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VAT EXPERT GROUP

VEG N° 070 REV1

Paper on topic for discussion

**Meaning of "financial, economic and organisational links" among VAT
group members**

1. EXECUTIVE SUMMARY – THE VAT EXPERT GROUP’S OPINION

The VEG welcomes the Commission’s Paper on the „Meaning of financial, economic, and organisational links among VAT group members” (VEG No. 63) and the opportunity to provide technical and practical input into it based on the VEG’s collective experience as academics, as lawyers and as tax advisors working in business or advising businesses across the EU.

One of the agreed short-term actions in the Dublin Fiscalis was for the Commission to look at Article 11 of the VAT Directive and explore whether the VAT grouping preconditions can be further clarified to ensure a more consistent application across the EU and increase legal certainty and efficiency. It was agreed in Dublin that the Commission would involve the GFV and VEG in its work. We would like to thank the Commission for giving the VEG the opportunity to comment.

A common and consistent approach on the „Meaning of financial, economic, and organisational links among VAT group members” in EU Member States that apply VAT grouping either on an optional or on a mandatory basis for businesses is of high importance. VAT grouping may only reach its full potential, thereby being beneficial for both businesses and tax administrations, ensuring legal certainty and leveling the playing field, when such a harmonized approach is agreed on and applied.

The importance of VAT grouping is expected to expand in the years to come given the recent decisions of the CJEU on “cost sharing” arrangements – Article 132.1.f of the VAT Directive. This is particularly the case in the financial services industry.

The VEG’s key recommendations are:

- Application of a holistic approach based on economic reality and applied on the basis of the 3 criteria stipulated in Article 11 (closely bound to one another by financial, economic and organisational links) – all links need to be fulfilled as a whole (i.e. are cumulative) but not all links need to be fulfilled to the same extent to both the situations where VAT grouping is optional for businesses and where it is mandatory for businesses as per domestic legislation.
- In order to guarantee legal certainty for both business and tax administrations, a confirmation process shall be implemented, confirming both that a VAT group can be formed and who its members are, as the relevant criteria of Article 11 are holistically fulfilled.
- Preservation of the integrity of the VAT system by following the general VAT principles for example on input VAT deduction and by also applying, if and where necessary, target oriented anti-avoidance rules.
- Call for further guidance on the meaning of financial, economic, and organisational links among VAT group members to facilitate a consistent implementation and application of Article 11 across the EU including the requested confirmation process – key to increase legal certainty and foster a level playing field, important drivers for future growth and jobs in the EU.
- Further clarification needed on a list of subjects in the Annex.

We are looking forward to contributing to the further work of the Commission and the Member States and other relevant stakeholders to learn from best practices in the EU and implement those.

2. BACKGROUND

VAT grouping was introduced into the EU VAT system in the second VAT Directive in 1967 when the EU only had 6 Members. It was requested by the Netherlands and agreed to by the other 5 Member States. It is included in the current VAT Directive¹ as an option for Member States leaving the implementation to each of them.

The second subparagraph of the provision was added in 2006.² Since then, the provision has remained unchanged and reads as follows in the current EU VAT Directive:³

Article 11

*“After consulting the advisory committee on value added tax (hereafter, the “VAT Committee”), each Member State **may** regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, **are** closely bound to one another by financial, economic and organisational links.*

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision”

The rationale behind VAT grouping is to provide Member States a “tool” to combat abuse and fraud and to provide administrative simplification to the taxable persons. Next to that the joint and several liability of the members of the VAT group protects the interests of the “Exchequer” and of the tax administrations.

This is one of the main drivers for Member States to introduce VAT grouping next to providing administrative simplification to taxable persons reducing their cost of compliance and to manage risks when billing intra-group. From a tax authority perspective, the cost of collection (only one VAT return to be processed instead of multiple) and enforcement also reduces, as a “group” is now registered and needs to be audited with a single point of contact, being the representative of the VAT group.

This is one of the main reasons why the tax authorities are in favour of VAT grouping. All “activities” of an entire group are - without multiple interactions and audits at each company - transparent to the tax authorities through this single point of entry.

¹ Second Council Directive 67/228/EEC of 11 April 1967 on the harmonization of the legislation of Member States concerning turnover taxes structure and procedures for application of the common system of value added tax, OJ L303, 14.4.67, page 67, Annex A.2,
<https://publications.europa.eu/en/publication-detail/-/publication/99ab67a1-f672-4605-8a30-c93cf82973de/language-en>.

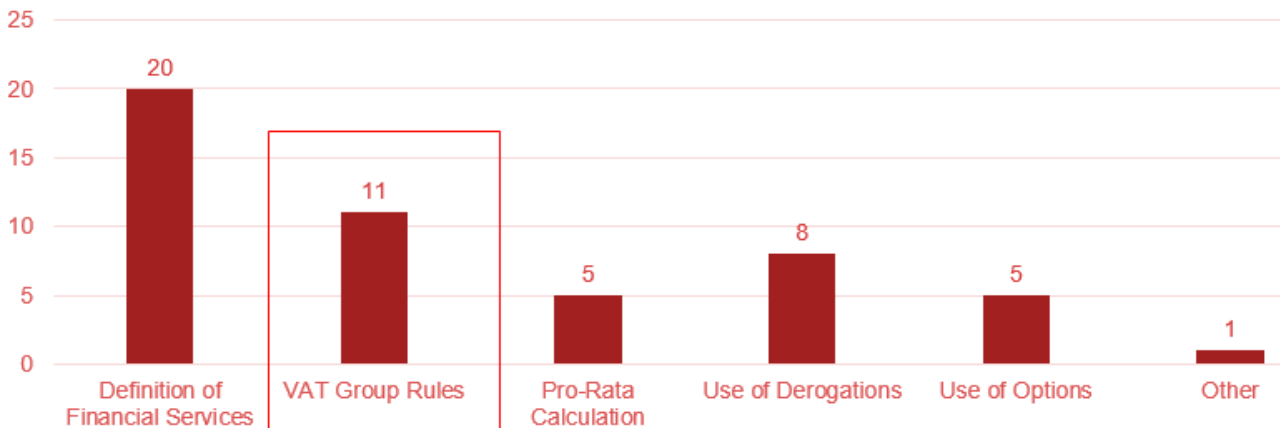
² Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations, OJ L 221, 12.8.2006.

³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, page 1,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:347:0001:0118:en:PDF>.

Reducing the impact of VAT on the cash flow of businesses where one member of a group is in a payable VAT position whilst another member claims a refund, has become another major advantage of VAT grouping both for business and tax administrations, particularly as some Member States were and are still struggling with an efficient and timely VAT refund system process.

In addition, many Member States who did introduce VAT grouping also did so in order to improve the competitiveness of their country both within the EU and from a global perspective. The competitiveness is improved not only by reducing the cost of compliance and the risk of doing business as no VAT risks occur for intra-group transactions within the same Member State. An important element is also to limit the cascading of non-deductible VAT in order to keep in or attract industries impacted to their Member State.

VAT Grouping is one of the most important VAT factors to attract and retain financial services operators and outsourcers



Source: Study to increase the understanding of the economic effects of the VAT exemption for financial and insurance services, PwC, Report to the European Commission - September 2006

This is especially targeted at the financial and insurance industries where the use of technology is key and where outsourcing is the norm. Outsourcing within a VAT group is a better and viable option compared to outsourcing and offshoring to low-cost non-EU jurisdictions. Indeed, from a PwC Study made for the EU Commission in 2006, it appears that VAT grouping is one of the most important VAT factors to attract and retain financial services operators.⁴ Further VAT groups become more important within the financial and

⁴ Study to increase the understanding of the economic effects of the VAT exemption for financial and insurance services, PwC, Report to the European Commission, September 2006.

insurance industries as recent CJEU case law⁵ limits cost-sharing associations to public interest and the social sector (whereas for VAT grouping there is, in principle, no sector limitation).

3. INTRODUCTION OF VAT GROUPING BY THE MEMBER STATES AND NUMBER OF VAT GROUPS

The Netherlands and Germany were the first Member States to introduce VAT grouping.

As the figure shows VAT grouping is currently implemented in 16 Member States, possibly 18 soon. Italy introduced VAT grouping in its law in 2018 allowing VAT groups as from 2019 and Luxembourg is expected to follow.

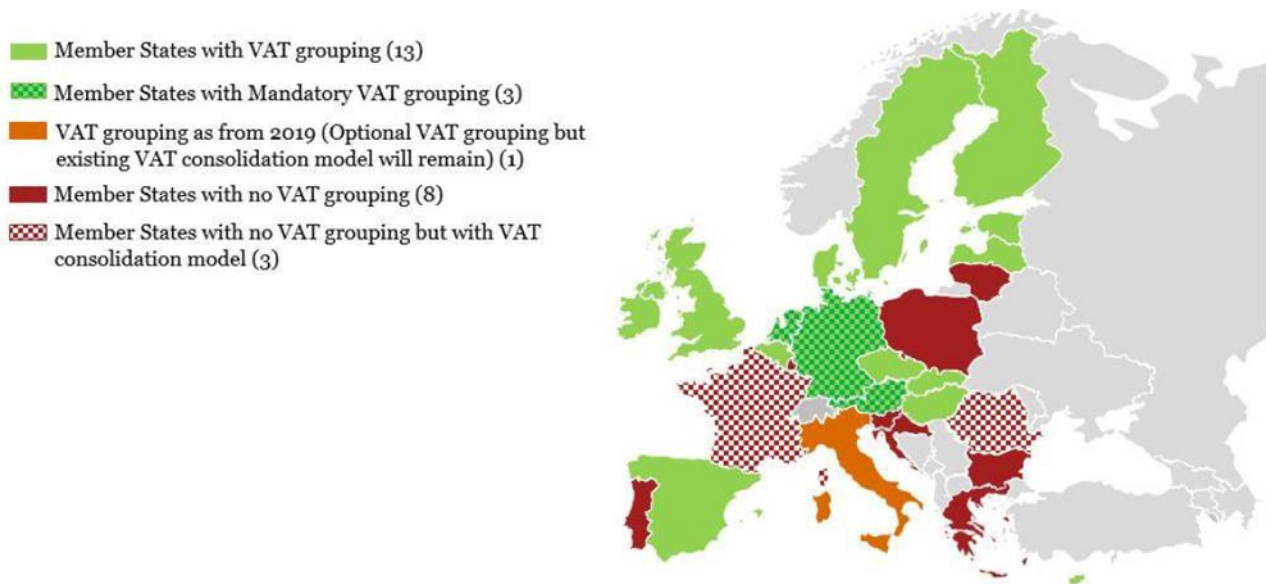
The vast majority of Member States who have introduced VAT grouping leave the decision to group or not to group to the businesses (hereafter optional VAT grouping). Only 3 Member States, being Austria, Germany and the Netherlands make it mandatory for businesses when the criteria are fulfilled (with no option to waive) (hereafter mandatory VAT grouping).

VAT grouping is different from a VAT consolidation payment scheme. This scheme is introduced for instance in Italy, Malta, Romania and France.⁶ In case of VAT consolidation (with the exception of the Maltese scheme), the parent company of a group files a consolidated periodical VAT return. This consolidated VAT return is an aggregation of all periodical VAT returns from the entities which are part of the business structure. As a consequence, the VAT return position of “group companies” can be offset and only the balance will be paid to or refunded by the Member State. It is a “cash management” tool. However, under a consolidated VAT payment scheme, the group companies are, contrary to the VAT grouping, not “a single” taxable person and are not jointly and severally liable for VAT towards the Member State.

⁵ CJEU, C-605/15 (Aviva Towarzystwo Ubezpieczeń na Życie S.A. w Warszawie), 21 September 2017, CJEU C-326/15 (DNB Banka AS), 21 September 2017, CJEU C- 616/15 (Commission against Germany), 21 September 2017.

⁶ CJEU, C-162/07 (Amplifiscientifica Srl, Amplifin SpA), 22 May 2008 – on the basis of an authorization for a derogation (article 395 of the current VAT Directive). In Malta VAT grouping is introduced under an informal scheme.

Overview of VAT grouping in the EU

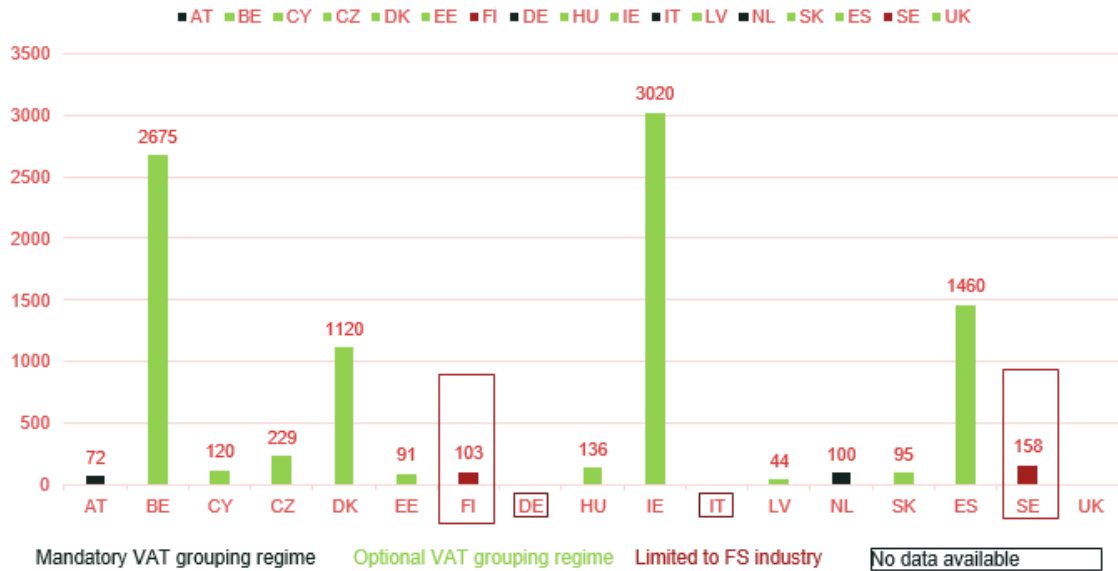


Source: Survey October 2017

In two Member States, Sweden and Finland a limited scope of VAT grouping applies. In Finland, companies performing mainly taxable services can also be members of a Finnish VAT group but only if the company is under the control of a member of the VAT group which either supplies mainly financial or insurance services exempt from VAT or is a holding company of a financial or insurance group. In Sweden, the grouping is possible for taxable persons operating under the supervision of the Swedish Financial Services Authority (i.e. within the finance and insurance sector), or for taxable persons providing the majority of their supplies (approx. 70-80 %) to the before mentioned taxable persons but also to those taxable persons, regardless of the type of business they perform, who are so-called “kommissionärsföretag” and “kommittentföretag” in accordance with chapter 36 in the Swedish income tax act (1999:1229), i.e. companies operating under an agreement providing that the operations are carried out by one taxable person on behalf of another taxable person.

In the other Member States, VAT grouping applies cross-industry.

The figure below shows that the uptake in Member States where the system is not mandatory and applies cross-industry is high. This underlines that VAT grouping is important to businesses and is meeting their needs notwithstanding the joint and several liability and the full transparency. On the basis of these data one can conclude that VAT grouping is a win-win for both stakeholders, i.e. governments and businesses.



Source: [Fiscalis Seminar on Modernising of VAT Groups](#), 12-14 September 2016, Dublin

4. EXPERIENCES WITH VAT GROUPING

4.1. The Netherlands

The concept of VAT grouping has existed in the Netherlands since 1969, so for almost five decades, and works very well. The provision on VAT grouping can be found in article 7(4) of the Wet op de Omzetbelasting 1968 (Dutch Turnover Tax Act). Though there have been a few court cases, for instance about the foundations and the CJEU case Van der Steen⁷, both businesses and tax administration are very happy with this concept. As far as we know, there are no major cases known of abuse or fraud with the use/application of the VAT grouping regime.

4.2. Belgium

Belgium introduced an optional VAT grouping scheme about a decade ago. The provision on VAT grouping can be found in article 4, §2 of the Belgian VAT Code. Since then the uptake has been important cross-industry. Neither the legislation nor the administrative guidance had to be changed since then. No disputes or litigation occurred to our knowledge. A specialized unit within the administration has been put in place for handling VAT grouping requests and to perform audits of VAT groups.

⁷ CJEU, C-355/06 (Van der Steen v Inspecteur van de Belastingdienst Utrecht-Gooi/kantoor Utrecht), 18 October 2007.

4.3. The UK

The UK applies a voluntary VAT grouping regime which treats the VAT group as a single taxable person and considers the whole legal entity as a member of the VAT group (i.e. including headquarters or branch(es) located abroad). Regarding eligibility, the VAT grouping is limited to “bodies corporate”, which includes mostly companies and limited liability partnerships.

To ensure the entities are “closely bound by financial, economic and organisational links”, the UK applies a control test, where all members of the group are controlled either by one member of the group, or a single other “person” who is not one of the members of the group. In summary, it is a “vertical grouping” with a single controlling body at the top.

The eligibility test is being consulted on (with possibly a further technical consultation on draft legislation later in 2018), focusing on the potential expansion to non-legal entities (partnerships or individuals) following the Larentia & Minerva judgement⁸. At this stage there is no clear conclusion on any legal changes.

4.4. Germany

The concept of VAT grouping exists in Germany since 1934, at that point in time Germany operated a turnover tax without input VAT deduction. The concept was also introduced in the later implemented EU based VAT system in Germany. VAT grouping is a mandatory system in Germany, so companies that fulfil the preconditions (financial, economic and organisational link) must form a VAT group. Until about 15 years ago, there were no major issues with operating VAT groups in practice, and the tax authorities applied a holistic approach when applying the preconditions. Unfortunately, a variety of court cases in Germany and their focus on the links (particularly on the organisational link), have since created a significant degree of legal uncertainty both for business and tax administrations through an overly formalistic approach developed by the local courts in Germany. Therefore, the work taken up by the European Commission to further clarify the “meaning of financial, economic, and organisational links among VAT group members” is highly welcomed by all stakeholders in Germany.

Making VAT grouping optional for business as the majority of Member States do, is also a currently discussed hot topic in Germany, which many stakeholders would support given the best practices in other countries.

4.5. Spain

VAT grouping was introduced in Spain as from 1 January 2008. The regime is twofold: a mere VAT consolidation regime (the so-called basic level) and, optionally, a VAT grouping (“advanced level”). Although the latter does not respond to the idea of a single taxable person, it tries to achieve an analogous economic outcome. The regime is voluntary so that even within a particular group, some entities may opt for its application while others remain out of the group. However, the dominant entity must always be part of the group. The three links must be met. The definition of the links is based on the Commission’s Communication of 2009. A rebuttable presumption is established by virtue

⁸ CJEU, C-108/14 (Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG), 16 July 2015.

of which the organisational and economic links are deemed to be met if the financial link exists. Since its introduction it has been widely applied, with no major controversies having been brought to the administrative courts.

5. ANALYSIS

5.1. Legal certainty

VAT grouping is a “stand alone” VAT concept that does justice to both neutrality of legal form and economic reality.

It allows the grouping of taxable and non-taxable persons independent of the legal form, the business set-up, the commercial, economic reality or specific regulatory requirements imposed on business.⁹

Note that following several CJEU cases,¹⁰ Article 11 of the VAT Directive merely refers to “persons” being able to join a VAT group, which covers both taxable and non-taxable persons and legal and non-legal persons.

The concept does not make any distinction as to whether the “person” is incorporated or is a single legal person for business or commercial law reasons, or as several legal persons.

As a VAT concept, VAT grouping has to be implemented in a harmonised way in the single market. As such, the concept of VAT grouping should apply in the same way whether the Member State where the group is constituted has chosen to implement the concept as optional or mandatory for businesses. This is especially true regarding the application of the 3 criteria (see *infra*) regarding the links between members, which are the cornerstones for constituting a VAT group.

In terms of legal certainty, once the criteria are met whether the person is bound to be part of a VAT group or whether it is an option, we recommend that the tax authorities confirm that the criteria are met to form a VAT group and the names of the members of the group.

5.2. Conditions to group - financial link/economic link/organisational link: none of the links prevail, requiring a holistic approach when applying this requirement.

Article 11 of the VAT Directive provides that Member States **may** “*After consulting the advisory committee on value added tax (hereafter, the ‘VAT Committee’), each Member State may regard as a single taxable person any persons established in the territory of that*

⁹ CJEU, C-60/90 (Polysar Investments Netherlands BV), 20 June 1991, C-155/94 (Welcome Trust Ltd), 20 June 1996, C-80/95 (Harnas & Helm), 6 February 1997, C-142/99 (Floridienne and Berginvest), 14 November 2000.

¹⁰ CJEU, C-65/11 (European Commission v. Kingdom of the Netherlands), 25 April 2013; CJEU, C-74/11 (European Commission v. Finland), 25 April 2013; CJEU, C-85/11 (European Commission v. Ireland), 3 April 2013; CJEU, C-86/11 (European Commission v. United Kingdom of Great Britain and Northern Ireland), 25 April 2013; CJEU, C-95/11, (European Commission v. Kingdom of Denmark), 25 April 2013; CJEU, C-109/11 (European Commission v. Czech republic), 25 April 2013; CJEU, C-108/14 (Larentia + Minerva), 16 July 2015.

Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.”

The reference to financial, economic and organisational links has been part of the provision as from its implementation.

The requirements regarding the links between the members should not be interpreted too formalistically. In particular, all the ‘links’ of Article 11 of the VAT Directive must exist between the members in order to form a VAT group. The links need to exist simultaneously but the text of the VAT Directive is not saying that one link is more important than the other and therefore prevails. Those “linking factors” can exist in different forms and different weights/strengths, depending on the circumstances and facts (size, type, organisation and set-up of the economic activities) reflecting the economic reality. Therefore, not all links have to be fulfilled to the same extent and with the same weight. The key term here is “**closely bound to one another**”. The three links should be applied in a flexible way based on a **holistic approach**, looking at the economic and organisational reality and taking the specific circumstances and facts into consideration.

The overall picture of the economic activity and the economic reality is decisive, in particular to avoid discrimination based on the structure of the business.

Article 11 does not preclude non-taxable persons (not engaged in an economic activity) from being included in a VAT group further to the case law of the Court of Justice. Only a holistic view enables them to fulfil the financial, economic and organisational links test. Furthermore, it also ascertains that “groups” whether consisting of taxable persons only and of taxable and non-taxable persons are treated equally also respecting the neutrality principle (legal form neutrality). Additionally, applying the general input VAT deduction rules in a proper way ensures that the integrity of the VAT system is preserved.

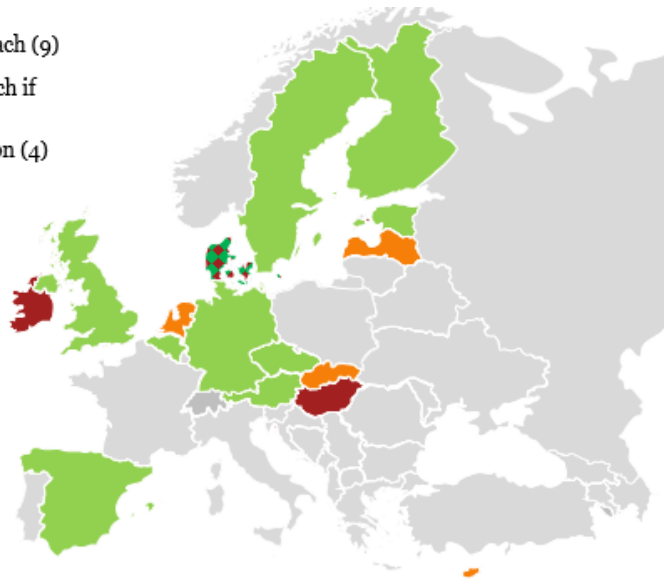
Applying the criteria on a stand-alone basis and in a too strict and formal way, taking a form over substance (“ticking the box”) instead of a holistic approach would mean that certain taxable persons that are bound to one another and non-taxable persons (e.g. not for profit, charities, hospitals, public bodies) which are also economic units would fall outside the scope of the VAT grouping facility whereas on the ratio legis of VAT grouping they should not.

We view **the holistic approach as a best practice** requiring to be applied both for mandatory VAT grouping and optional VAT grouping. It is interesting to note that such a holistic approach is already applied in 10 out of the 16 Member States that already have VAT grouping. Germany also applied this best practice but this has changed in the last 15 years through local court cases causing legal uncertainty both for taxable persons and the VAT authorities. VAT grouping should allow taxable and non-taxable persons who “operate” together and are “united” through the links whether financial, economic or organisational to be “one taxable person”.

- The **financial link** is commonly “defined” as the direct (or indirect) participation in the capital, e.g. the shares or in the voting rights. In practice, the participation ranges from at least 10% (Belgium) to 75% (Austria). The majority of the Member States apply a threshold of more than 50% participation in the capital shares to determine the financial link.

- The **economic link** is commonly “defined” as economic cooperation, that is the principal activity of the members is of the same nature, providing similar or complementary business activities or carrying out activities that benefit, fully or substantially, the other group members – it is about promoting the group’s economic activity as often indicated in the group’s parent’s articles of association.
- The **organisational link** is commonly “defined” as a shared, or partially shared, management structure between group members, based on and following company and common decision making guidelines, standards and policies, monitored and controlled by internal audit.

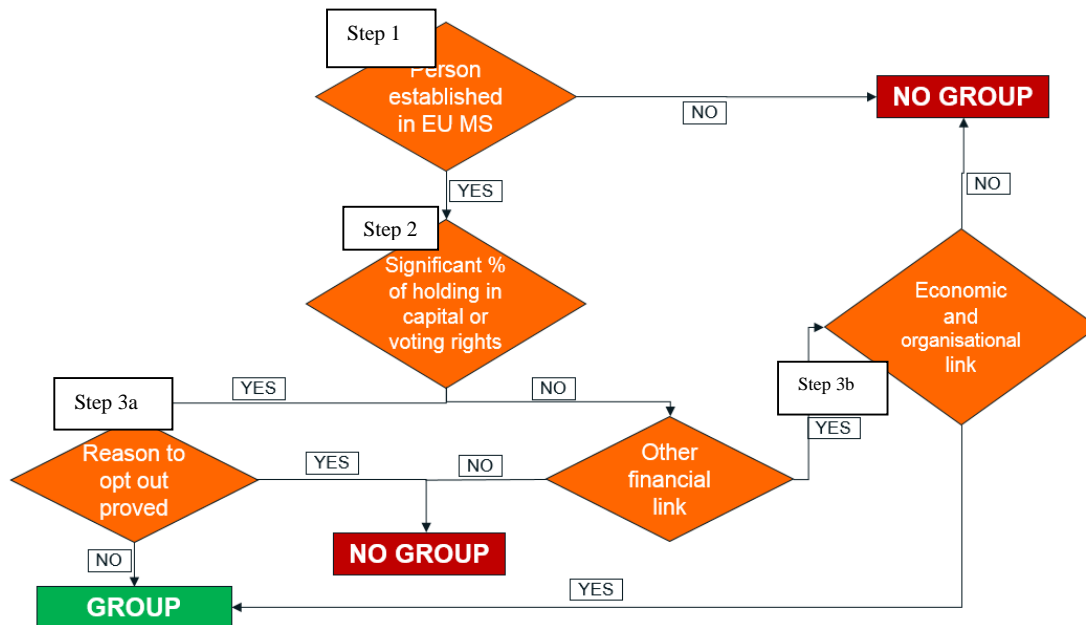
- Member States with links not same weight / holistic approach (9)
- Member State with links not same weight / holistic approach if Members are fully taxable persons (1)
- Member States with links same weight / strict interpretation (4)
- Member States with financial link most important (2)
- Member State with financial link most important if Members are not fully taxable persons (1)



Source: Survey October 2017

5.3. How to apply the holistic approach

In this section, we explain using examples how the holistic approach is applied in practice and assures that the VAT group is indeed grouping taxable and non-taxable persons that are really and genuinely closely bound to one and another and consequently merit to be treated as “one“ taxable person, being a “VAT group“. The visual example below explains the interactions.



After testing the first conditions to group (step 1), the next test consists in asserting whether the direct or indirect participation in capital amounts to **more than 50%** (step 2). If the **financial link exists**, a rebuttable presumption applies that the other links exist too. That presumption can be rebutted if it is possible to demonstrate that the economic and organisational links do not exist and the “person” can either be excluded by failing on one or the other branch of the eligibility test (step 3a).

While the parent company is abroad the local subsidiaries can still group (the local subsidiary with the biggest economic substance can act as VAT group parent). In that case, the financial link is significant (“protects” the financial interests of the shareholders) and the economic and organisational links, which are also existing (promoting the economic activity of the group parent and following the company standards, common policies and guidelines monitored by internal audit), are a given. Additionally, the consolidation of financial accounts in accordance with accounting regulations may indicate the existence of a financial link.

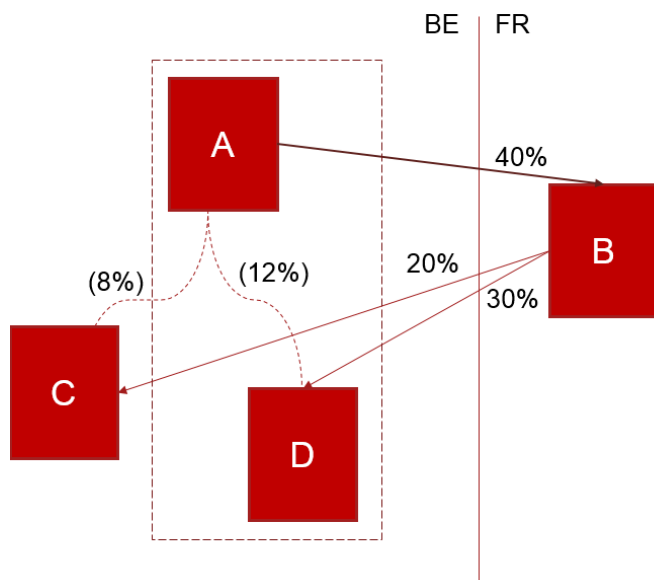
However, note that whether the local subsidiary carries out similar economic activities is not relevant.

Indeed, Article 11 of the VAT Directive only refers to the independent legal persons being bound economically. The Directive is not requiring the activity to be similar or the same. The performance of an “economic activity” as mentioned in Article 9 of the VAT Directive suffices. Article 11 cannot limit or change the scope of Article 9.

It is on this basis that Belgium, Spain and Italy resume that the independent (taxable) persons not only have close financial links but all have a “common” interest in their respective economic activities defined in accordance with Article 9 of the VAT Directive and are as a matter of fact in view to keep “control” of the subsidiaries run as “one” organisation.

The direct or indirect participation in capital can be **less than 50%** (step 3b). Rather than a strictly numerical test applied, when the financial link is less strongly fulfilled which makes the consideration for economic and organisational links is more important, than only applying a strict numerical text. Indeed, “common” organisational measures and processes need to be demonstrated.

As noted before the economic link is tied to the term “economic activity” from Article 9 of the VAT Directive.



Note that while the parent company is abroad, the local subsidiaries can still group. In the above scheme, the financial link is established between A and D due to indirect shareholdings via foreign parent B.

Example:

A multinational enterprise intends to outsource its accounting department to a shared service centre and the former manager of the accounting department becomes shareholder of that shared service centre (owns 40% of the shares). The multinational enterprise is the only client (besides some very small external clients) of the service centre and keeps 60% of the shares (inclusive of voting rights). The multinational enterprise and the shared service centre are both part of a VAT group.

After one year, the multinational enterprise sells 20% of the shares to the manager, who then owns 60% of the shares. This entails that the multinational enterprise has a minority of the shares, but is, as the only client, still “in charge”. In principle, the links to form a VAT group are no longer met (looking at the links on a stand-alone (“tick the box”) basis,

but based on the holistic approach the situation remains the same as before the sale of shares. The parties are still closely bound to one another by financial, economic and organisational links, if the economic and organisational links can be demonstrated, which can be done here through measures, such as economic metrics and quality assurance processes, decision making guidelines, standards and policies, etc.

Last, a taxable person that possesses voting rights or shares profits may still group while having no capital participation.

Where the financial link is less strong, grouping should still be possible based on the economic and organisational links. As mentioned earlier, the organisational link can be demonstrated through the obligation to follow company and decision making guidelines, standards and policies, monitored and controlled by internal audit, management and operational structure and organisational set-up, but also consolidated accounts based on accounting regulatory requirements can be an indicator.

The same should be the case where based on the economic interest, independent persons can be linked by common management. Grouping should be possible for ‘businesses’ such as foundations that are not owned by shareholders. The determination of a sufficient financial link could rely upon the existence of a relationship of direct dependence. This dependency being reflected by the degree of control over the other entities equivalent to that of a majority shareholder in a business owned by shareholders. Being linked through a common management is particularly common in the financial industry, e.g. fund industry with different third-party investors as explained in the following example:

Example: grouping of funds – financial interest to act as a group - economic and organisational areas of commonality.

A company acts as originator of different funds. All the funds are owned by different investors but are originated/managed by the same entity/manager, who centralizes the management of the funds (e.g. portfolio management, promotion, ...). The different investors do not have a participation in the management entity, but have a direct or indirect contractual control over the different activities of the manager. It is clear that all funds are not linked by strict financial links based on shareholding. However, they are certainly linked by means of organisational and economic links. This also applies for not-for profit associations, foundations, charities, not having capital but an interest to act as a group because of the link of their economic activities with a common management with strong organisational measures and processes in place.

Example: Dutch Court Case – Company A + Foundation B

The latter can also be demonstrated through a Dutch Court Case¹¹ in which it was said that a company A and a foundation B were closely linked.

A doctor holds 100% of the shares of a holding, which in its turn is 100% shareholder and the sole director of company A. Company A has 2 employees the doctor and his spouse.

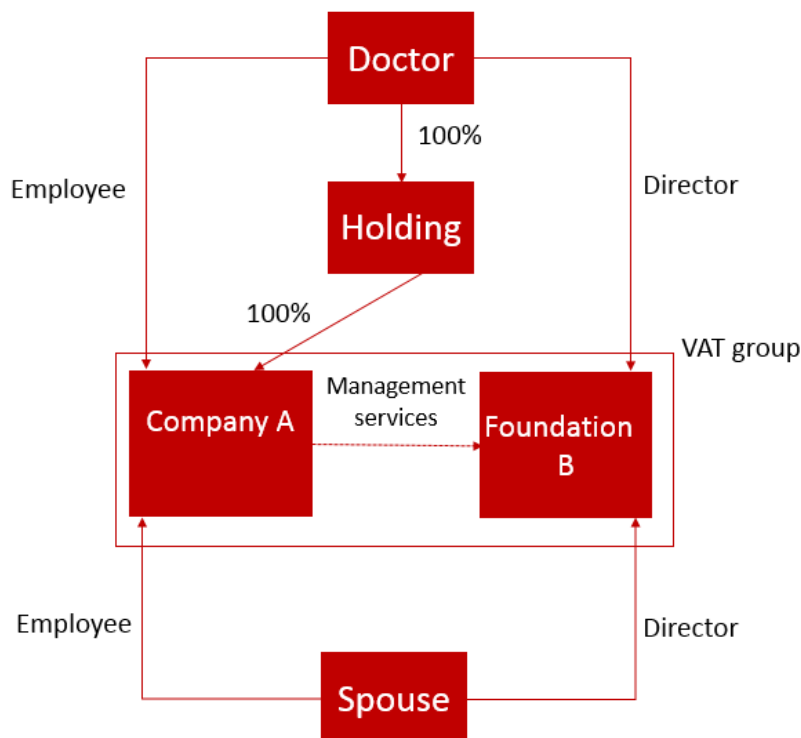
¹¹ [ECLI:NL:RBDHA:2014:8449 Rechtbank Den Haag, 09-07-2014, AWB-13_9316.](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014001316)

The doctor has created a foundation B (a not for profit) that provides medical care. The doctor and his spouse are both directors of foundation B. Foundation B has no employees and is located at the same address as company A. In his capacity as employee of company A, the doctor is responsible for the daily management of the foundation B. Company A charges a management fee to foundation B for the management services rendered.

The elements to sustain a close financial and organisational link between company A and foundation B were:

- The doctor is the only one that represents foundation B towards third parties;
- The doctor decides on the pricing of the services rendered by foundation B;
- The doctor concludes the agreements on behalf of foundation B;
- The doctor manages the bank accounts of both company A and foundation B;
- The doctor executes all activities of foundation B and is the “face” of foundation B.

It is clear that Company A (via the doctor) manages de facto the foundation including its financial affairs. Therefore, the Court accepts a VAT group between company A and foundation B.



Example: Absence of share capital and thin financial link

In Belgium, entities without share capital and which do not have a strong financial link between each other may apply the VAT grouping provisions.

Indeed, the Belgian VAT authorities have ascertained that a close financial link exists when one of the following conditions is fulfilled:¹²

- A person owns at least 10% of the assets of a person other than a legal person with share capital represented by shares or units. This includes the situation in which a person A provides a person B assets without consideration and these assets represent a value of at least 10% of the assets of person B. However, note that the assets cannot be definitively acquired by B.
- A person undertakes to cover the operating losses of a person other than a legal person with share capital represented by shares or units. This includes the situation in which a person A irrevocably undertakes to assume the losses resulting from the economic activity of a person B. In contrast, the provision of a credit or a loan is not proof of a financial link.
- A person has significant or decisive influence over the management of a person other than a legal person with share capital represented by shares or units. This includes the situation in which a person A has, in respect of a person B, among others, the right to appoint or dismiss a majority of the directors or holds at least 20% of the voting rights at the general assembly meeting. However, the mere fact that members have one or more common directors is not proof of financial link.

Please be aware that the link must have a permanent character, which means that it must continue throughout the existence of the VAT group.

The VAT authorities examine on a case by case basis the specific situations that are submitted to it to determine whether such a link exists or not.

Example: franchise contracts

Franchise contracts and mutual participation as mentioned in the Commission paper, do not, in our view, meet the three-links test. Indeed, Restaurants (such as McDonalds, Subway, etc.) and shop chains often operate a franchise model (the right to use the franchisors' business model and brand for a prescribed period of time). However, when it comes to the operation of the business itself every franchisee (such as individual restaurant or shop) operates economically, organisationally and financially independent from each other. Therefore, they cannot be seen as a single taxable person. This would be against the economic and legal intent of the relevant parties involved in the franchise set-up. In addition, this would also violate competition laws.

6. CONCLUSIONS AND RECOMMENDATION FOR NEXT STEPS

To sum up, all links mentioned in Article 11 of the VAT Directive need to be fulfilled as a whole (i.e. cumulative) but not all links carry the same weight (i.e. not all links need to be fulfilled to the same extent). Only a holistic approach allows taxable and non-taxable persons to group equally based on the facts and circumstances substantiating the fulfilment of the required links.

¹² Administrative Decision - E.T.122.346 dd. 16.10.2014.

A holistic approach, based on economic reality and applied on the basis of the 3 criteria stipulated in Article 11 of the VAT Directive (i.e. members being closely bound to one another by financial, economic and organisational links) will give legal certainty to both business and tax administrations – in the case a Member State makes VAT grouping optional for businesses as well as in the case a Member State makes VAT grouping mandatory for businesses that meet the criteria. The best guarantee for legal certainty is achieved through an official confirmation process whereby both business and tax administrations receive the confirmation that a VAT group can be formed and who can be part of it.

We would like to further stress that the integrity of the VAT system should and needs to be preserved by following the general VAT principles for example on input VAT deduction and also by applying, if and where necessary, target oriented anti-avoidance rules.

Approaching things this way and by giving further guidance on the meaning of financial, economic, and organisational links among VAT group members a more consistent implementation and application of Article 11 across the EU will be clearly facilitated, which will in turn increase legal certainty and foster a level playing field, important drivers for future growth and jobs in the EU.

The VEG wishes to thank the Commission for the opportunity to provide its input. We look forward to contributing to the further work of the Commission and the Member States and other relevant stakeholders to learn from best practices in the EU and implement those.

Other remarks received by members and observers

1. Preference for the VAT group to be optional for business.
2. Compliance aspects:
 - Identification of the group and of the members;
 - Invoices within the VAT group;
 - VAT returns of the VAT group and of the members.
3. Skandia case law – reference is made to VEG paper no. 47, requesting for further work / guidance from the VAT Committee.
4. Mutual recognition by the Member States of VAT Groups and its consequences across policy areas.