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The Danish VAT Grouping Scheme and its compatibility with the EU VAT Directive

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Abstract

In the article, an analysis is made of the Danish rules on VAT grouping including case law and administrative practice related thereto, specifically in relation to the substantive conditions and the territorial condition for VAT grouping. Danish VAT grouping is voluntary upon request or application, generally applicable for all business sectors, and an option for taxable persons who exclusively perform taxable activities, or, for VAT-registered persons together with VAT-exempt and non-taxable persons within a group of companies. Denmark has only implemented the financial link, which may not be compatible with Article 11 of the VAT Directive stating three links, i.e. financial, economic and organisational links. As for the territorial condition, Denmark follows the narrow territorial approach to VAT grouping based on the Skandia America case, consequently, a VAT group constitutes a new taxable person superseding the FCE Bank principle applicable between a main establishment and its branch. Many discussions on VAT grouping take place in Denmark concerning inter alia the right to input VAT deduction, the potential risk of abuse and avoidance, the effect of VAT grouping as a "merger" e.g. in connection with the sale of shares or transfer of a going concern etc..

Keywords: EU VAT law; VAT grouping; Denmark; cross-border; joint registration.

1. Introduction

In Denmark, VAT grouping is a well-known concept used by businesses and groups of companies, though the absolute number of VAT groups is not that high. Currently, there are 479,000 VAT-registered businesses in Denmark, out of which 4,400 are grouped for VAT purposes, resulting in 1,000 VAT groups.[1]

The Danish rules on VAT grouping were introduced in 1967 in connection with the introduction of the Danish VAT Act; in 1994 they were significantly modified, and in 2004 a minor adjustment took place (section 2.1). Danish VAT grouping is based on Article 11 of the VAT Directive,[2] but Denmark has deviated distinctly from the wording of that provision (sections 2.2–2.3). Thus, the purpose of this article is to examine whether and to what extent the Danish rules on VAT grouping are compatible with Article 11 of the VAT Directive, based on a legal analysis of Danish VAT law and

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1. The numbers are approximate as informed by the Danish tax authorities (*Skattestyrelsen*) as per e-mail of 6 November 2020.

2. Directive (EC) No 2006/112 of the Council of 28 November 2006 on the common system of value added tax, *OJ L 347, 11.12.2006* (VAT Directive).

EU VAT law. The analysis focuses primarily on the three substantive conditions for VAT grouping, i.e. the financial, economic and organisational links (section 3), and the territorial condition for VAT grouping (section 4). Additionally, the current and future discussions in Denmark regarding VAT grouping are briefly mentioned purely to provide a brief insight into what seems to be problematic issues from a Danish perspective (section 5).

Remarkably, case law from the Danish courts within the area of VAT grouping is quite scarce, whereas administrative practice, particularly in the form of binding rulings from the Danish Tax Council (*Skatterådet*) where the applicant asks for clarification of the VAT treatment of future contemplated dispositions,[3] is more voluminous.[4] The reasons could be many; the most obvious being that the substantive conditions for Danish VAT grouping are very objective in nature, and are thus clearly and easily determinable both for businesses and the tax authorities, as they do not really cause any interpretative uncertainty. Another probable reason could be that businesses are rarely denied a request or application for VAT grouping, or that the tax authorities have not yet tried to terminate existing VAT groups to any significant extent, with the result that no such complaints have been made nor officially published so far. The potential risk of abuse and avoidance and the lack of specific entry/exit rules in connection with VAT grouping are mentioned below (section 5).

2. The Danish VAT grouping scheme

2.1. Brief history of Danish VAT grouping

The possible use of VAT grouping has existed since the introduction of the Danish VAT Act in 1967.[5] In 1994,[6] there was a major general revision of the Danish VAT Act in order to make it more compatible with the Sixth VAT Directive,[7] which laid down the foundation for the current rules on VAT grouping. The most important amendment was that it became possible for VAT-registered persons to be grouped together with non-VAT-registered persons, such as VAT-exempt persons, under certain conditions.[8] It can be understood from the background and the *travaux préparatoires* to the amendment that the underlying aim was to benefit especially the financial sector by securing that internal transactions within the VAT group were not taxed, though this was not directly expressed in the wording of the rules.[9]

3. The Danish Tax Administration Act, Consolidated Act No 635 of 13 May 2020, as most recently amended by Law No 1589 of 27 December 2019, Chapter 8.

4. C. Kristoffersen, M. Gale, Z. P. Hansen, *EU-Domstolen presser fællesskabet til samarbejde eller kaos!*, in SU 2015, 122, section 2.3.

5. Law No 102 of 31 March 1967. K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 12; H. J. Kozuch, T. S. Svane, *Fællesregistrering for moms – uklar praksis*, in TfS 2005, 481.

6. Law No 375 of 18 May 1994.

7. Sixth Directive (EEC) No 77/388 of the Council of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, *OJ L 145, 13.6.1977* (Sixth VAT Directive).

8. Law proposal No 124 of 8 December 1993, 1993/1994, section 4 and special comments to § 47. B. H. Hansen, *Nogle momsmæssige betragtninger – i lyset af L 124 om revision af momsloven*, in TfS 1994, 194, section 2.3; B. H. Hansen, *Ny momslov*, in SPO.1994.142; E. Dekov, L. L. Jørgensen, *NY MOMSLOV*, in SR.1994.0245, section 5b; B. H. Hansen, *Revision af momsloven fra 1967 – EU-harmonisering med nye områder og begreber*, in RR.1994.08.0023; E. Dekov, *Moms og lønsumsafgift i koncerner – Med kravet om 100% koncernejerskab går Danmark længere end EU*, in RR.1995.09.0056; S. Engers, *Rapport om momsloven og 6. momsdirektiv*, in SU 2001, 249; H. J. Kozuch, T. S. Svane, *Fællesregistrering for moms – uklar praksis*, in TfS 2005, 481.

9. K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 12. See also E. Dekov, L. L. Jørgensen, *NY MOMSLOV*, in SR.1994.0245, section 5b; B. H. Hansen, *Ny momslov*, in SPO.1994.142; E. Dekov, *Moms og lønsumsafgift i koncerner – Med kravet om 100% koncernejerskab går Danmark længere end EU*, in RR.1995.09.0056.

Basically, these rules have remained the same except for a small change to the wording of the rules in 2004, where it became explicitly possible for VAT-registered persons to be registered together with non-taxable persons, such as holding companies.[10] It was stated in the *travaux préparatoires* to the amendment that the purpose was to use the option provided for in the Sixth VAT Directive, which allowed for this.[11]

In 2011, the European Commission filed several actions for failure to comply with Article 11 of the VAT Directive against Member States,[12] including Denmark,[13] *inter alia* on the basis that national legislation permitted the inclusion of non-taxable persons such as holding companies in a VAT group, which was the case of Denmark. The Commission's action was dismissed by the Court of Justice of the European Union (CJEU), since it had not established that Article 11 of the VAT Directive could be interpreted as meaning that non-taxable persons cannot be included in a VAT group.[14] Further, the CJEU noted that it is conceivable that the presence, within a VAT group, of non-taxable persons contributes to administrative simplification, both for the group and for the tax authorities and makes it possible to avoid certain abuses,[15] e.g. due to joint and several liability for the VAT group.[16] Consequently, Danish VAT grouping is fully compatible with the VAT Directive in this regard.

2.2. Current Danish rules on VAT grouping

The current Danish rules on VAT grouping are derived from three different provisions in the Danish VAT Act (DVA),[17] i.e. Section 3(3), Section 46(9) and Section 47(4). Section 3(3) of the DVA is a general provision stating the effect of grouping for VAT purposes, i.e. the emergence of a single taxable person:[18]

Several persons, who are registered together, cf. Section 47(4), are treated as a single taxable person.

The terminology used in Denmark is not "VAT grouping", but "joint registration" (*fællesregistrering*); however, it is materially equivalent to a real "VAT group", because of the consequence of being treated as a single taxable person for VAT purposes and thus, is not just a mere VAT consolidation payment scheme for the members of the registration.[19]

10. Law No 356 of 19 May 2004.

11. Law proposal No 148 of 28 January 2004, 2003/1. The Danish Ministry for Taxation, working group report of 2 July 2001 on the Danish VAT Act and Sixth VAT Directive, as of 12 October 2020, see https://www.skm.dk/aktuelt/publikationer/rapporter/rapport-om-momsloven-og-6-momsdirektiv-juli-2001/, sections A and 3.2.

12. Judgment of 25 April 2013, Commission v Sweden, C-480/10, EU:C:2013:263; judgment of 25 April 2013, Commission v Netherlands, C-65/11, EU:C:2013:266; judgment of 9 April 2013, Commission v Ireland, C-85/11, EU:C:2013:217; judgment of 25 April 2013, Commission v United Kingdom, C-86/11, EU:C:2013:267; judgment of 25 April 2013, Commission v Czech Republic, C-109/11, EU:C:2013:269. B. Terra, J. Kajus, *A Guide to the European VAT Directives – Volume 1*, Amsterdam, 2020, 400–403.

13. Judgment of 25 April 2013, Commission v Denmark, C-95/11, EU:C:2013:268.

14. *Ibid*. Same result in judgment of 9 April 2013, Commission v Ireland, C-85/11; judgment of 25 April 2013, Commission v United Kingdom, C-86/11. S. Pfeiffer, *Current questions of EU VAT grouping*, in World Journal of VAT/GST Law, 2015, 4.

15. Judgment of 25 April 2013, Commission v Denmark, C-95/11, para. 44; judgment of 9 April 2013, Commission v Ireland, C-85/11, para. 48; judgment of 25 April 2013, Commission v United Kingdom, C-86/11, para. 44. M. Gabriël, H. v. Kesteren, *VAT Groups*, in M. Lang – I. Lejeune (editors) *Improving VAT/GST – Designing a Simple and Fraud-Proof Tax System*, Amsterdam, 2014, 504; B. Terra, J. Kajus, *A Guide to the European VAT Directives – Volume 1*, Amsterdam, 2020, 402.

16. Advocate General's Opinion of 27 November 2012, Commission v Ireland, C-85/11, EU:C:2012:753, para. 26.

17. Consolidated Act No 1021 of 26 September 2019, as most recently amended by Law No 591 of 13 May 2019 (DVA).

18. The author's translation in K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 11.

19. Judgment of 22 May 2008, Ampliscientifica and Amplifin, C-162/07, EU:C:2008:301, para. 21; European Commission, VAT Expert Group – VEG No 070 REV1 of 19 March 2018 on the Meaning of "financial, economic and organisational links" among VAT group members, taxud.c.1(2018)1668166, 5; M. Gabriël, H. v. Kesteren, *VAT Groups*, in M. Lang –

Denmark follows the interpretation of the consequences of VAT grouping as set out by the CJEU in the *Ampliscientifica and Amplifin* case,[20] meaning that treatment as a single taxable person precludes persons who are thus closely linked from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since only the single taxable person is authorised to submit such declarations, that a single VAT number be allocated to the group,[21] that internal transactions within the group are outside the scope of VAT,[22] and that the VAT group must calculate one total deduction percentage for all members of the VAT group.[23]

The substantive conditions for VAT grouping are stated in Section 47(4) of the DVA:[24]

Upon request, two or more taxable persons which exclusively perform taxable activities can be registered together. The tax authorities may permit persons carrying on activities that are subject to VAT registration to be registered together with persons whose activities are not subject to VAT registration and persons without economic activities. Such permission may only be granted if, via direct or indirect ownership, one person (parent company etc.) owns all the shares etc. in the other person(s) (subsidiaries, sub-subsidiaries etc.) which are covered by the joint registration. Only companies etc. that are established in Denmark may be registered jointly. An application for joint registration must be filed no later than one month before the joint registration is intended to take effect.

First of all, Danish VAT grouping is *voluntary*, as it requires either: 1) a request from *fully taxable persons*, or 2) an application to the Danish tax authorities for permission from a *mixed group of companies* consisting of taxable persons *and* VAT-exempt persons *or* non-taxable persons. Thus, VAT-exempt persons, e.g. banks, hospitals, universities etc., as well as non-taxable persons e.g. holding companies, public entities etc., can be included in a VAT group. Further, Danish VAT grouping is *generally* applicable for all business sectors.[25]

Obviously, Denmark has not implemented the same wording of the three substantive conditions

I. Lejeune (editors) *Improving VAT/GST – Designing a Simple and Fraud-Proof Tax System*, Amsterdam, 2014, 486; A. Parolini, *Cross-Border Group Taxation Regimes: VAT/GST v. Direct Taxation*, in M. Lang et al. (editors) *Value Added Tax and Direct Taxation – Similarities and Differences*, Amsterdam, 2009, 947; A. Parolini, *European VAT and Groups of Companies*, in G. Maisto (editor) *International and EC Tax Aspects of Groups of Companies*, Amsterdam, 2008, 109–110.

20. Judgment of 22 May 2008, Ampliscientifica and Amplifin, C-162/07.

21. *Ibid*, paras. 19–20; judgment of 17 September 2014, Skandia America Corp., C-7/13, EU:C:2014:2225, paras. 28–29. L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 56–57.

22. Danish Western Court of Appeal (*Vestre Landsret*), judgment of 5 February 2009, SKM2009.466.VLR; Danish Tax Council (*Skatterådet*), binding ruling of 29 January 2019, SKM2019.105.SR; Danish Tax Council, binding ruling of 24 April 2018, SKM2018.246.SR; Danish Tax Council, binding ruling of 28 March 2017, SKM2017.368.SR; Danish Tax Council, binding ruling of 20 October 2015, SKM2015.707.SR; Danish Tax Council, binding ruling of 25 September 2012, SKM2012.569.SR. A. v. Doesum et al., *Fundamentals of EU VAT Law*, Alphen aan den Rijn, 2020, 95 and 167–168; L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 1173.

23. Eastern Court of Appeal (*Østre Landsret*), decision of 11 November 2015, SKM2015.740.ØLR; Eastern Court of Appeal, decision of 13 November 2015, SKM2015.806.ØLR; Danish Tax Tribunal (*Landsskatteretten*), decision of 23 November 2017, SKM2017.666.LSR; Danish Tax Tribunal, decision of 26 June 2002, SKM2002.406.LSR; Danish Tax Tribunal, decision of 30 November 2000, SKM2001.99.LSR; Danish Tax Council, binding ruling of 29 January 2019, SKM2019.105.SR; Danish Tax Council, binding ruling of 24 March 2015, SKM2015.239.SR; Danish Tax Council, binding ruling of 21 June 2011, SKM2011.422.SR. As of 12 October 2020, see http://www.skat.dk, The Legal Guidelines 2020–2, sections D.A.3.3.1 and D.A.14.1.7. B. H. Hansen, E. Dekov, *Nye afgørelser om moms*, in SR.1995.0351; H. J. Kozuch, T. S. Svane, *Fællesregistrering for moms – uklar praksis*, in TfS 2005, 481; I. Massin, K. Vyncke, *EC Communication on VAT Grouping: An Attempt to Harmonize or to Restrict the Use of Group Registration?*, in International VAT Monitor, 2009, 458; T. Ehrke-Rabel, *VAT grouping: the relevance of the territorial restriction of Article 11 of the VAT Directive*, in World Journal of VAT/GST Law, Vol. 1, 2012, Issue 1, 64–65; K. K. E. Elgaard, *Interaktionen mellem momsretten og indkomstskatteretten*, Copenhagen, 2016, 401–402; S. E. Pedersen, *Moms og fast ejendom*, Copenhagen, 2020, 101.

24. The author's translation in K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 11–12.

25. H. Jurland, *Enslydende fortolkning af fællesregistreringer i EU*, in SU 2010, 2.

for VAT grouping in relation to the "financial, economic and organisational links" as is used in Article 11 of the VAT Directive (section 2.3). According to the Danish provision, the *only* condition for a mixed VAT group is 100% direct or indirect ownership within a group of companies, which is analysed below (section 3). Denmark has implemented the territorial condition for VAT grouping, whereby only persons that are *established* in Denmark can be included in a Danish VAT group, which means that cross-border VAT grouping is not allowed. Danish branches/fixed establishments of foreign main establishments can be part of a Danish VAT group (section 4).

The Danish tax authorities and the Danish Tax Council have agreed that the conditions for VAT grouping stipulated in Section 47(4) of DVA are objectively determinable, which does not include any element of discretion.[26] Thus, provided the conditions for VAT grouping are fulfilled on an objective basis, both the requesting fully taxable persons and an applying mixed group of companies will be immediately entitled to obtain permission for VAT grouping from the tax authorities.

Section 46(9) of DVA states that several entities that do not have the same owner and are registered together pursuant to Section 47(4) are jointly and severally liable for payment of VAT relating to the entities covered by the joint registration.[27] As of today, the provision has only resulted in one case before the Danish Supreme Court (*Højesteret*) in 1989.[28]

Denmark has not implemented any special anti-avoidance rules in connection with the rules on VAT grouping by virtue of the second sentence of Article 11 of the VAT Directive (cited in 2.3 below).[29]

2.3. Implementation of Article 11 of the VAT Directive

The Danish rules on VAT grouping implement the EU VAT grouping scheme pursuant to Article 11 of the VAT Directive (former second subparagraph of Article 4(4) of the Sixth VAT Directive):

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 boun 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 through the use of this provision.

The purposes of the EU VAT grouping scheme were *simplifying administration* or *combating abuses*, e.g. where advantage is taken of a special VAT scheme and when such advantage arises from a pure legal technicality as to the definition of "independence."[30]

No further details on the exact material content of the *close connection* in the form of the *financial, economic and organisational links* are stated in the short provision, and no further explanation is

26. Danish Tax Council, binding ruling of 23 June 2015, SKM2015.530.SR.

27. The author's translation in K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 11. The Legal Guidelines 2020–2, section D.A.13.8.

28. Danish Supreme Court (*Højesteret*), judgment of 25 October 1989, TfS 1989, 638. T. Vistisen, *Fællesregistrering i henhold til momsloven – modregning*, in TfS 1989, 637.

29. K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 12.

30. Proposal for a Sixth Council Directive COM(73) 950 final from the Commission of 20 June 1973 on the harmonization of legislation of Member States concerning turnover taxes, 4; judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, EU:C:2015:496, para. 40; judgment of 9 April 2013, Commission v Ireland, C-85/11, para. 47; judgment of 25 April 2013, Commission v Sweden, C-480/10, para. 37. K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 7–8; A. v. Doesum et al., *Fundamentals of EU VAT Law*, Alphen aan den Rijn, 2020, 95–96; C. D. Soares, A. Arnaldo, *VAT Grouping Schemes – Standpoint*, in International VAT Monitor, 2015, 86; O. Henkow, *Financial Activities in European VAT*, Alphen aan den Rijn, 2008, 192–193.

given in the proposal to the provision.[31] This leaves a *margin of discretion* for the Member States to implement the national content of the three links,[32] which significantly affects the analysis of whether and to what extent Danish VAT law complies with the VAT Directive. Moreover, the CJEU has not clarified the interpretation of the three links, which is probably because it has not yet been presented with a case concerning the specific content of the three links.

The fact that the content of the three links is not sufficiently clear and precise was established in the *Larentia + Minerva and Marenave* case,[33] where the CJEU stated that Article 4(4) of the Sixth VAT Directive (now Article 11 of the VAT Directive) may not be considered to have the *direct effect* of allowing taxable persons to claim the benefit thereof against their Member State, in the event that that State's legislation is not compatible with that provision and cannot be interpreted in a way compatible with it.[34] Further, the CJEU stated that the condition that the formation of a VAT group is subject to the existence of close financial, economic and organisational links between the persons concerned needs to be specified at *national level*, and that provision is thus conditional, in view of the fact that it involves the application of national provisions determining the actual scope of such links.[35] Finally, the CJEU also noted that the wording of Article 11 of the VAT Directive does not make the application thereof subject to other conditions than that the persons must be closely bound to one another by the three links,[36] thus, leaving room for a *certain margin of discretion* for the Member States besides what is stipulated in Article 11 of the VAT Directive.[37] Thereby, the three links set the limits for the margin of discretion exercised by the Member States.

The European Commission has explained its opinion on the content of the three links, which is simply the legal interpretation of the Commission.[38] As Pfeiffer has stressed, the Commission's interpretation may serve as a minimum definition from which Member States deviate to further determine the scope of the three links.[39] First, the Commission finds that all three links have to be met for the entire duration of a VAT group as the conditions are *cumulative*, and that those conditions should be fairly strict.[40] Next, the Commission suggests the following definitions of the

31. COM(73) 950 final. O. Henkow, *Financial Activities in European VAT*, Alphen aan den Rijn, 2008, 194–195.

32. Communication COM(2009) 325 final from the Commission to the Council and the European Parliament of 2 July 2009 on the VAT group option provided for in Article 11 of the Council Directive 2006/112/EC on the common system of value added tax; European Commission, VAT Expert Group – VEG No 047 of 31 August 2015 on VAT grouping and judgement in case C-7/13 (Skandia America Corp. (US)), taxud.c.1(2015)3986774, 6; K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 7; C. Heber, *VAT Grouping – A Comment*, in M. Lang et al. (editors) *CJEU – Recent Developments in Value Added Tax 2016*, Vienna, 2017, 158; C. B. Eskildsen, *Fællesregistrering – en analyse af momslovens § 47, stk. 4*, in SU 2011, 62, section 3; I. Massin, K. Vyncke, *EC Communication on VAT Grouping: An Attempt to Harmonize or to Restrict the Use of Group Registration?*, in International VAT Monitor, 2009, 454; L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 56.

33. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14.

34. *Ibid*, para. 52. M. Merkx, *VAT and Holding Companies: Position Finally Clear?*, in EC Tax Review, 2016, Issue 1, 52–53; S. Pfeiffer, *Recent CJEU Case Law on Taxable Persons and Public Bodies*, in M. Lang et al. (editors) *CJEU – Recent Developments in Value Added Tax 2015*, Vienna, 2016, 188–189; B. Terra, J. Kajus, *A Guide to the European VAT Directives – Volume 1*, Amsterdam, 2020, 405.

35. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, para. 50; Advocate General's Opinion of 26 March 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, EU:C:2015:212, para. 112. S. Pfeiffer, *Recent CJEU Case Law on Taxable Persons and Public Bodies*, in M. Lang et al. (editors) *CJEU – Recent Developments in Value Added Tax 2015*, Vienna, 2016, 187; B. Terra, J. Kajus, *A Guide to the European VAT Directives – Volume 1*, Amsterdam, 2020. 405.

36. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, paras. 36–38, where reference is made to the judgment of 9 April 2013, Commission v Ireland, C-85/11, para. 36.

37. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, para. 39.

38. S. Pfeiffer, *Current questions of EU VAT grouping*, in World Journal of VAT/GST Law, 2015, 12.

39. *Ibid*, 13.

40. COM(2009) 325 final, 8–9.

three links as guidelines:[41]

- The *financial link*: defined by reference to a percentage of participation in the capital or in voting rights (over 50%), or defined by reference to a franchise contract. This guarantees that one company has the actual control of another.
- The *economic link*: defined by reference to the existence of at least one of the following situations of economic cooperation. The principal activity of the group members is of the same nature, or the activities of the group members are complementary or interdependent, or one member of the group carries out activities which are wholly or substantially to the benefit of the other members.
- The *organisational link*: defined by reference to the existence of a shared, or at least partially shared, management structure.

Having all of the above in mind, this article will now analyse whether and to what extent the Danish rules on VAT grouping are compatible with Article 11 of the VAT Directive in respect of both the three substantive conditions for VAT grouping and the territorial condition for VAT grouping.

3. The three substantive conditions for VAT grouping

3.1. Unconditional VAT grouping for taxable persons who exclusively perform taxable activities

Pursuant to the first sentence of Section 47(4) of the DVA, several taxable persons who *exclusively* perform taxable activities can be registered together as a single taxable person upon request. Clearly, there is no mention of the financial, economic and organisational links as in Article 11 of the VAT Directive, and hence, no requirement for any close connection between the members of the VAT group. From an immediate point of view, this is not a correct implementation of the VAT Directive, since the close connection is a condition, based on the direct wording of Article 11 of the VAT Directive.[42] However, it may be argued that due to the requirement that all members of the VAT group exclusively perform taxable activities, for which they are registered for VAT, VAT grouping in itself will not result in any economic or tax advantages for the members of the VAT group.[43] Following this logic, VAT grouping is in principle neutral for fully taxable persons and as a starting point, would not harm the functioning of the VAT system.

Accordingly, VAT grouping is possible *in general* for all fully taxable persons– i.e. all forms of persons/entities within all business sectors – regardless of the lack of close connection between them, meaning that an independent seller and an independent buyer would be able to form a VAT group,[44] thereby not paying VAT on internal transactions between them.[45] In such a situation, the disadvantages of VAT grouping would be an obligation to file a joint VAT return, having just one VAT registration number, joint calculation of the partial right to input VAT deduction,[46] joint and several liability for the seller and the buyer etc.,[47] which would most probably deter independent third

41. *Ibid*, 9.
42. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, para. 36; L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 1172.
43. L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 1173; U. Brandt, *Momsmæssig fællesregistrering i et nationalt og EU-retligt perspektiv*, in SU 2001, 358.
44. H. Jurland, *Enslydende fortolkning af fællesregistreringer i EU*, in SU 2010, 2.
45. Gjems-Onstad et al. have viewed this situation as potential tax avoidance and not in line with the purpose of the Norwegian VAT grouping scheme: O. Gjems-Onstad et al., *Lærebok i merverdiavgift*, Oslo, 2017, 342–343; K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 18–19.
46. K. Marcussen, *Momsfritagelsen for cost sharing – hvad gør vi nu?*, in RR.4.2018.58.
47. C. D. Soares, A. Arnaldo, *VAT Grouping Schemes – Standpoint*, in International VAT Monitor, 2015, 92.

parties from forming a VAT group. Jørgensen et al. have stated that in practice, VAT grouping is only known in situations where there is a certain identity between the owners of the entities, and where e.g. the liquidity effect of VAT through VAT grouping has been suppressed in terms of "internal" supplies, with a more correct economic result as a consequence.[48] Thus, from a practical point of view it may be expected that VAT grouping between completely independent third parties would very rarely occur,[49] *inter alia* due to the disadvantages of VAT grouping and normal market mechanisms; still it is an available operational possibility for such parties to choose under Danish VAT law.

In the author's opinion, the first sentence of Section 47(4) of DVA allowing for unconditional VAT grouping for fully taxable persons is not compatible with the VAT Directive, which presupposes the existence of a certain qualified close connection between the members of the VAT group, through fulfilment of the three substantive links.[50] The EU legislators have directly specified that VAT grouping is available for persons who are closely connected by the three links, and thus, the option is not available for other persons who are *not* closely connected by the three links. This is emphasised by the Commission services, which has stated: *"If entities whose economic activities are completely unrelated were allowed to form a VAT group, the economic link requirement laid down in Article 11 of the VAT Directive would become meaningless"*.[51] The statement illustrates that it would not make sense to have the three links, if completely unrelated entities could group for VAT purposes despite non-fullfilment of the links.

Just as a remark, the CJEU did not comment on this diverging Danish implementation of Article 11 of the VAT Directive in the *Commission* v *Denmark* case,[52] although this does not of course entail any approval thereof, as it was not the subject matter of the case.

However, for reasons of practicality and neutrality and having due regard to the purposes of VAT grouping, i.e. simplifying administration and combating abuses, it may be argued that the Danish implementation is in harmony with the intention and purposes of VAT grouping. In this situation, VAT grouping is neutral for fully taxable persons, it results in significant administrative simplification both for businesses and the tax authorities, and it poses a low risk of abuse and avoidance when all members of the VAT group are entitled to a full right of input VAT deduction. Furthermore, the actual use of this option seems to be very low, and therefore perhaps relatively unproblematic from a practical point of view. Thus, the Danish rules on unconditional VAT grouping for fully taxable persons do not seem to cause any harm to the functioning or effect of the EU VAT system and the Danish VAT system, which may speak in favour of accepting the current state of law, even though not in line with the VAT Directive.

It is noteworthy that Pfeiffer has proposed that the EU VAT grouping rules should be further harmonised. In that connection he has said that while abolishing the rule is out of the question, then the harmonisation process with the least impact on the VAT revenues of Member States could be chosen, i.e. the introduction of VAT grouping for taxpayers with a full right of input VAT deduction only.[53] Seen in this light, the Danish diverging implementation of unconditional VAT grouping for fully taxable persons may be a realistic way forward to consider at EU level in the future – which also speaks in favour of maintaining the Danish rules on this point. Ultimately, it is for the CJEU

48. L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 1173.

49. H. Jurland, *Enslydende fortolkning af fællesregistreringer i EU*, in SU 2010, 2.

50. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, para. 36; S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 155; C. B. Eskildsen, *Fællesregistrering – en analyse af momslovens § 47, stk. 4*, in SU 2011, 62, sections 3.1 and 5; L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 1172.

51. European Commission, VAT Committee, Working Paper No 918 of 16 February 2017 on the Meaning of "financial, economic and organisational links" among VAT group members, taxud.c.1(2017)982178, 22.

52. Judgment of 25 April 2013, Commission v Denmark, C-95/11.

53. S. Pfeiffer, *VAT Grouping – Consequences of Nigl and Follow-up on Skandia America*, in M. Lang et al. (editors) *CJEU – Recent Developments in Value Added Tax 2016*, Vienna, 2017, 154–155.

to decide in a future concrete case as to whether Danish law is compatible or not with the VAT Directive, if such a case ever comes before the CJEU.

3.2. Conditional VAT grouping for a mixed group of taxable, VAT-exempt and non-taxable persons within a group of companies

According to the second and third sentences of Section 47(4) of the DVA, VAT grouping of a mixed group of VAT-registered/taxable, non-VAT registered/VAT-exempt and non-taxable persons within a group of companies is allowed upon application to and permission from the Danish tax authorities, provided certain conditions are met; see below.

3.2.1. The financial link

3.2.1.1. 100% ownership condition

Permission for VAT grouping is only granted in cases where one person (*parent company* etc.), through direct or indirect ownership of *all the shares* etc., owns the other person(s) (*subsidiaries, subsubsidiaries* etc.) included in the VAT group. Thus, Danish VAT grouping is only an option for groups of companies consisting of *both* parent and subsidiary(-ies), which are vertically integrated into each other, since two subsidiaries on a stand-alone-basis cannot form a VAT group,[54] unless these two subsidiaries can be grouped by way of the option for unconditional VAT grouping for fully taxable persons (section 3.1).[55] Based on the wording of the rules on conditional VAT grouping for a mixed group of companies, this option is aimed at companies etc., i.e. *legal persons*,[56] and not at persons/entities in general. It is not a requirement that all companies within a group of companies are part of the VAT group.[57]

Obviously, in terms of conditional VAT grouping for a mixed VAT group, Denmark has chosen to implement the financial link to the highest degree at 100% participation in the capital. This approach has been heavily criticised in Danish literature: Hansen has stated that the 100% ownership condition is not in accordance with the Sixth VAT Directive;[58] Hansen and Dekov have stressed that Danish VAT groups are competitively disadvantaged being established in Denmark than in other EU countries, which runs counter to VAT harmonisation in the EU;[59] Brandt has not found the 100% ownership condition proportional;[60] Rasmussen and Jørgensen have stated that a more restrictive VAT grouping rule has been chosen in Danish VAT regulation than that provided for by the Directive;[61] and Dekov and Jørgensen have expressed the view that the 100% ownership condition may seem to go beyond what the three links require.[62]

From an immediate point of view, it may seem too restrictive to require 100% direct or indirect ownership under the Danish rules, since there is no mention of such a high percentage of participation in the capital in Article 11 of the VAT Directive. Furthermore, the European Commission

54. U. Brandt, *Momsmæssig fællesregistrering i et nationalt og EU-retligt perspektiv*, in SU 2001, 358.

55. L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 1173.

56. The Legal Guidelines 2020–2, section D.A.14.1.7.

57. Law proposal No 124 of 8 December 1993, special comments to § 47. The Legal Guidelines 2020–2, section D.A.14.1.7.

58. B. H. Hansen, *Nogle momsmæssige betragtninger – i lyset af L 124 om revision af momsloven*, in TfS 1994, 194, section 2.3; B. H. Hansen, *Revision af momsloven fra 1967 – EU-harmonisering med nye områder og begreber*, in RR.1994.08.0023.

59. B. H. Hansen, E. Dekov, *Nye afgørelser om moms*, in SR.1995.0351. See also E. Dekov, *Moms og lønsumsafgift i koncerner – Med kravet om 100% koncernejerskab går Danmark længere end EU*, in RR.1995.09.0056.

60. U. Brandt, *Momsmæssig fællesregistrering i et nationalt og EU-retligt perspektiv*, in SU 2001, 358.

61. L. Rasmussen, L. L. Jørgensen, *Ny skat på selskaber – Tanker efter TfS 1999.908, hvor Told-Skat udviser manglende respekt for momsens princip om fuldstændig neutralitet og gør momsen til en ny "selskabsskat"*, in SR.2000.110.

62. E. Dekov, L. L. Jørgensen, *NY MOMSLOV*, in SR.1994.0245, section 5b. See also E. Dekov, *Moms og lønsumsafgift i koncerner – Med kravet om 100% koncernejerskab går Danmark længere end EU*, in RR.1995.09.0056.

has suggested that the financial link should be defined by a percentage of participation in the capital or in voting rights *over 50%*, as the purpose is to guarantee the *actual control*;[63] therefore, it seems sufficient to require only *more than 50% ownership or control*, provided this leads to actual control.[64] Thus, due to the wording of Article 11 of the VAT Directive and the Commission's interpretation of the financial link, the 100% ownership condition does seem – on an isolated basis – to go significantly beyond what the financial link requires.[65]

On the other hand, the wording of Article 11 of the VAT Directive does not directly prohibit a financial link in the form of 100% ownership, since the Member States enjoy a margin of discretion in determining the specific content of the financial link in national law (section 2.3). In the author's view, the 100% ownership condition is within the scope of the financial link and within the margin of discretion of the Member States, and is therefore compatible with the VAT Directive. This is also supported by the fact that the 100% ownership condition is in harmony with the purposes of VAT grouping, i.e. simplifying administration and combating abuses, since 100% ownership is clearly and easily identifiable by the businesses and the tax authorities,[66] and the VAT group is simple to control. The purpose of combating abuses is discussed further below.

As an additional note, the Commission did not file an action against Denmark for breach of the financial link, but solely for breach of the personal condition by allowing holding companies to be part of VAT grouping.[67] Perhaps that indicates a choice, or perhaps it indicates the level of seriousness of the alleged breach in the eyes of the Commission, but no conclusion can be drawn.

Actually, it does not appear directly from the *travaux préparatoires* what the reason was for the 100% ownership condition (section 2.1). Hansen and Dekov have stated that the Danish Ministry for Taxation has reasoned the 100% ownership condition on the basis of the risk of loss of VAT revenue, as the VAT group is under the tax authorities' control and furthermore has a limited right of input VAT deduction.[68] Provided that Hansen's and Dekov's information is correct, then the 100% ownership condition serves the purpose of protecting the VAT revenue, by securing the control of the VAT group and of its calculation of its right to partial deduction when VAT-exempt persons are part of the VAT group. Such a purpose indicates that the 100% ownership condition is most probably intended as an anti-avoidance measure. If that is the case, it has been criticised in Danish literature that the 100% ownership condition is not proportional as an anti-avoidance measure.[69] Additionally, Hansen has proposed the possibility for dispensation in cases of ownership below 100%,[70] which has never been taken up by the Danish legislators.

Based on the second sentence of Article 11 of the VAT Directive and case law from the CJEU,[71] there is a wide margin of discretion for the Member States to adopt national legislation in order to

63. COM(2009) 325 final, 9.

64. In the same direction: P. Stacey, *A Rational Basis for Setting GST and VAT Grouping Thresholds*, in International VAT Monitor, 2006, section 3; U. Brandt, *Momsmæssig fællesregistrering i et nationalt og EU-retligt perspektiv*, in SU 2001, 358.

65. In the same direction: E. Dekov, L. L. Jørgensen, *NY MOMSLOV*, in SR.1994.0245, section 5b; E. Dekov, *Moms og lønsumsafgift i koncerner – Med kravet om 100% koncernejerskab går Danmark længere end EU*, in RR.1995.09.0056.

66. S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 130.

67. Judgment of 25 April 2013, Commission v Denmark, C-95/11.

68. B. H. Hansen, E. Dekov, *Nye afgørelser om moms*, in SR.1995.0351. See also E. Dekov, *Moms og lønsumsafgift i koncerner – Med kravet om 100% koncernejerskab går Danmark længere end EU*, in RR.1995.09.0056.

69. U. Brandt, *Momsmæssig fællesregistrering i et nationalt og EU-retligt perspektiv*, in SU 2001, 358; B. H. Hansen, *Nogle momsmæssige betragtninger – i lyset af L 124 om revision af momsloven*, in TfS 1994, 194, section 2.4.

70. B. H. Hansen, *Nogle momsmæssige betragtninger – i lyset af L 124 om revision af momsloven*, in TfS 1994, 194, section 2.4.

71. Judgment of 22 May 2008, Ampliscientifica and Amplifin, C-162/07, paras. 27–32; judgment of 25 April 2013, Commission v Sweden, C-480/10, paras. 38–39; judgment of 9 April 2013, Commission v Ireland, C-85/11, para. 48; judgment of 25 April 2013, Commission v Denmark, C-95/11, para. 45; judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, para. 42.

combat abuse, avoidance and evasion within the area of VAT grouping. Thus, national legislation deviating from the first sentence of Article 11 of the VAT Directive is widely allowed by the CJEU, provided such national measures are necessary and appropriate in terms of countering abuse and avoidance,[72] which is for the national courts to decide.[73] In addition to this, the Commission has expressed the opinion that limitations to VAT grouping could be justified only if there is a need to take action against potential abuse for clearly identified transactions.[74]

With due consideration to the wide margin of discretion for the Member States to implement anti-avoidance measures within the area of VAT grouping – regardless of explicit reference to the second sentence of Article 11 of the VAT Directive – it is the author's view that limitations and restrictions on the option for VAT grouping would be justified to a very large extent in the majority of cases. As examples, the CJEU established that the inclusion of non-taxable persons in a VAT group *could serve as an anti-avoidance measure*,[75] the same in regard to limiting VAT grouping to the financial sector,[76] and again the same regarding a condition that solely entities with legal personality and linked to the controlling company of the group in a relationship of subordination can be VAT grouped.[77] In the latter *Larentia + Minerva and Marenave* case, the condition on subordinateship is to some extent comparable to the Danish 100% ownership condition, since both conditions express the requirement for (full) vertical integration between the members of the VAT group, which could serve as an anti-avoidance measure on a case-by-case basis.

In the author's opinion, the CJEU has given its seal of approval to a very broad range of national anti-avoidance measures, which underlines the wide freedom for Member States to justify national deviations from the VAT Directive and lay down further specified conditions, provided they can argue convincingly for anti-avoidance purposes. Taking all of the above into account, in the author's view, the 100% ownership condition in Danish law for VAT grouping for a mixed group of companies is compatible with the VAT Directive, but of course it is to be finally decided by the CJEU in a future case, if any.

3.2.1.2. The financial link as the only link

Next, the question arises as to whether it is compatible with Article 11 of the VAT Directive for Denmark to have incorporated solely the financial link in the form of 100% ownership for VAT grouping for a mixed group of companies, and neither of the other two links, i.e. the economic and organisational links. On the one hand, it could be argued that Article 11 of the VAT Directive explicitly calls for all the three links cumulatively to be present,[78] since the presence of the financial link is not in itself enough to fulfil the other two links.[79] On the other hand, it could also be argued that all three links do not have to be present at the same time, as long as the close connection can be established based on an overall assessment hereof.[80]

72. K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 2.

73. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, paras. 43–46.

74. COM(2009) 325 final, 9.

75. Judgment of 25 April 2013, Commission v Denmark, C-95/11, para. 44; judgment of 9 April 2013, Commission v Ireland, C-85/11, para. 48; judgment of 25 April 2013, Commission v United Kingdom, C-86/11, para. 44.

76. Judgment of 25 April 2013, Commission v Sweden, C-480/10, paras. 38–39.

77. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, para. 46.

78. COM(2009) 325 final, 8–9; S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 155; K. Vyncke, *EU VAT Grouping from a Comparative Tax Law Perspective*, in EC Tax Review, 2009, Issue 6, 303.

79. VAT Committee, Working Paper No 918, taxud.c.1(2017)982178, 5; S. Pfeiffer, *Current questions of EU VAT grouping*, in World Journal of VAT/GST Law, 2015, 12; A. Parolini et al., *VAT and Group Companies*, in Bulletin for International Taxation, 2011, 352; C. B. Eskildsen, *Fællesregistrering – en analyse af momslovens § 47, stk. 4*, in SU 2011, 62, section 3.2.

80. C. B. Eskildsen, *Fællesregistrering – en analyse af momslovens § 47, stk. 4*, in SU 2011, 62, sections 3.2 and 5. In the same direction: A. v. Doesum et al., *Fundamentals of EU VAT Law*, Alphen aan den Rijn, 2020, 102; A. v. Doesum, G-J

It is explicit in the wording of Article 11 of the VAT Directive that VAT grouping requires the presence of a close connection between the members of the VAT group based on an assessment of all the three links taken cumulatively, which is emphasised by the "and" in "financial, economic *and* organisational links."[81] Furthermore, the CJEU has stated that the wording of Article 11 of the VAT Directive makes the application thereof subject to the conditions that the persons are closely bound to one another by the three links, with no other conditions stated,[82] which only leaves room for a certain margin of discretion for the Member States besides what is stipulated in that provision.[83] As a clear starting point, the presence of only the financial link, as in Denmark, is not enough to fulfill the three substantive conditions for VAT grouping according to the VAT Directive; thus it is incompatible herewith.[84]

Then, the next question arises as to whether the presence of only the financial link may nevertheless be enough to satisfy the other two links, based on an overall assessment of a sufficient close connection and of the three links.[85] More precisely, the question is whether the financial link, or the purpose of actual control,[86] may simultaneously also fulfill the economic and organisational links.[87] For example, Pfeiffer has stated that in light of the financial threshold, the higher such threshold is set, the more probable it becomes that in addition to the financial link, the economic link is fulfilled cumulatively, with this stemming from the fact that highly integrated groups are more likely to also be economically interdependent.[88] Initially, this sounds plausible as an underlying financial and economic rationale for a group of companies.

With reference to the 100% ownership condition in Denmark, it could be argued that the condition implies that the economic and organisational links are fulfilled as well. This view has been expressed by Eskildsen, who says that there must be an overall assessment of the necessary close connection between the members of the VAT group, thus, in this case, it is redundant to demand further close links, when there is 100% ownership, and if so, the Danish implementation is fully compatible with Article 11 of the VAT Directive.[89] Certainly, his view is reasonable, but the author is not convinced based on the wording of Article 11 of the VAT Directive, the *Larentia + Minerva and Marenave* case and the international literature.

Indeed, Pfeiffer has pointed out the great advantage of having a criterion such as the percentage needed to fulfil a financial link in the light of applicability, since in practice, such formal criteria can be easily determined by both companies and tax administrations.[90] Furthermore, he says that the rebuttable presumption of fulfilling the economic link at a certain threshold of financial inter-

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v. Norden, *T(w)o become one: the Communication from the Commission on VAT groupin*g, in British Tax Review, 2009, 663.

81. COM(2009) 325 final, 8; VAT Committee, Working Paper No 918, taxud.c.1(2017)982178, 3–4.

82. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, paragraphs 36–38, where reference is made to judgment of 9 April 2013, Commission v Ireland, C-85/11, paragraph 36. See also O. Henkow, *Financial Activities in European VAT*, Alphen aan den Rijn, 2008, 194.

83. Judgment of 16 July 2015, Larentia + Minerva and Marenave, joined cases C-108/14 and C-109/14, para. 39. See also O. Henkow, *Financial Activities in European VAT*, Alphen aan den Rijn, 2008, 194–195.

84. In the same direction: K. Vyncke, *EU VAT Grouping from a Comparative Tax Law Perspective*, in EC Tax Review, 2009, Issue 6, 303.

85. A. v. Doesum et al., *Fundamentals of EU VAT Law*, Alphen aan den Rijn, 2020, 102; A. v. Doesum, G-J v. Norden, *T(w)o become one: the Communication from the Commission on VAT groupin*g, in British Tax Review, 2009, 663.

86. COM(2009) 325 final, 9.

87. S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 134; M. Gabriël, H. v. Kesteren, *VAT Groups*, in M. Lang – I. Lejeune (editors) *Improving VAT/GST – Designing a Simple and Fraud-Proof Tax System*, Amsterdam, 2014, 499.

88. S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 132–134.

89. C. B. Eskildsen, *Fællesregistrering – en analyse af momslovens § 47, stk. 4*, in SU 2011, 62, sections 3.2 and 5.

90. S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 130.

dependence can be seen as a means of achieving administrative simplication and legal certainty.[91] Following his view, there are arguments in favour of considering the economic link to be fulfilled implicitly as a consequence of fulfilment of the financial link *qua* the 100% ownership condition.

Additionally, Pfeiffer states that the establishment of a financial link in itself provides the framework for the parent company to exercise its will in an organisational and economic framework; however, such a single criterion may be subject to tax planning: By reducing or increasing the shareholding in companies, the formation of VAT groups would be made easy.[92] In any case, he concludes that the wording of Article 11 of the VAT Directive makes it clear that the financial, economic and organisational links must be fulfilled in order to apply the VAT grouping regime;[93] thus, the presence of only the financial link is not enough to fulfill also the other two links.

In addition, Parolini et al. have stated that it may be argued that Article 11 of the VAT Directive does not authorise VAT grouping on the basis of ownership of a majority of the share capital or voting rights in a company alone, as the mere holding of interests does not, *per se*, imply that the entities are also closely bound by economic and organisational links.[94]

Similar in his stance, Zuidgeest questions whether actual control of a company can be exercised under all circumstances on the basis of shareholdings or voting rights, as shareholding does not give a direct influence over the daily management of the company.[95] He therefore finds it logical that, in addition to the financial link, the members of a VAT group must also be closely bound to one another by economic and organisational links.[96]

The author shares these last views: that the presence of the financial link cannot in itself compensate for the lack of the economic and organisational links as stipulated directly in the VAT Directive. Consequently, the fact that Denmark has only implemented the financial link and not the other two links is incompatible with the VAT Directive, which once again is for the CJEU to decide in a future case concerning an assessment of the three links on either a separate or a cumulative basis.

3.2.2. The (lack of) economic link

As already stated, Denmark has only implemented the financial link in the form of 100% ownership in relation to conditional VAT grouping for a mixed group of companies and neither of the other two links, including the economic link, which are required according to Article 11 of the VAT Directive. Thus, the clear point of departure is that the lack of the economic link is not compatible with the VAT Directive (section 3.2.1.2).

In some ways, it may be argued that the economic link is fulfilled, based on the view that the economic cooperation is taking the form of a group of companies under 100% ownership of the parent company, due to the activities of the whole group of companies being economically connected. If that holds true, it may be reasonable to assume that the principal activity of the whole group of companies is normally of the same nature, that the activities of the members are complementary or interdependent, or one member of the group carries out activities, which are wholly or substantially to the benefit of the other members, cf. the European Commission's guidelines (section 2.3).[97]

91. *Ibid*, 147 and 156.

92. *Ibid*, 155.

93. *Ibid*.

94. A. Parolini et al., *VAT and Group Companies*, in Bulletin for International Taxation, 2011, 352; A. Parolini, *Cross-Border Group Taxation Regimes: VAT/GST v. Direct Taxation*, in M. Lang et al. (editors) *Value Added Tax and Direct Taxation – Similarities and Differences*, Amsterdam, 2009, 950; A. Parolini, *European VAT and Groups of Companies*, in G. Maisto (editor) *International and EC Tax Aspects of Groups of Companies*, Amsterdam, 2008, 111.

95. R. Zuidgeest, *Cross-Border VAT Grouping*, International VAT Monitor, 2010, 30.

96. *Ibid*, 30.

97. COM(2009) 325 final, 9.

Contrary to this, it could be argued that an economic link is not always established within a group of companies. Doesum et al. have expressed this view, as they state that although the definition provided by the Commission for the economic link can be considered quite liberal, they feel that even so, it unnecessarily restricts the scope for establishing VAT groups, as it would conflict with the principle of neutrality, since group companies will often not satisfy the economic link.[98]

In the author's view, it is still difficult to argue that the Danish implementation of the financial link alone is a sufficient implementation of the three substantive conditions for VAT grouping in the VAT Directive.

3.2.3. The (lack of) organisational link

To repeat, Denmark has only implemented the financial link requirement (100% ownership for a mixed group of companies) and no other links, including the organisational link, as stated in Article 11 of the VAT Directive, which is therefore not compatible with the VAT Directive (section 3.2.1.2).

However, it could be argued that a shared management structure can be regarded to exist implicitly *qua* the 100% ownership by the parent company of the subsidiary(-ies). The author doubts this, as the 100% ownership condition does not say anything about the management structure or agreements etc., i.e. nothing that confirms the actual control of the parent company over the subsidiary(-ies).[99]

Another argument could be that the financial link may have some sort of spill-over effect on the organisational link. As an example, Doesum et al. have stated that if the financial and organisational links are considered together, a control test is applied, where the decisive factor is whether an entity controls another entity by means of participation in capital or in voting rights, whereby this control should be formalised in at least a partially shared management structure.[100] Their view is supported by the fact that some Member States seem to follow a rebuttable presumption of fulfilling the organisational link upon fulfilling the financial threshold.[101]

Hansen has stated that the 100% ownership condition was also motivated by the wish of the Danish tax authorities for clear equality with one-man businesses, so the VAT treatment does not differ depending on whether the business is organised with divisions inside the business, or places certain activities to 100% owned subsidiaries.[102] Hence, the 100% ownership condition may be seen as an expression of organisational neutrality between VAT-registered persons, thereby an indirect fulfilment of the organisational link.

In the author's view, it is still difficult to argue that the Danish implementation of the financial link alone is a sufficient implementation of the three substantive conditions for VAT grouping in the VAT Directive. Even if the arguments in favour of having the organisational link fulfilled implicitly *qua* the financial link may be a little stronger than for the economic link, they are not convincing enough to change the author's opinion.

98. A. v. Doesum et al., *Fundamentals of EU VAT Law*, Alphen aan den Rijn, 2020, 102; A. v. Doesum, G-J v. Norden, *T(w)o become one: the Communication from the Commission on VAT groupin*g, in British Tax Review, 2009, 662–663.

99. COM(2009) 325 final, 9.

100. A. v. Doesum et al., *Fundamentals of EU VAT Law*, Alphen aan den Rijn, 2020, 103; A. v. Doesum, G-J v. Norden, *T(w)o become one: the Communication from the Commission on VAT groupin*g, in British Tax Review, 2009, 663.

101. S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 154 and 156; A. Parolini, *European VAT and Groups of Companies*, in G. Maisto (editor) *International and EC Tax Aspects of Groups of Companies*, Amsterdam, 2008, 111.

102. B. H. Hansen, *Nogle momsmæssige betragtninger – i lyset af L 124 om revision af momsloven*, in TfS 1994, 194, section 2.3; B. H. Hansen, *Revision af momsloven fra 1967 – EU-harmonisering med nye områder og begreber*, in RR.1994.08.0023; B. H. Hansen, *Ny momslov*, in SPO.1994.142.

4. The territorial condition for VAT grouping

4.1. Current discussions in literature and at EU level

Generally, the territorial condition for VAT grouping has been widely discussed *inter alia* as to whether it is in conflict with the principle of freedom of establishment under the EU Treaties.[103] Both opinions have been raised in literature,[104] but this discussion is outside the scope of the article.

Currently, the discussions both in literature[105] and at EU level[106] centre on the cross-border effects of VAT grouping, especially after the *Skandia America* case, where the CJEU stated that the supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a VAT group,[107] because the VAT group including the branch constitutes a new taxable person separate from the main establishment.

The discussions will most probably evolve even further when the CJEU delivers the result of the "reverse *Skandia America* case" in the pending *Danske Bank* case.[108] Here, the question is, whether a Swedish branch of a bank established in another Member State constitutes an independent taxable person where the principal establishment supplies services to the branch and imputes the costs thereof to the branch, if the principal establishment is part of a VAT group in the other Member State, while the Swedish branch is not a member of any Swedish VAT group.[109] The *Danske Bank* case boils down to the question of how far the result of the *Skandia America* case can reach in terms of establishing that a branch can be regarded as an independent taxable person on a stand-alone

103. Article 49 and Article 54 of the Treaty on the Functioning of the European Union, Consolidated version, *OJ C 202, 7.6.2016*.

104. A. v. Doesum, H. v. Kesteren, G-J v. Norden, *The internal Market and VAT: intra-group transactions of branches, subsidiaries and VAT groups*, in EC Tax Review, 2007, Issue 1, 37–41; M. Jensen, *Manglen på grænseoverskridende fællesregistrering i momsloven – i et nationalt og EU-retligt perspektiv*, in SU 2009, 280; I. Massin, K. Vyncke, *EC Communication on VAT Grouping: An Attempt to Harmonize or to Restrict the Use of Group Registration?*, in International VAT Monitor, 2009, 460–461; R. Zuidgeest, *Cross-Border VAT Grouping*, in International VAT Monitor, 2010, 25–30; C. B. Eskildsen, *VAT Grouping versus Freedom of Establishment*, in EC Tax Review, Vol. 20, 2011, Issue 3, 114–120; T. Ehrke-Rabel, *VAT grouping: the relevance of the territorial restriction of Article 11 of the VAT Directive*, in World Journal of VAT/GST Law, Vol. 1, 2012, Issue 1, 61–79; M. Merkx, *Establishments in European VAT*, Alphen aan den Rijn, 2013, 152–154; S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 113–115; S. Pfeiffer, *Current questions of EU VAT grouping*, in World Journal of VAT/GST Law, 2015, 7–8.

105. E. Kristoffersson, *Cross-border supplies and VAT groups: the Skandia America Corp judgment*, in World Journal of VAT/GST Law, Vol. 3, 2014, Issue 3, 219–223; C. B. Jespersen et al., *Én bliver til to – eller gør den? – En kommentar til den verserende sag C-7/13, Skandia America Corporation*, in ART.MP20140001; D. R. Jensen, *Kommentar til EU-domstolens afgørelse i sag C-7/13, Skandia*, in ART.MP20140006; S. Pfeiffer, *VAT Grouping from a European Perspective*, Amsterdam, 2015, 175–191; S. Cornielje, I. Bondarev, *Scanning the Scope of Skandia*, in International VAT Monitor, 2015, 17–21; O. Courjon, *New Rules for Head Office to Branch Scenarios – Comments on the Skandia Case*, in International VAT Monitor, 2015, 22–24; N. Bjørnholm, M. Juul, *Uklarheder efter Skandia-dommen*, in SU 2015, 314; G-J. v. Norden, *State of Play in Respect of the Skandia America Corporation Case*, in EC Tax Review, 2016, Issue 4, 211–220; H. v. Kesteren, *Taxable and Non-taxable Transactions*, in M. Lang et al. (editors), *CJEU – Recent Developments in Value Added Tax 2015*, Vienna, 2016, 207–216.

106. European Commission, VAT Committee, Guidelines resulting from the 105th meeting of 26 October 2015, Document A – 886 on Case-law – Issues arising from recent judgments of the Court of Justice of the European Union, taxud.c.1(2016)7465801; European Commission, VAT Committee, Working paper No 845 of 17 February 2015 on CJEU Case C-7/13, *Skandia America*: VAT group, taxud.c.1(2015)747072; VAT Expert Group – VEG No 047, taxud.c.1(2015)3986774.

107. Judgment of 17 September 2014, Skandia America Corp., C-7/13. B. Terra, J. Kajus, *A Guide to the European VAT Directives – Volume 1*, Amsterdam, 2020, 407–410.

108. Request for a preliminary ruling of 4 November 2019, Danske Bank, C-812/19. E. Banner-Voigt, *UDLANDSNYT – Skatter og afgifter*, in RR.1.2020.78.

109. A somewhat similar "reverse *Skandia America* case" is mentioned by Kristoffersson, where the Swedish Supreme administrative court deals with a case concerning a Norwegian branch that was the non-member of the Swedish VAT group, where it was submitted that the same principles should apply in such a situation as in the *Skandia America* case: E. Kristoffersson, *Cross-border supplies and VAT groups: the Skandia America Corp judgment*, in World Journal of VAT/GST Law, Vol. 3, 2014, Issue 3, 222.

basis, which is contrary to the *FCE Bank* principle[110] to an even higher degree than the *Skandia America* case. It follows from the *FCE Bank* principle that a branch, which is dependent upon a main establishment, constitutes a single taxable person with that main establishment.[111] It is outside the scope of the article to engage in this discussion, as the analysis of the territorial condition for VAT grouping focuses on the Danish implementation thereof in both regulation and practice.

4.2. Danish regulation and administrative practice

The territorial condition for VAT grouping is implemented in the fourth sentence of Section 47(4) of the DVA, where only companies etc. *established* in Denmark can be part of a Danish VAT group. This is compatible with Article 11 of the VAT Directive.[112] Danish branches/fixed establishments of foreign main establishments/head offices/companies can be part of a Danish VAT group.[113] So far, no case law from the courts exists regarding the territorial condition for VAT grouping, but there is administrative practice.

In 2009, the Danish Tax Council issued a binding ruling[114] which reflects the "reverse *Skandia America* case", since the branch is the non-member of the VAT group. The case concerned a Danish VAT group within the insurance sector, where one of the members of the VAT group had a branch/representation office in a third country. The issue of the case was whether the VAT group could include the insurance turnover from customers outside the EU when calculating its VAT refund, even if there was a branch/representation office in that country. The Council found that if a taxable person is established both in Denmark and abroad, only the Danish establishment can be part of a Danish VAT group; thus, the Danish establishment and the foreign establishment will become two separate taxable persons as a consequence of the VAT group, whereas the foreign establishment is still part of the original taxable person. Consequently, *if* the foreign branch/representation office in the third country is a fixed establishment, that fixed establishment and the member of the VAT group can no longer be regarded as a single taxable person. Based on the facts of the case, the Council found that there was *no* fixed establishment, as there was merely a representative office; therefore, it was part of the VAT group, and its turnover could be included in the calculation of VAT refund. Thereby, the Council upheld the *FCE Bank* principle, because the branch/representation office did *not* constitute a fixed establishment.[115] In instead the branch in fact had constituted a fixed establishment, the *Skandia America* case would have prevailed and changed the result of the case.

In 2016 after the *Skandia America* case, the Danish Tax Council applied the "reverse *Skandia America* case" by stating that a Danish branch must calculate VAT on services received from the head office in another EU country, when that company is part of a VAT group in that country, and when the head office allocates a share of its general costs to the Danish branch.[116] Furthermore, the Council confirmed that the Danish branch's supplies to the VAT group in the other EU country are taxable supplies for consideration. Thus, if the conditions for deduction are fulfilled, the Danish branch has a deduction right for purchases used for the supplies to the VAT group in the other EU country.

110. Judgment of 23 March 2006, FCE Bank, C-210/04, EU:C:2006:196.

111. *Ibid*, para. 37.

112. COM(2009) 325 final, 6–7.

113. L. L. Jørgensen et al., *Momsloven med kommentarer og EU-henvisninger*, Copenhagen, 2007, 1174.

114. Danish Tax Council, binding ruling of 17 February 2009, SKM2009.119.SR. The case is commented by N. Bjørnholm, M. Juul, *Uklarheder efter Skandia-dommen*, in SU 2015, 314, section 3; C. Kristoffersen, M. Gale, Z. P. Hansen, *EU-Domstolen presser fællesskabet til samarbejde eller kaos!*, in SU 2015, 122, section 2.3.

115. D. R. Jensen, *Kommentar til EU-domstolens afgørelse i sag C-7/13, Skandia*, in ART.MP20140006.

116. Danish Tax Council, binding ruling of 21 June 2016, SKM2016.344.SR.

This result was again confirmed in 2017 in respect of two VAT groups, where a Danish branch was part of a Danish VAT group, and the foreign main establishment was part of a VAT group in another EU country, and both of the VAT groups were regarded as independent taxable persons.[117]

Currently, the Danish tax authorities (*Skattestyrelsen*) agree with the Guidelines from the VAT Committee (103rd and 105th meetings)[118] that only the main establishment/head office or a branch/fixed establishment in a given EU country can become part of a VAT group in that EU country.[119] Following this, the guidelines of the tax authorities state the following, while mirroring the cases mentioned above:[120] The members of a VAT group cannot be regarded as taxable persons as there is only a single taxable person, i.e. the VAT group; when a legal person consists of several entities, an entity is no longer part of the legal person, if that entity becomes part of a VAT group; the other entities remain part of the legal person, unless the entities become members of other VAT groups.

In addition, the guidelines also state that supplies between two entities within the same legal person are taxable, if one of the entities is a member of a VAT group, and the other entity is either not a member of a VAT group or else is a member of another VAT group, provided it is a supply for consideration.[121] Finally, it is of no significance, if one of the entities is not a member of a VAT group due to the lack of access to VAT grouping in that EU country.[122]

The Danish tax authorities follow the *Skandia America* case, meaning that the members of a VAT group in an EU country are regarded as a single taxable person for VAT purposes.[123] The fact that a branch etc. in another EU country is part of a VAT group in that EU country is equivalent to the fact that the branch is VAT grouped in accordance with the Danish rules on VAT grouping when applying the rules of the DVA.[124]

The same goes for members of a VAT group in a third country, who are also regarded as a single taxable person for VAT purposes.[125] A Danish company's branch in a third country is regarded as having left the taxable person/VAT group in Denmark, when the branch is part of a VAT group in a third country.[126] Again, the fact that e.g. a branch is part of a VAT group in a third country is equivalent to the fact that the branch is VAT grouped in accordance with the rules in the DVA.[127] However, this only applies, when the third country has both a VAT system that is comparable to the EU VAT system, and at the same time also has rules on VAT grouping which are comparable to the rules in the VAT Directive and in DVA.[128]

As can be seen, Denmark has taken a *narrow approach* to the territorial scope of VAT grouping, according to which the territorial scope of a VAT group should coincide with the VAT jurisdiction of the Member State implementing the VAT grouping scheme, thus restricting the membership in the

117. Danish Tax Council, binding ruling of 20 December 2016, SKM2017.19.SR.

118. VAT Committee, Guidelines resulting from the 105th meeting, Document A – 886, taxud.c.1(2016)7465801. See also S. Pfeiffer, *VAT Grouping – Consequences of Nigl and Follow-up on Skandia America*, in M. Lang et al. (editors) *CJEU – Recent Developments in Value Added Tax 2016*, Vienna, 2017, 151–153.

119. The Legal Guidelines 2020–2, section D.A.3.3.1.

120. *Ibid*.

121. *Ibid*.

122. *Ibid*.

123. *Ibid*.

124. *Ibid*. Danish tax authorities, guidance signal of 29 November 2019, SKM2019.593.SKTST.

125. The Legal Guidelines 2020–2, section D.A.3.3.1.

126. *Ibid*. Danish Tax Council, binding ruling of 15 November 2016, SKM2019.480.SR.

127. *Ibid*.

128. *Ibid*. The Danish tax authorities have amended their former practice as stated in Danish Tax Council, binding ruling of 24 April 2007, SKM2007.295.SR, cf. Danish tax authorities, guidance signal of 29 November 2019, SKM2019.594.SKTST.

VAT group to only those businesses physically present in the territory, and regardless of their legal ties with other entities of the same company that may be physically present elsewhere.[129] Thus, Denmark agrees with the vast majority of the VAT Committee.[130] It can be noted that the Danish narrow approach to the territorial condition for VAT grouping is in line with the European Commission's interpretation, where emphasis is placed on the physical presence of an establishment in the territory of a Member State.[131]

Conclusively, the Danish implementation of the territorial condition for VAT grouping is compatible with the VAT Directive, including EU case law based on the *Skandia America* case.

5. Current and future discussions in Denmark

In Denmark, various problems and questions in connection with VAT grouping are discussed, which need to be clarified further in the future. Just a few aspects of the discussions are briefly mentioned here, in order to give a little insight into these issues.

One aspect is the question of the full effect and consequences of VAT grouping for VAT purposes, i.e. whether VAT grouping must be considered as a "merger", meaning that the VAT group must be treated in every respect as a single taxable person.[132] As a consequence, the sale of shares in a subsidiary out of a VAT group would for example have to be regarded as a transfer of a going concern, i.e. equivalent to the sale of an internal department of a company.[133] So far, the Danish Tax Tribunal (*Landsskatteretten*) has taken the opposite standpoint in a decision from 2014.[134] The facts of the case were that a VAT group consisting of a holding company and several subsidiaries had incurred costs from advisory services in connection with the 100% sale of two VAT grouped subsidiaries, but it could not deduct input VAT on those costs, because the services could be directly allocated to the sale of shares. Thus, the Tribunal did not find – regardless of VAT grouping – that the sale of shares could be regarded as a transfer of a going concern.

Another aspect, which is interrelated to the first aspect, is the calculation of the right of input VAT deduction for the VAT group as a whole in terms of the *pro rata* partial deduction right for VAT-registered and VAT-exempt activities, and the *estimated* partial deduction right for VAT-registered and non-taxable activities.[135] In particular, this is complicated for mixed VAT groups of companies and in relation to the right to deduct input VAT incurred in connection with e.g. advisory and transaction costs related to the sale and purchase of shares.[136]

129. VAT Committee, Working paper No 845, taxud.c.1(2015)747072, 22.

130. VAT Committee, Guidelines resulting from the 105th meeting, Document A – 886, taxud.c.1(2016)7465801.

131. COM(2009) 325 final, 6–8. See also VAT Committee, Working paper No 845, taxud.c.1(2015)747072, 24–25.

132. COM(2009) 325 final, 4–5.

133. Doesum et al., *Share Disposals and the Right of Deduction of Input VAT*, in EC Tax Review, 2010, Issue 2, 70; C. B. Jespersen, C. B. Eskildsen, *EU-Domstolen fastslår, at et "rent" aktiesalg ikke kan udgøre en virksomhedsoverdragelse i momsretlig henseende*, in ART.MP20130628, section 3; C. B. Jespersen, C. B. Eskildsen, *Momsfradrag for rådgiveromkostninger ved køb og salg af aktier – En kommentar til (udvalgte dele af) EU-Domstolens dom i de forenede sager C-108 / 14 og C-109 / 14, Larentia + Minerva, og Landsskatterettens kendelse refereret i SKM2014.857.LSR*, in SU 2016, 1, section 3.2. The author has discussed this issue in K. K. E. Elgaard, *Recent Norwegian Supreme Court case law on VAT grouping and VAT deduction of transaction costs related to the sale and purchase of shares from an EU and a Danish perspective – Part three*, Skatterett, Vol. 39, 2020, Issue 3–4, 223–254.

134. Danish Tax Tribunal, decision of 8 April 2014, SKM2014.857.LSR.

135. The Legal Guidelines 2020–2, sections D.A.3.3.1 and D.A.11.1.3.2.3; Danish Tax Tribunal, decision of 23 November 2017, SKM2017.666.LSR; Danish Tax Council, binding ruling of 29 April 2014, SKM2014.376.SR.

136. Danish Tax Tribunal, decision of 26 June 2002, SKM2002.406.LSR. The author has discussed this issue in K. K. E. Elgaard, *Recent Norwegian Supreme Court case law on VAT grouping and VAT deduction of transaction costs related to the sale and purchase of shares from an EU and a Danish perspective – Part one*, Skatterett, Vol. 39, 2020, Issue 1, 28–48, see also the cited literature in notes 2–5; K. K. E. Elgaard, *Recent Norwegian Supreme Court case law on VAT grouping and VAT deduction of transaction costs related to the sale and purchase of shares from an EU and a Danish perspective – Part two*, Skatterett, Vol. 39, 2020, Issue 2, 101–135; K. K. E. Elgaard, *Recent Norwegian Supreme Court*

Yet another aspect is the risk of abuse and avoidance in connection with the use of VAT grouping in situations where VAT grouping results in a tax advantage for the VAT group, e.g. due to the fact that internal transactions within the VAT group are outside the scope of VAT. So far, neither court case law nor administrative practice have been made public on what may constitute abuse or avoidance in connection with VAT grouping, except for some indications in administrative practice. Such indications stem from a case in 2015, which concerned the internal sale of immovable property within a VAT group followed *inter alia* by a later VAT-exempt sale of shares, where the tax authorities stated that the transfer of the building sites immediately after VAT grouping would be regarded as an *indication* that there could be abuse of the rules.[137] Furthermore, the tax authorities and the Danish Tax Council noted that the EU VAT anti-abuse doctrine developed by the CJEU also comprises permission for VAT grouping, in the same way as VAT grouping can be terminated with effect for already performed transactions, where there is abuse of the VAT rules.[138] However, due to procedural rules, the Council did not answer whether the actual application for VAT grouping could be refused on the grounds of abuse, because it was outside the scope of its competence on issuing binding rulings.[139] Since then, there have been a few cases involving VAT grouping where abuse and avoidance were not present, or it would not be present under certain circumstances.[140] Thus, it still remains to be seen, whether and to what extent abuse and avoidance can be found to exist in connection with VAT grouping.

This leads to the last aspect on whether there is a need for the Danish legislators to adopt more detailed rules on VAT grouping,[141] the consequences of VAT grouping, the need for special anti-avoidance measures, the request and application procedure for new VAT groups or alterations thereto, termination and de-registration of existing VAT groups etc. Naturally, amendments to the rules on VAT grouping would have to be based on an overall and thorough assessment of the principles of legality, legal certainty and proportionality, as well as considerations on clarity, complexity, administrative simplification and so on. Maybe the essential issue here is more a matter of time, as to when the lack of clear and precise rules in respect of these areas puts a pressure on both businesses and the tax authorities that can no longer be ignored by the political and legislative bodies, if it ever comes to that.

6. Conclusions

Denmark has chosen not to implement the direct wording of Article 11 of the VAT Directive, including the close connection in the form of the three substantive links for VAT grouping, i.e. the financial, economic and organisational links, in the wording of Section 47(4) of DVA. There are two options for VAT grouping in Denmark. The first option is unconditional VAT grouping for taxable persons who exclusively perform taxable activities upon request. This option is not compatible with the VAT Directive, but it is in harmony with the purposes of administrative simplification and combating abuses, due to the fact that only fully taxable persons can opt for VAT grouping. Therefore, the incompatibility of the Danish rules on VAT grouping with the VAT Directive may seem to be an acceptable state of law.

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case law on VAT grouping and VAT deduction of transaction costs related to the sale and purchase of shares from an EU and a Danish perspective – Part three, Skatterett, Vol. 39, 2020, Issue 3–4, 223–254.

137. Danish Tax Council, binding ruling of 23 June 2015, SKM2015.530.SR. The case is commented by K. K. E. Elgaard, *A comparative analysis of VAT grouping schemes from a Nordic perspective – aspects of tax avoidance and fiscal competition*, in Nordic Tax Journal, 2017, Issue 1, 15–18.

138. Danish Tax Council, binding ruling of 23 June 2015, SKM2015.530.SR. S. E. Pedersen, *Moms og fast ejendom*, Copenhagen, 103–104; R. Christiansen, *Fast ejendom – hvad afgør om salget er momspligtigt?*, in SR.2017.96.

139. Danish Tax Council, binding ruling of 23 June 2015, SKM2015.530.SR.

140. Danish Tax Council, binding ruling of 24 April 2018, SKM2018.246.SR; Danish Tax Council, binding ruling of 28 March 2017, SKM2017.368.SR; Danish Tax Council, binding ruling of 20 October 2015, SKM2015.707.SR. S. E. Pedersen, *Moms og fast ejendom*, Copenhagen. 103–104.

141. H. J. Kozuch, T. S. Svane, *Fællesregistrering for moms – uklar praksis*, in TfS 2005, 481.

The second option concerns conditional VAT grouping for a mixed group of companies, allowing a group of companies consisting of VAT-registered, VAT-exempt and non-taxable persons to group, provided that the parent company etc. directly or indirectly owns 100% of the shares in the subsidiary(-ies) etc. Denmark has implemented the financial link to the widest extent possible as a 100% ownership condition, which in the author's opinion is compatible with the VAT Directive and within the margin of discretion enjoyed by the Member States. In addition, Denmark has only implemented the financial link and none of the other two links, i.e. the economic and organisational links, which is not compatible with the VAT Directive.

With regard to the territorial condition for VAT grouping, Denmark adheres to the result of the *Skandia America* case, which supersedes the *FCE Bank* principle, and Denmark follows the guidelines from the VAT Committee on this. Thus, Denmark has taken a narrow approach to the territorial condition for VAT grouping, meaning that the inclusion of a main establishment/head office or a branch/fixed establishment in a Danish or foreign VAT group results in that entity ceasing to be part of the original taxable person, and instead becoming part of a new taxable person, i.e. the VAT group.

Finally, there are still current and future problems and questions to be discussed within the area of VAT grouping, as this figure gives rise to many interesting practical and theoretical discussions, both in a national and international context. Thus, the discussions will surely continue to develop much further in the future, both in Denmark as well as in the EU.

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