- No company may enjoy exemption from corporate tax nor have gone into temporary receivership, bankruptcy or incurred losses that mean a reduction of the book value to less than half of the corporate capital.
- The minimum period for group taxation to apply is 3 years.

Sweden

No.

United Kingdom

The simple answer is no. There are no provisions in UK law for consolidated tax returns or consolidated group taxation.

On the other hand, where there is a common minimum 75% ownership of UK companies, then a UK group exists and many intergroup transactions can be carried out without tax consequence and current year losses of one company can be surrendered against other companies current year profits. A formal election signed by all companies involved in the surrender or receipt of losses is required annually.

Domestically/corporate tax

2. State the main consequences of a fiscal unity.
(e.g. non-taxed transfer of assets)

Austria

- Profits and losses of subsidiary are transferred to parent company for tax and statutory purposes (i.e. parent company becomes liable for any losses of sub arising after establishment of "Organschaft" and assumes 100% of the subsidiary's profit; subsidiary shows Nil income in its statutory financial statements);
- Minority shareholders of the subsidiary can receive a compensating payment from the parent company;
- No transfer of assets takes place;
- Intra-group profits are NOT eliminated but income/losses of companies in an "Organschaft" are to be determined on a stand-alone basis (arm's-length principle) and are then added up.

Belgium

N/A

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

Under joint taxation taxable income from profit making companies can be offset against tax losses from loss making companies within the group of companies.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

Losses of one company can be offset against the profit of another company. Normally intercompany transactions have no tax consequences. In some circumstances they may be tax consequences in the future if one of the companies leaves the group or if the tax group comes to an end.

Germany

If the requirements of a group taxation (fiscal unity) for corporate tax purposes are met, the income (profits and losses) of the controlled company is attributed to the controlling company. The controlling company is subject to tax on the total income of the fiscal unity, apart from the exception of sec. 16 German Corporation Income Tax Code. This provision states that compensation payments made by the controlled company to minority shareholders are subject to tax by the controlled company itself. Profits or losses of the controlled company can be offset against profits or losses of the controlling company.

Italy

Transfer pricing intercompany rules apply only to transactions between Italian resident companies and non Italian resident companies belonging to same group.

The Italian tax legislation doesn't contain any intercompany pricing rules applying to transactions between Italian resident companies belonging to same group (even though the Italian tax authority try often to assert conflicting opinions).

Luxembourg

The subsidiary is considered tax wise like a fixed establishment of the mother company.
Fiscal unity is applicable for a minimum period of 5 years.

The Netherlands

After official registration as fiscal unity, only one taxable person (the Mothercompany) exists. This means that no intragroup transactions can take place; these transactions can thus be carried out without tax consequences. Losses of one membercompany can be offset against the profits of the other company.

Portugal

- Losses of one membercompany can be offset against the profits of the other company.
- Profits or losses on any intra-group transactions can't be eliminated. (fiscal unity is not a "consolidated system" but only an "aggregated system".

Slovenia

You can reduce a profit of one company with loss of another company in a group. If all firms in group have tax profit there is no benefits achieved with group taxation.

Spain

After the group's acknowledgment by the administration, there is only one taxpayer. The taxation for the revenue yielded by internal transactions is deferred. The taxable base is calculated by compensating tax losses and profits.

Sweden

N/A.

United Kingdom

As mentioned above, where companies are part of a qualifying group, then many intergroup activities may be carried out without tax consequence. For example, assets can be transferred between such companies without the creation of tax liabilities, the recipient company will take over the existing tax attributes from the transferring company. Strictly, intercompany pricing rules do not apply to transactions between UK resident companies even where they are members of the same group.

3. Is group taxation achieved through filing of one consolidated tax return, or through filing by individual group companies, intra-group transactions being exempted?

Austria

- Separate tax returns are filed by parent and subsidiary;
- Intra-group transactions are NOT exempt (i.e. intra-group profits are not eliminated when determining the group's taxable income → no "consolidation" but aggregation of taxable income/loss of companies in the "Organschaft").

Belgium

N/A

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

Under the joint taxation scheme a joint tax return is filed as part of the parent company's tax return. The joint taxation tax return is a simple summarization of the taxable income and tax losses into one net taxable income or loss. All companies calculate its separate taxable income or loss. Intra group transactions are not exempted or excluded in any way - the ordinary tax rules apply both to the parent company and the subsidiaries.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

Each member of the group files its normal tax return plus specific tax returns mainly about the intercompany transactions.
Mother company has to prepare its normal tax return plus specific tax returns about the intercompany transactions plus specific consolidated tax returns.

Germany

Each individual company has to file its own tax return. Effectively group taxation is not achieved through the filing of one consolidated tax return. The controlling company as well as the controlled company has to file a special form, which is part of the tax return, to achieve the effects of group taxation.

Italy

See point 1.

Luxembourg

Filing of a consolidated tax return and of individual returns.

The Netherlands

One consolidated tax return.

Portugal

Group taxation is achieved through filing of one consolidated tax return.

Slovenia

Group tax return is a sum of individual tax returns.

Spain

Only one tax return obliges to pay (The dominant company), although all the companies of the group must file their own tax return, for informative purposes.

Sweden

N/A.

United Kingdom

As mentioned earlier, effectively group taxation is achieved not through the filing of one consolidated tax return but rather by the ability for transactions between qualifying group companies to be effected without tax consequence. Each individual company is responsible for filing its own tax return and making appropriate elections with respect to intergroup transactions.

4. ***Is it possible to carry forward existing losses (former years) from a merging company into the fiscal unity?***

Austria

- "Organschaft" is not a merger;
- Subsidiary may use its own NOLs which arose prior to the "Organschaft" against its own profits; parent company can not used pre-Organschaft NOLs from subsidiaries but can use its own NOLs against the income from subsidiaries.

Belgium

No.

Czech Republic

Provided the term "fiscal unity" relates to the group of resident companies (not to the individual company established or continuing its business as a result of merger of any other individual companies) there is no possibility to carry forward existing losses – see the response related to the question No. 1.

Denmark

Tax losses incurred prior to the participation in the jointly taxed group can be carried forward in accordance with the ordinary rules (5 year) but can only be utilised by the loss generating company itself and only after offsetting taxable income against tax losses for the current year within the jointly taxed group.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

Losses incurred by a company before the start of the fiscal unity can only be offset against profits made by the same company.

Germany

Under sec. 15 German Corporation Income Tax Code it is not possible for a controlled company to carry forward existing former losses, i.e. losses incurred from a period before the existing of the fiscal unity, into the group taxation (fiscal unity). The losses of the controlled company from pre-group periods are frozen and shall be offset against profits of the controlled company after the termination of the fiscal unity.

This provision is not applicable to the controlling company, which can carry forward existing former losses into the fiscal unity within the scope of the general rules.

Italy

See point 1.

<u>*Luxembourg*</u>

Carry forward of losses is possible but these may only be offset with subsequent profits of the company that suffered the losses.

<u>*The Netherlands*</u>

Losses incurred by a company *before* the start of the fiscal unity can only be offset against profits made by this company during fiscal unity.
Carry forward of losses can only take place *after* off-setting current losses of fiscal unity companies against current profits of other member-companies. Therefore, in spite of the fiscal unity concept, individual accounting by member companies is still required.

<u>*Portugal*</u>

A special regime applies to carry forward existing losses. Thus, the losses to carry forward are limited to current taxable income from the merging company.

<u>*Slovenia*</u>

No.

<u>*Spain*</u>

No. The individually made losses prior to the company's incorporation into the group can be compensated with the group's earnings profit, up to the profit limit of the company which made said losses and up to a deadline of 10 years since these losses have been made.

<u>*Sweden*</u>

N/A.

<u>*United Kingdom*</u>

It is not possible to bring forward losses from pre-group periods into a group tax loss surrender election. It should be noted that it is equally not possible to surrender losses brought forward even if they arise from a previous period in which a group relationship existed. Only current year losses can be surrendered for use against current year profits of the recipient.

5. *Is it possible to carry back losses incurred during fiscal unity to ' pre -fiscal unity' profits of individual companies?*

Austria

In Austria there is generally no carry-back of losses allowed.

Belgium

No. This clause is only applied to Belgian firms with permanent business premises in a country whose domestic legislation provides for a carry back of losses. In this case, the Belgian company's declarations of previous years must be revised, given that the amount of exempted profits of these years is reduced by the amount of the subsequent losses suffered abroad. The taxation of these profits occurs at the reduced rate, for reason of their foreign origin.

Czech Republic

Not applicable – see the response related to the question No. 4.

Denmark

No.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

Mother company can elect for carrying back losses of the group on its own profits realized before the creation of the group (in the prior three years).

Germany

Under sec. 15 German Corporation Income Tax Code it is not possible for a controlled company to carry back losses incurred during a fiscal unity to "pre-fiscal unity" profits of individual companies.

Again, this provision is not applicable to the controlling company, which can carry back losses incurred within the period of the existing fiscal unity to "pre-fiscal unity" profits of itself. The loss carry back is only possible within the scope of the general rules.

Italy

See point 1.

Luxembourg

No.

The Netherlands

Yes, but only on individual basis (individual losses during fiscal unity can be carried back to *own* profits of pre-fiscal unity years).

Portugal

No.

Slovenia

No.

Spain

No. The losses made by the group can only be compensated with profits obtained by the same group within the ten years after the loss has been made. If any company leaves the group or the latter ceases and there are losses pending a set-off, the companies will be entitled to an individual set-off of these losses insofar as they have contributed to their making.

Sweden

N/A.

United Kingdom

It is not possible to carry back losses against pre-group profits of group companies.

6. Is it possible to 'merge' new companies into an existing taxable group (fiscal unity)?

Austria

A parent company can establish an "Organschaft" relationship with several subsidiaries.

Belgium

N/A.

For your information, we would like to point out that the Income Tax Code (ICT) provides for an exemption of tax, under certain conditions, for the following situations:

- contribution by a Belgian resident company of a branch of activity or a comprehensive group of assets to a Belgian or EU company;
- contribution by a EU company of a Belgian permanent establishment remaining in Belgium;
- contribution by a foreign company of a Belgian permanent establishment to a Belgian company.

Czech Republic

Not applicable – see the response related to the question No. 4.

Denmark

Yes, new companies can participate in joint taxation, provided the conditions described above are fulfilled. Tax losses carried forward in joint taxation can only be utilised by the companies, which participated at the time when the tax loss was incurred. Consequently, a newly joined company cannot utilise tax losses carried forward in joint taxation from prior to its participation.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

Yes.

Germany

If the aforementioned requirements of establishing group taxation (fiscal unity) for corporate tax purposes are fulfilled, the “merger” of new companies into an existing fiscal unity is possible.

Italy

See point 1.

Luxembourg

Yes.

The Netherlands

Yes, even if a company is being incorporated by one of the member-firms during the fiscal year, this new company can immediately be merged within the existing fiscal unity.

Portugal

No. To merge new companies implies a new taxable group.

Slovenia

No.

Spain

The incorporation into the group is carried out as from the next accounting period following the one in which the company is controlled by, at least, 90% of its corporate capital and provided the remaining requirements of the first paragraph are met.

Sweden

N/A.

United Kingdom

As fiscal unity provisions do not exist, this is not really an applicable question. It should, however, be noted that it is possible to bring new companies into the provisions of the taxable group as from the date that the required 75% minimum shareholding is acquired.

7. Is it possible to quit a group without negative tax consequences?

Austria

"Organschaft" can be terminated without negative consequences after 5 years by terminating the profit and loss assumption agreement. The Organschaft can be terminated earlier without negative tax consequences for valid important business reasons (e.g. if the subsidiary is (partly) sold etc).

Belgium

N/A

Czech Republic

Yes. Since there are not fiscal entities constituted by the groups of companies in the Czech Republic there is no relationship between taxation and involvement of the individual company in any group of companies too. The result is that it is possible to quit a group without negative tax consequence.

Denmark

Yes, Danish companies can leave the jointly taxed group without any adverse tax consequences (see 8 below). If a foreign company (see 2 below) leaves the joint taxation this might trigger a recapture of tax losses utilised in the joint taxation. Recaptures of tax losses, which will take place at the level of the parent company, are controlled by complicated rules.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

There may be some negative consequences

- Capital gains or losses obtained on intercompany transactions on fixed assets have to be added to group income.
- Intra-group abandonment of debts and subsidies have to be added to group income in some circumstances.

Germany

It is possible to quit existing group taxation (fiscal unity). The termination of the profit transfer agreement after five years will not affect the tax consequences of a fiscal unity for the former years. The termination of the profit transfer agreement before the expiration of the five years term shall lead to the non-existence of the fiscal unity from the beginning.

Italy

See point 1.

Luxembourg

Yes.

The Netherlands

Quitting a fiscal unity is possible, but… if transactions have taken place between member companies and the quitting company through which hidden reserves have moved, quitting can be recognized as a *taxable event*. In this case, *all* hidden reserves of the quitting company must be re-valued to their current value.

Portugal

No. See 6.

Slovenia

No.

Spain

A company may leave a group. In this case, all internal transactions which have not had fiscal effects so far will have to join the group for taxation. In addition, if there are losses made by the group, deductions pending an application or instalment payments which have been made, they will have to be shared out according to the degree of participation in the latter of the company which leaves the group.

Sweden

N/A.

United Kingdom

Generally it is possible to leave a group without negative tax consequence. One circumstance where it would not be is where the company leaving the group as acquired assets from associated companies without the previous six years. By leaving the group, the deferred taxable gains on this transfer will be triggered.

8. *State the most important anti-abuse regulations regarding the fiscal unity in corporate tax law.*
(e.g. non-sale period of shares for three years)

Austria

Profit / loss takeover agreement between parent company and subsidiary must be maintained basically for at least 5 years

Belgium

N/A

For your information, we should note that the indirect transfer of profits from a firm established in Belgium to a taxpayer or a permanent establishment is governed by two types of provisions

1) On the one hand, by a general rule providing for the reincorporating of granted abnormal or voluntary benefits, regardless of their form (nevertheless, the financial aid granted to affiliated companies with financial problems does not constitute such a benefit; instead, it constitutes a waiving of receivables granted only with a view to compensate the borrower's losses). However, the abnormal or voluntary benefits granted by a firm established in Belgium to a non-affiliated firm that is established in a foreign country cannot be reintegrated in the Belgian firm's taxable base if this foreign country is linked to Belgium by a double taxation treaty. The fact that treaty law prevails over domestic law also requires the Belgian tax authorities to provide proof that the benefit is granted, due to links of interdependence, whether direct or indirect.

2) In addition, by rules governing specific situations: the payment of interest, fees and compensation of provisions or services and certain sales contracts. The first rule is intended to prevent the transfer of profits from a Belgian firm via the payment of fictitious or exaggerated charges to foreign companies or foreign business premises located in countries known to have lower tax rates. The second rule enables the tax authority to ban transfers of profits in the form of an assignment by a Belgian firm of revenue-generating assets to a foreign firm that is taxable abroad and on its revenues at a tax rate that is known to be lower than its Belgian equivalent. These articles merely attach a legal presumption of fictitiousness to certain transactions, which may however be refuted.

Moreover:

1) To determine their taxable base, Belgian firms with one or more permanent business premises abroad must break down their profits into three categories, depending on their origin: 1) profits realised in Belgium; 2) profits realised abroad that are not exempted from tax, pursuant to a double taxation treaty; and 3) profits realised abroad that are exempted from tax by treaty. If a Belgian firm suffers losses during a given year, these losses must be charged, on a priority basis, to this year's profits realised in Belgium. If these losses exceed the Belgian profits, the balance must be charged to foreign profits, commencing with the profits not exempt pursuant to a treaty, followed by profits exempted by a treaty. Specifically, what this means in practice is that it is necessary to charge Belgian losses to profits not taxed in Belgium. This was accepted by the Court of Cassation (VELASQUEZ decision, 29 June 1984). This position has been submitted to the Court of Justice. In these conclusions, the Solicitor General ruled that the "Velasquez" jurisprudence is contrary to the freedom of establishment offered to Belgian firms to open a permanent business office in another EU Member State. Said freedom is guaranteed by articles 52 to 58 of the EEC treaty.

2) Belgian establishments cannot bear a portion of general administrative expenses and management expenses of the foreign parent company (with the exception of advertising expenses). (This deduction is nevertheless granted by virtue of Tax Treaties). The same applies for interest paid, except in case of a bank.

3) Foreign exchange profits realised during transfers of funds by a Belgian subsidiary to its foreign parent company and made available previously cannot be taken into consideration for taxation purposes.

4) When a foreign company allocates or pays interest to a non-resident, and the interest is charged to the foreign company's Belgian permanent establishment, Belgian précompte mobilier [withholding tax on income from movable assets] must be withheld.

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

A company can only join the same jointly taxed group once. If a company participates in year 1 and exits in year 2 the company can (with rare exemptions) never be jointly taxed with the parent company again. This rule and the rule regarding recapture of tax losses regarding jointly taxed foreign subsidiaries are the most important anti-abuse rules.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

See point 7

Other: in certain circumstances financial expenses incurred to buy a company from persons who are already controlling the group are not deductible from group income (Art.223 B CGI).

Germany

There are no specific anti-abuse provisions in relation to a fiscal unity under the German Corporation Income Tax Code.

A general anti-abuse rule is stated in sec. 8 para. 4 German Corporation Income Tax Code. This rule provides that a loss carry back or a loss carry forward in relation with an acquisition is only possible if the company asserting a loss is legally and economically identical with the company having realised the loss. This provision may become relevant in relation with the acquisition of the controlling company. Sec. 8 para. 4 German Corporation Income Tax Code has no direct impact on the controlled company.

Italy

See point 1.

Luxembourg

No special anti-abuse rules are necessary as the fiscal unity is only applied in very special cases and approval by the Minister is needed. The regime may not be applied for a period of less than 5 years, this avoids application for achieving short term advantages.

The Netherlands

Most important anti-abuse clause: see nr. 7. Other clauses refer to loss-compensation and other technical details.

Portugal

A special regime applies to carry forward losses.

Slovenia

Non-sale period of shares for tree years. Tax group is closed for three years, so you can't merge new companies especially those with fiscal losses.

Spain

The regulations are mainly applied with reference to the compensation of losses and to the taxation of internal transactions in the case of leaving the group.

Sweden

N/A.

United Kingdom

As fiscal unity does not exist under UK law, there are really no anti-abuse regulations. There are however rules concerning the creation of artificial groups for UK tax purposes which in essence say that unless at least 75% of the true voting rights of the company are held within the group, then the provisions of the law relating to group relief will be denied.

9. State (in short terms!) other features in the tax system with work out as group taxation for corporate tax purposes.
(e.g. transfer of business against shares)

Austria

Corporate reorganisations possible without tax being triggered, eg:

- Transformation of a corporation into a partnership (partnership is transparent for tax purposes and therefore achieves the same tax effect as group taxation)
- Merger of 2 corporations

- Transfer of a business in exchange for shares

Belgium

Belgium has a minimum lump sum profit regime for foreign firms with an office in Belgium (for example, BEF 900,000 per staff member for the chemicals industry, BEF 500,000 for the food industry, etc.). However, these firms can still avoid the application of the lump sum by providing conclusive data that show the correct results (profits or losses) of the industrial, commercial or farming activity exercised in Belgium.

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

The rules in EU directive 90/434 have been implemented in Danish tax law. Consequently, tax-exempt restructuring is possible, however, without any connection with the joint taxation scheme. No special rules on tax-exempt restructuring exist for jointly taxed companies.

Finland

Group contribution as described above is available.

Transfer of assets (business)

A limited liability company may transfer all or part of its assets and liabilities to a new or already existing company and receive newly issued shares of the recipient company as consideration.

The transfer is tax neutral in income taxation, provided that the transferred assets and liabilities form a business entity and are transferred at their book values.

In addition, asset transfer tax is not payable by the newly established recipient company even if the transferred assets consist of real property or shares and other securities. Transfer of assets to an already existing company, however, trigger the transfer tax if the transferred assets include real estate or securities (e.g. shares). The transfer tax is 4 % of the fair market value of the real estate and 1,6 % of the fair market value of the securities.

France

If a subsidiary is not subject to company tax (general partnership), portion of the income (profit or loss) belonging to the parent company is directly added to the parent company income.

Germany

The German tax system, in general, does not recognize comparable features to a group taxation (fiscal unity). Nevertheless, tax-free reorganisations are possible in Germany. E.g. sec. 20 German Reorganisation Tax Act provides a tax-free transaction in relation to the transfer of a business or "branch of activity" but only in exchange for newly issued shares.

Italy

D. Lgsl. n° 358/97 recognizes transfer of a business (or a 'branch of activity') as a tax-free transaction when consideration is given by shares.

Luxembourg

Transfer of business against shares.

The Netherlands

Art. 14 Dutch CTA recognizes transfer of a business (or a 'branch of activity') as a tax-free transaction *only if* consideration is given by shares.

Portugal

Slovenia

Spain

The contribution of branch of activity are acknowledged in exchange for the representative value of the acquiring firm's corporate capital as transactions not liable to tax.

Sweden

The concept and definition of a Corporate Group exists in Civil Law in Sweden. This Group does not however constitute a taxable person (i.e. a fiscal unity). Instead each company constitutes an independent tax subject. For tax purposes however there is a system for group contribution whereby, if certain formal conditions are met, a contribution is a tax effective method of offsetting profits and losses within a group. The contribution can be a mere book transaction in the group accounts. There are no limitations as to the amount transferred even to the extent of creating a tax loss in the contributing company.

The formal conditions can be summarized as follows:

- Both companies must carry on an active business.
- A holding of more than 90 % of the shares in the subsidiary for the entire taxable year (i.e. in the ingoing and outgoing balance).
- Only profits/losses generated within the group.
- Added requirement of more than 25 % of the voting stock if the contribution goes from a subsidiary to parent.
- Swedish contributing (limited liability) company and Swedish (limited liability) recipient. (Tax treaties mitigate this requirement. To the extent they do not, however, recent precedents from the Supreme Court render it virtually impossible to uphold discriminatory nationality requirements in Swedish tax law where it deprives a non Swedish EU company tax or other benefits.)

It is also possible, where certain formal requirements are met, to transfer equity and property within a group without immediate tax effects. Basically all intra group transactions should be tax neutral; i.e. treated for tax purposes as intra company transactions.

United Kingdom

Normally, where transfer of assets to a new entity is contemplated, for example transfer of a business to a new subsidiary, the new company is set up first wholly-owned by group members and the transfer then effected afterwards under normal group relief provisions. Accordingly, there are really no features in UK tax law that replicated group taxation without the need for a group.

Across borders/corporate tax

1. Is it possible to establish a permanent establishment as head of the fiscal unity ? (e.g.: Dutch permanent establishment of German company as head of a Dutch fiscal unity)

Austria

No (under present law). However, it is believed that by applying the principles from the St.Gobain case the ECJ would rule that a branch of an EU resident company can be the head of an "Organschaft".

Belgium

N/A

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

No.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

Yes.

Germany

Under sec. 18 German Corporation Income Tax Code it is possible that a permanent establishment of a foreign controlling company can be head of a fiscal unity. This provision requires a permanent establishment of the foreign controlling company within Germany, a profit transfer agreement between the controlling company (in the name of the permanent establishment) and the controlled company and the financial integration of the controlled company and the permanent establishment.

Italy

See point 1.

Luxembourg

No.

The Netherlands

No (see nr. 5!)

Portugal

No.

Slovenia

Yes.

Spain

No.

Sweden

N/A.

United Kingdom

No.

2. ***Is it possible to merge a foreign EU-company into a local fiscal unity? (e.g. French S.A. as a member of a Dutch fiscal unity)***

Austria

"Organschaft" is not a merger. A non-Austrian entity cannot establish an Organschaft-relationship with an Austrian entity.

Belgium

N/A.

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

All foreign companies can be jointly taxed with a Danish parent company, provided the conditions described above are fulfilled.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

No.

Germany

It is not possible to “merge” a foreign EU-company as controlled company into an existing local unity under German Corporation Tax Law.

Italy

See point 1.

Luxembourg

No.

The Netherlands

Yes, but only in case of NV/BV look-alike.

Portugal

No.

Slovenia

No. Fiscal unit must be a resident of Slovenia.

Spain

No. Companies involved must be resident.

Sweden

N/A.

United Kingdom

No.

3. Is it possible to merge two resident 'sister'-companies being headed by a foreign company? (e.g. Spanish holding company with two UK-daughter companies, the latter two forming a fiscal unity for UK corporate tax purposes)

Austria

It is possible to legally merge 2 sister companies of a foreign parent company. 2 Sister companies of a foreign parent company can, however, not establish a fiscal unity ("Organschaft") between them.

Belgium

N/A.

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

Two Danish sister companies can be merged tax exempt as stated under 9 above. Two Danish sister companies owned by a foreign company cannot be jointly taxed.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

No.

Germany

A "merger" between two affiliated companies to form a fiscal unity under German Corporation Tax Law is not possible. Affiliated Companies will normally not fulfil the requirements mentioned above (profit transfer agreement and financial integration) to establish a group taxation (fiscal unity) for corporate tax purposes in Germany.

Italy

See point 1.

Luxembourg

No.

The Netherlands

No, 99% direct share-ownership is needed between member-companies.

Portugal

No.

Slovenia

No.

Spain

No. (see nr.3)

Sweden

N/A.

United Kingdom

This was never possible under UK law until changes introduced with effect from April 2000. It is now possible to include UK subsidiaries and permanent establishments within a UK group taxation treatment even when owned by different foreign companies provided that they are ultimately 75% or more owned by a common foreign (or UK) parent company.

4. Is it possible for a fiscal unity to deduct losses of a foreign EU-branch ? (e.g. deduction of losses of Spanish permanent establishment of Dutch fiscal unity)

Austria

Losses of a foreign branch can be considered in Austria only if the tax treaty with the country in which the branch is established provides for the credit method (Art 23 B OECD Model Treaty) rather than the exemption method (Art 23 A of the OECD Model Treaty).

Belgium

N/A.

Czech Republic

Not applicable – see the response related to the question No. 1.

Denmark

Yes, if the company, which runs the permanent establishment, is part of the joint taxation (e.g. a Spanish permanent establishment controlled by a French company will be part of the joint taxation, provided the French company is jointly taxed with its Danish parent company).

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

No.

Germany

Basically each company of the fiscal unity is subject to tax on its own income. If one of the companies' foreign permanent establishment produces losses, the company (the controlling company or the controlled company) is entitled to deduct these losses. However, general loss limitations applying to foreign-source losses may limit such deductibility.

Italy

See point 1.

Luxembourg

No.

The Netherlands

Yes.

Portugal

Yes. Resident entities are liable to Corporate Income Tax (IRC) on a personal liability base, that is to say, on the worldwide income from Portuguese and foreign sources.

Slovenia

No.

Spain

Tax losses registered by foreign branches are fully deductible for ordinary Spanish companies. Consequently, groups can also credit those losses.

Sweden

N/A.

United Kingdom

Individual companies in the UK are taxable on profits arising from overseas permanent establishments. They are also entitled to take a tax deduction for trading loss arising from overseas permanent establishments. It follows, as a result, that if a UK company makes a loss because of the trading deficit arising in an overseas permanent establishment, it could surrender that loss to other UK resident group companies in the normal way. New anti-avoidance rules introduced in the 2000 Finance Act do, however, restrict availability of group relief for losses of overseas permanent establishments where such losses can also be relieved in the overseas country.

5. Is the legislator planning to change law regarding fiscal unities across borders?

Austria

No specified plans although business has requested repeatedly to abolish the "organisational integration" and "business integration" as preconditions for establishing an "Organschaft".

Belgium

N/A.

During the second half of 2001, Belgium will take over the EU's presidency. Discussions are in progress on the major themes to be addressed during this presidency. Said themes include: the charging of losses in other Member States, the elimination of the issue of transfer prices and compensation of costs in firms operating within the EU, the elimination of withholding at the source on interest and fee payments between companies, the elimination of taxes on reorganisations, cross-border mergers and de-mergers, and the broadening of the directive on parent and daughter companies to all companies subject to corporate tax, regardless of their legal form. Recently, Prime Minister Verhofstadt announced his desire to reduce the corporate tax rate from 40% to 30% without, however, reducing revenues from said tax.

Czech Republic

No.

Denmark

No.

Finland

Finnish tax system does not recognize groups of resident companies as taxable persons (i.e. fiscal unity) for corporate tax purposes.

France

No, not in the traditional group regime.

There are two other group regimes (bénéfice mondial and bénéfice consolidé) that allow it but only with a special agreement of the French Government. Very few companies may benefit of them.

Germany

No.

Italy

There is no official knowledge of any proposal to change law regarding fiscal unities across borders.

Luxembourg

No.

The Netherlands

Yes: proposed changes:
- permanent establishment can be head of Dutch fiscal unity;
- 95% (in stead of 99%) of sharecapital needed;
- ‘one-taxable entity’ theory will be replaced by consolidation of profits through accounting techniques;
- requirements will be codified (now: regulations of Dutch Ministry of Finance).

Data of implementation of legislation remains still uncertain.

Portugal

No.

Slovenia

The process of changing corporate tax law is already in progress but we have not have a draft with proposed changes yet.

Spain

No.

Sweden

No. The legislator is however currently in the process of removing any discriminatory nationality requirements from Swedish Tax Law.

United Kingdom

Recent changes mentioned above under question 3 would lead one to conclude that there are no further current planned changes in the law regarding cross-border loan set offs.