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## German tax consolidation regimes in an international comparison

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### ABSTRACT

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The tax climate of a jurisdiction may encourage or discourage potential investors. There are many tax factors taken into account by multinational enterprises when making location decisions. One of those factors is the possibility of creating a group for tax purposes. Consolidation allows two or more companies to be potentially considered as a single entity for tax purposes. The European Union and OECD member states offer tax grouping regimes on different conditions. This article reviews the German tax consolidation model and discusses requirements and options for that consolidation. Moreover, it compares German consolidation rules with the ones implemented in selected countries. The methodology of this article is determined by the research objectives and the research topic. The requirements for tax consolidation are specified in the law implemented in European countries. Hence, this article includes a legislative analysis of the regulations comprised in selected national acts. It also reviews the literature on the topic analysed, along with the statistical data collected by the German Federal Ministry of Finance in regard to the tax groups and their functioning.

**Keywords:** fiscal consolidation, Germany, corporate income tax, trade tax, value added tax

**JEL Classification Codes:** H21, H25

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## Introduction

The tax consolidation regime is considered as one of the factors taken into account by multinational corporations when deciding about investment locations. Forming a group for tax purposes may have many advantages related in particular to a reduction in tax compliance costs. Companies benefiting from such a tax consolidation regime are entitled to ignoring mutual transactions for tax purposes, may deduct losses incurred by one group member from the profits of another member, are not obliged to adhere to the transfer pricing rules or submit a single tax return.

The popularity and advantages related to the regime discussed depend on the national regulations that, *inter alia*, define the conditions to be met in order to create a group for tax purposes. In some countries, tax grouping is a direct consequence of the fulfilment of certain requirements, in others, groups of companies may be formed for tax purposes on a voluntary basis. Certain ramifications of tax grouping may dissuade the formation of consolidating entities. For instance, tax groups may be the subject of more intensive tax audit activities.

This article is devoted to German tax grouping regimes that, according to the legislation, are applicable for corporate income tax, trade tax and value added tax. It outlines the requirements for tax consolidation, indicates pros and cons of tax grouping, evaluates the regulations in force. One of its aims is also to compare the consolidation regimes – mainly on the European scale – and analyse selected financial aspects of the functioning of tax groups in Germany.

## 1. Pros and cons of fiscal consolidation

Legally, non-integrated business models may have multiple disadvantages from the tax perspective. They are usually related to higher operation costs in comparison to models involving business activities carried out in the form of one single legal unit. As a result of this, both turnover (value added) taxes and corporate taxes provide for tax consolidation regimes to overcome this problem [Doesum, Norden, 2009, p. 901]. Tax consolidation has its roots in the so-called enterprise doctrine. According to this doctrine, enterprises economically, financially and organisationally integrated should be treated as one entity despite their separate legal forms. As is indicated by A. Ting, there are the following justifications to implement a tax consolidation regime in a country [Ting, 2013, pp. 22–26]:

- simplicity – the motive of tax system simplification is often claimed to be very important while putting forward proposals for a tax reform. Such an argument may, however, be misleading with regard to tax grouping and introduction of the described regimes may in fact result in increased complexity. The main reason for this is the application of the enterprise doctrine. It leads to the expansion of the definition of the taxable unit and the

corresponding expansion of the tax base to the whole group of companies. As a result, tax grouping regimes must be properly integrated into the tax system as a whole;

- fairness – this justification is usually perceived from the perspective of individual shareholders or deals with cross-border transactions. Certain countries, such as the UK or Australia, apply the principle of fairness not only to shareholders but also directly to companies. Taking into account the shareholder involvement, fairness is evaluated while comparing two amounts: the net amount after deduction of tax paid at the company and shareholder level and the net amount obtained if the individual receives the income directly without passing through the company level. The perspective of cross border transactions addresses two dimensions of fairness: allocation of taxing rights and allocation of income between jurisdictions;
- neutrality – this principle entails that the tax system raises revenue while minimizing discrimination in favour of, or against, any particular economic choice [*Fundamental principles*, 2014, p. 30]. In relation to tax grouping it implies that the two following enterprise structures should have the same tax outcome: the tax group controlled by the parent company and the company operating through branches. As a result, the legal form of the company should be irrelevant from the tax point of view;
- competitiveness – tax preferences are commonly used to attract foreign direct investment and that is why the application of enterprise doctrine to tax consolidation regimes may be a method to achieve the objective of competitiveness. Tax grouping regimes may be of particular interest to international companies. However, it must be underlined that domestic tax consolidation is far more available to companies than cross-border grouping. The reasons for excluding foreign subsidiaries from tax grouping recognition are in most cases grounded on budgetary reasons and are directly related to the exercise of taxing power of particular jurisdictions. Exceptions are provided by such countries as Austria, Denmark, France, Italy and to some extent also to Canada, Mexico and the United States [Parolini, 2009, p. 942].

Tax grouping is considered to be a preferential solution for enterprises conducting their business activities in different locations. It provides some advantages leading to a reduction in compliance costs for enterprises and the lowering of the tax risks. It is, inter alia, a result of a simplification of selected obligations. Interrelated companies located in different jurisdictions and conducting intra-group supplies are obliged to adhere to transfer pricing rules. Those rules enforce the so-called arm's length principle. According to this principle, companies are required to establish a pricing policy for intra group transactions based on similar transactions made between unrelated parties. Following such a principle requires the keeping and providing to the tax authorities detailed documentation about transactions conducted between related enterprises. Due to the fact that intra group activities are, in the case of tax consolidation, disregarded for tax calculation purposes there is no need for transfer pricing documentation in relation to those activities. As tax consolidated groups turned out to be quite often used as an aggressive tax optimization tool, certain restrictions have been introduced

in many countries concerning those advantages in recent years. Anti-tax avoidance regulations currently in force may require that transactions made by companies belonging to a tax-consolidated group are to be made in line with the arm's length principle. They also give a possibility to the tax authorities to analyse in retrospect (e.g. when the tax group loses its consolidated status) the transfer pricing rules applied in transactions between group member companies for compliance with the pricing rules used by independent entities.

In the case of a tax group there exist more benefits of an administrative nature. Its members fill out only one consolidated tax return and may in certain countries submit one request for the interpretation of the tax law. Moreover, the obligation to settle the advance tax payments and an annual income tax payment rests with the parent company. Grouping may also provide advantages related to economies of scale; inter alia, consultancy, tax advising and accounting costs may be reduced or dispersed among the group members.

The domestic tax laws of many countries incorporate the mechanism to offset the losses of one group member against the profits of another member. The methods for that deduction may be different depending on a tax jurisdiction. This group relief, however, rarely operates in cross-border scenarios [Harris, Oliver, 2010, p. 334]. Tax grouping allows for the elimination of double taxation of income paid out in the form of a dividend between group members. Similarly, all transactions between group members are treated as internal and do not generate profit or turnover for tax purposes and do not require any declaration. The same is true for certain financial activities among companies forming a group. Loans, donations, transfers of assets within a group are considered to be neutral from the tax perspective.

Special privileges are granted to enterprises in the case of VAT grouping. Those are presented, among others, by K. Vyncke [Vyncke, 2007, p. 250]. Supplies of goods and provision of services exchanged between the members of the group are outside the scope of VAT. As a consequence, group registration reduces the costs of operation of enterprises due to the fact that without the grouping option a considerable time may pass between the payment of VAT on the supplies and receiving the VAT refund (excess input tax). Forming a VAT group may be particularly beneficial if at least one of the members has a partial right to deduct, because the group scheme will help to reduce the amount of irrecoverable input VAT. That is why VAT grouping incorporates the principle of tax neutrality, which is often considered as a cornerstone of the VAT system. Increased neutrality may also be accomplished, because VAT grouping allows companies to organize themselves more efficiently without having to suffer from the increased tax burden (e.g. no difference exists from the tax point of view between operating with daughter companies and fixed establishments) [Belgian VAT, 2007, p. 3]. As VAT is considered to be one of the most time-consuming duties in terms of compliance, consolidating for VAT purposes may also significantly bring down the compliance cost of an enterprise. The advantages accrued from VAT grouping are especially noteworthy in the case of production, distribution, financial and insurance sectors of the economy.

Consolidation for tax purposes may also have some disadvantages. Although tax authorities profit from more efficient and better targeted audit possibilities of consolidated groups, the

activities of those groups themselves may become a focal point when it comes to selection for tax audit. In addition, various thresholds in the tax law apply, irrespective of the companies' organizational forms, so increasing the scale of operation, profit and turnover by consolidating activities may result in the loss of certain tax preferences.

## 2. Fiscal consolidation regimes in Germany

The German legislator currently provides an option to create a tax group for the purposes of the three most important taxes imposed on corporations: corporate income tax, trade tax and value added tax. Tax grouping – *steuerliche Organschaft* – has a relatively long history in Germany. It was first introduced in 1934 for the purpose of the turnover tax [§ 2 Abs. 2 Nr. 2 Umsatzsteuergesetz, 1934]. As mentioned by G. Maisto, at that time the *Organschaft* served as a means of avoiding the penalization of long supply chains [Maisto, 2008, p. 592] and was the direct consequence of the rapid development of holding activities. However, after the implementation of the mechanism of input tax deduction in 1967, the economic relevance of turnover tax grouping declined significantly. Two years after the first implementation of tax grouping for turnover tax purposes, regulations on trade tax grouping [§ 2 Abs. 2 Nr. 2 Satz 2 Gewerbesteuerengesetz, 1936] and 35 years later corporate income tax grouping [Gesetz zur Änderung des Körperschaftsteuergesetzes, 1969] became a part of national legislation.

According to the regulations of the Corporate Income Tax Act, there are the following conditions that have to be complied with by a group of corporations to be able to consolidate for tax purposes:

- financial integration [§ 14 Abs. 1 Nr. 1 Körperschaftsteuergesetz, 2002];
- profit and loss pooling agreement [§ 14 Abs. 1 Nr. 3 Körperschaftsteuergesetz, 2002].

Financial integration takes place when a company (controlling parent) holds, directly or indirectly, more than 50% of the voting rights in another company (subsidiary; affiliated company) from the beginning of the year [Jäger, Lang, 2009, p. 805]. The profit and loss pooling agreement between the parent company (*Organträger*) and the subsidiaries (*Organgesellschaften*) must be signed, in the form of a notarial deed, for the period of at least five years [Herzig, 2003, p. 11]. The law introduces an obligation to consistently apply this agreement throughout its entire term. Moreover, the financial results of the subsidiaries are, for the first time, added to the financial result of the parent company in the year in which the agreement is entered into the commercial registry. The Corporate Income Tax Act defines precisely the requirements concerning the legal status and tax residency of companies creating the group. While the subsidiaries must have their place of management in Germany and be incorporated (have their legal seats) in Germany or in another EU or EEA member state, since 2011 there have been no similar requirements for the parent. The parent may have the form of a corporation or be an individual, partnership, association of persons or property [Schreiber, 2005, p. 287]. The subsidiary, however, should be a corporation: a European Company, joint stock

company or partnership limited by shares. The regulations concerning trade tax consolidation (business tax consolidation) of German companies are included in the Trade Tax Act [inter alia, in §2 Abs. 2 Satz 2 Gewerbesteuergesetz, 2002]. The conditions for trade tax grouping are identical to those for corporate income tax purposes.

**Table 1. Corporate income tax grouping in Germany (2013)**

Type of company	Number	Annual tax per company (EUR)
Companies not forming a group	1 170 866	14 035
Parent companies	9150	1 296 959
Subsidiaries	28 036	1898
Parent companies being at the same time subsidiaries in another tax group	2786	47 557

Source: [*Körperschaftsteuerstatistik*, 2018, p. 7].

Taking into account the recent statistical data concerning tax consolidation for the purpose of income taxes in Germany, it must be underlined that the number of tax groups is growing. In the years 2010–2013 it increased by nearly 7.7%. In 2013–2014 there were 12 090 parent companies leading consolidated groups for trade tax purposes and 9150 – for corporate income tax purposes [*Gewerbesteuerstatistik*, 2018, p. 18; *Körperschaftsteuerstatistik*, 2018, p. 7]. Approximately 23.3% of parent companies leading groups for corporate income tax purposes were at the same time subsidiaries in another consolidated structure (Table 1).

**Table 2. VAT grouping in Germany (2016)**

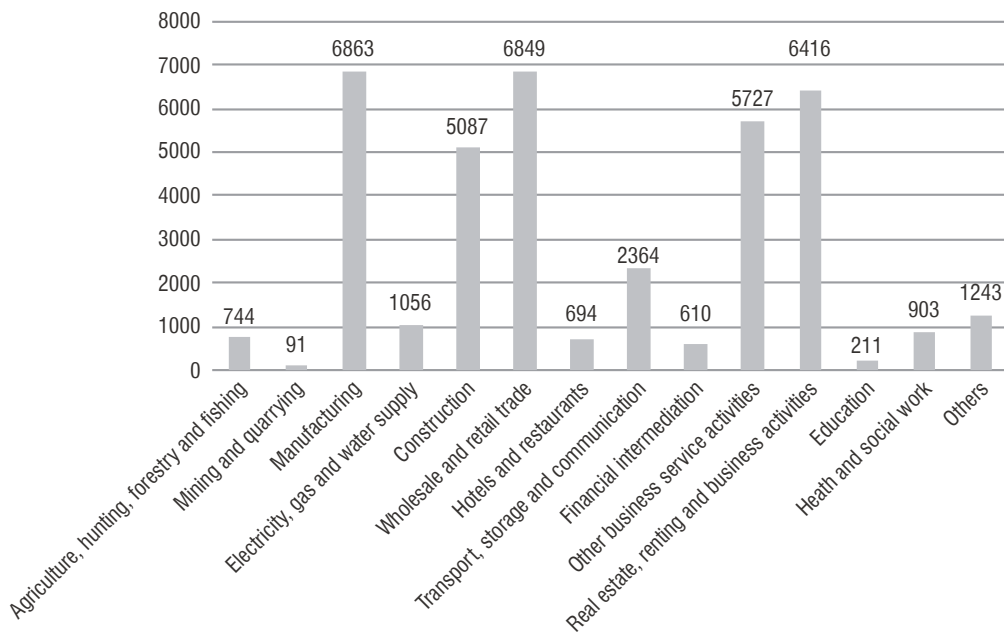
Specification	Value
Tax groups (number)	38 858
Turnover (million euro)	1 935 936
Share in turnover in total (%)	31.8
VAT (million euro)	27 525

Source: [*Umsatzsteuerstatistik*, 2018, p. 33].

Consolidation of companies in Germany also takes place for VAT purposes. While grouping for corporate income tax purposes and trade tax purposes is facultative, the consolidation for VAT purposes is an automatic repercussion of the fulfilment of certain conditions by a group of companies. An option to consolidate for VAT purposes is included in the article 11 of the Council Directive 2006/112/EC. As provided in this article, each Member State, after consulting the advisory committee on value added tax, may regard as a single taxable person the entities established in the territory of that Member State which, while legally independent, are closely bound to one another by financial, economic and organizational links. A Member State exercising that option is also entitled to adopting any measures needed to prevent tax evasion or avoidance through the use of tax grouping. This regulation means that the EU tax law limits

the use of VAT grouping only to national entities [Kristoffersson, 2009, p. 923]. In Germany, for reasons of simplification, subsidiaries fulfilling the above-mentioned requirements are integrated from the VAT perspective into the business of the parent company in accordance with the § 2(2) number 2 of the Value Added Tax Act [§ 2 Abs. 2 Nummer 2 Umsatzsteuergesetz, 2005]. There is, however, no need to sign a profit and loss pulling agreement in order to be consolidated for VAT purposes.

**Figure 1. Number of VAT groups by sectors of economic activity in Germany in 2016**



Source: [Umsatzsteuerstatistik, 2018, p. 33].

The definition of financial integration for VAT purposes is the same as that for corporate income tax or trade tax purposes. Economic relationships may be observed when the principal activities of companies are complementary or successive (for example, one company produces intermediate products and delivers them to the company producing final goods), those activities are of the same nature or type, some companies forming a group carry out activities which are to the benefit of other group members or they have the same category of customers [Vyncke, 2007, p. 257]. Organizational integration is deemed to exist when the controlling parent is able to exercise ultimate decision-making authority over the controlled company (it does not necessarily mean that those links may be proven merely when the subsidiaries' decision-making process is the same as that of the controlling parent). Premises allowing the assumption of the existence of organisational relations include, among others, sharing some of the members of the board of directors, signing a profit and loss pulling agreement or joint bookkeeping. Until the end of 2018 a tax group for VAT purposes may comprise only corporations. As of 1 January 2019, certain partnerships are also able to be included as part of a tax group for VAT purposes.

Due to the obligatory nature of VAT consolidation, the number of tax groups in Germany is relatively high (Table 2). Their share in the total number of taxable persons in 2016 reached 1.2%. They also accounted for 31.8% of the total turnover and 16.5% of the total VAT due. Most of the tax groups for VAT purposes conduct their activities predominantly in the following sectors of the economy: wholesale and retail trade, real estate, renting and business activities (Figure 1). Tax groups operating in those sectors accounted in 2016 for 51.8% of all tax groups for VAT purposes.

### 3. Consolidation regimes in Germany and other countries

Diversified methods of consolidation exist that may be applied by a state. For that reason, consolidation regimes vary significantly in all the countries that have introduced the possibility of tax grouping. In addition, those methods may also be differently classified in economic literature. A. Parolini, for example, divides them in the following way [Parolini, 2009, p. 934]:

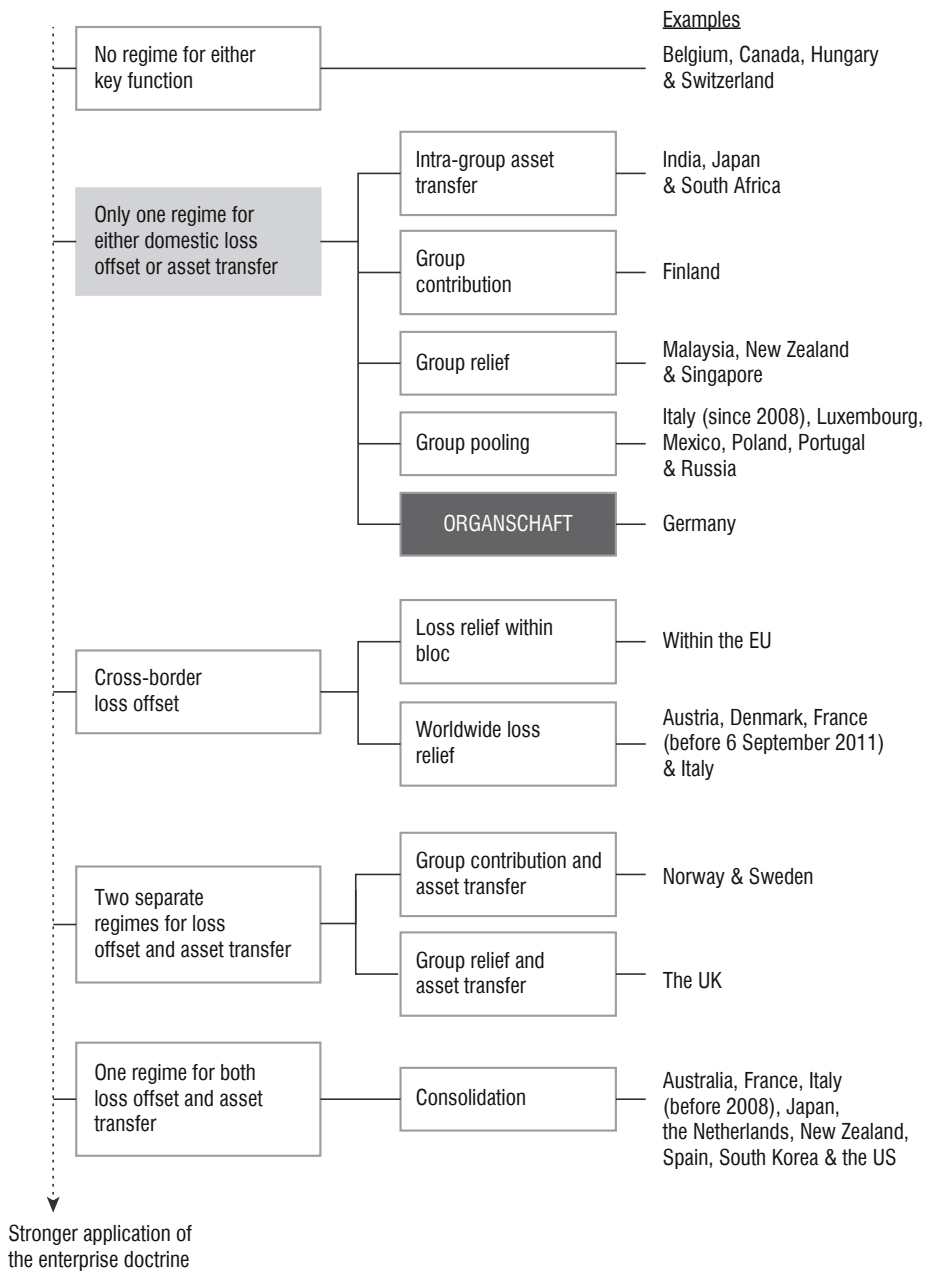
- fiscal unity – this method implies that each company being part of the group is no longer considered a taxable entity in itself and that intra group transactions are not taken into account for tax purposes;
- tax base consolidation – when this method is used, each group member calculates the taxable income on its own and so the defined tax bases of different companies are pooled at the level of the parent. Within this method two approaches may be applied: losses of one company may be transferred (surrendered) to a profitable group member – group relief or company realising a profit may make a payment to a loss-making group member – group contribution;
- financial consolidation – under this method each group member calculates both the tax base and tax due on its own. Tax due is then transferred either to the parent or another company in the group.

An alternative classification of tax grouping regimes is offered by A. Ting [Ting, 2013, p. 53]. He suggests a division based on functions that the tax groups regimes are designed to achieve and differentiates between intra group loss offset and intra group asset transfer models (allowing tax free transfer of assets within a group without a need of restructuration – Figure 2). While from the point of view of the first classification, the German *Organschaft* for corporate income and trade tax purposes may be treated as an example of the tax base consolidation model and for VAT – the fiscal unity model. In the second classification, it may be placed among intra group loss offset models.

European countries apply a wide range of varied requirements for tax grouping. In most countries domestic corporate income group consolidation is optional and whenever it is applied as a facultative solution, it is possible to select the companies to be included in the tax group (so called ‘cherry picking’) [Parolini, 2009, p. 941].



Figure 2. Comparison of selected tax grouping regimes



Source: [Ting, 2013, p. 53].

In certain countries such as Belgium and Switzerland, tax grouping regimes are not available. However, Belgium plans to apply a tax consolidation regime for corporate income tax as of the financial year ending 31 December 2019 and later. In most of the consolidation regimes tax grouping is available only to corporations. Moreover, they provide for a relatively high level of control (e.g. 100% in Australia; 90% in Sweden and Norway).

Different solutions concern liability rules. In some regimes all companies are jointly and severally liable for tax payment, in others this liability lies with the controlling parent. In certain countries such as Austria, Denmark, France, there exists a possibility of cross-border grouping. The German tax grouping regime for corporate income tax purposes is to some extent unique in relation to the combination of a definition of the tax group, requirements for consolidation, calculation of the tax base, scope of cross-border consolidation. Austria, which also had *Organschaft*, replaced it in 2004 with a different regime allowing, inter alia, cross-border offset of losses.

German tax grouping regimes are usually compared with the ones in France and the United Kingdom. In the first of those countries, in order to be able to consolidate for tax purposes, the parent company must be a resident entity that is not itself 95% or more directly owned by another resident company. The parent may be, however, owned by a non-resident enterprise. Only subsidiaries that are at least 95% owned, directly or indirectly, by the parent company may be included in a tax group. The tax is levied on the aggregate income after certain adjustments [Schellekens, 2014, p. 293]. The tax group may elect to submit one consolidated tax return. While in Germany all the group members are jointly and severally liable for the total tax due, in France group members are jointly and severally liable for their share of the consolidated tax due.

In the United Kingdom there are no general consolidation regimes. However, there exist certain provisions concerning the transfer of losses and the transfer of assets within a group or so-called consortium. A consortium consists of 20 or fewer UK resident companies that each own 5% or more or together own 75% of another company. For tax neutral transfers of assets, the parent must own (directly or indirectly in each subsidiary) more than 50% of profits and assets available to equity holders on a liquidation and each subsidiary must be part of a chain of subsidiaries owned to 75%. Group relief for losses can be achieved between two companies if a common parent holds at least 75% of both companies' ordinary share capital and 75% of both companies' profits and assets available for distribution to equity holders on a liquidation, or if one of the companies holds such interests in the other [*Group Taxation*, 2003, p. 10]. Each corporate group member is required to submit their own tax return and the group members are not jointly and severally liable for the total tax due (except for VAT grouping).

The concept of European VAT grouping appears to be based on the German notion of *Organschaft* [Doesum, Norden, 2009, p. 909]. For that reason, VAT grouping regimes more or less resemble each other. Apart from Germany, such countries as Austria and the Netherlands have implemented mandatory VAT grouping. In Italy optional VAT grouping automatically renewable for the following grouping periods has been applicable since 2018 (the 'all in, all out' approach without 'cherry picking'). All other European countries have introduced this grouping as an option for taxpayers meeting the relevant criteria. No VAT grouping is applicable in Bulgaria, Greece, Lithuania, Poland and Portugal.

## Summary

Germany is one of the countries with a relatively wide application of tax grouping. This application covers both income taxes and value added tax. Due to the advanced process of indirect tax harmonisation, VAT grouping regulations in the European Union member states are based on a common concept which includes a requirement for financial, economic and organizational integration of consolidating companies. In this regard European Union provisions may be traced back to the case law developed by the Fiscal Court of the German Reich (*Reichsfinanzhof*) in the year 1934.

On the international scale, especially in the European Union, the corporate income tax grouping schemes in different countries are far from converging. Tremendous differences may be observed in their design in individual countries. As every tax regime, the German consolidation model for corporate income tax purposes may be perceived as being, in selected aspects, more or less preferential in comparison to foreign models. It is characterised by a relatively low holding quota for consolidating enterprises and simplicity towards other consolidation models. Moreover, it incorporates a stronger application of the enterprise doctrine than its counterparts in such countries as Finland, Luxembourg, Portugal or Italy. The application of tax consolidation models for the purpose of both corporate income tax and trade tax in Germany as well as relatively liberal conditions for the creation of a tax group contributed to its popularity and the growing number of consolidating companies throughout the years.

German tax consolidation regimes are sometimes criticised in scientific literature. Many economists point out that in the era of globalisation tax grouping should not be restricted in any form to the entities located in a specific area. Some countries already offer more preferential options of cross-border grouping than Germany. Certain authors also criticise the fact that for the subsidiary it is not possible to have more than one intra-group parent. Only three countries among the European Union Member States apply the VAT grouping regime that is obligatory for the corporations fulfilling certain conditions. A compulsory system provides for the equal treatment of all taxpayers and is said to prevent abusive practices. On the other hand, if a VAT group automatically comes into existence, difficulties may arise related to the immediate needs to change the organisational and bookkeeping systems of a company. Specific requirements or selected consequences of tax consolidation may even discourage potential investors. In particular, certain features of tax grouping may be treated by tax authorities as an external risk management area, which leads to the increased likelihood of tax audit for the consolidated group of companies.

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