Association
Henri Capitant

DRAFT EUROPEAN BUSINESS CODE

BOOK 13

TAX LAW

Working group (in alphabetical order)

Georges Cavalier,	Senior lecturer, Accredited to supervise research
Franck Le Mentec,	Lawyer of the Paris bar, Partner at Cohen & Gresser, working group director
Günter Reiner,	Professor at the University of Hambourg
Christophe Vernières,	Professor at Paris 1 Panthéon-Sorbonne University, Deputy Secretary-General of Association Henri Capitant

BOOK 13: TAX LAW

APPROACH

The approach adopted for this Book was as follows:

- an attempt to consolidate existing rules, as clarified and interpreted by the CJEU and national courts, which, while useful, did not seem realistic to us given the particularly dispersed nature of the sources of European tax law. Instead, the main focus was on identifying areas for simplification and incentives to enable SMEs in each country to expand their local and international operations;

- on this basis, two systems have been designed:
    - first, a tax consolidation framework, based on the application of the tax base rules of the State in which the parent company of a group is resident, and an allocation of the tax base, according to an apportionment formula, based in particular on the location of the group's assets and employees; and
    - second, a tax incentive scheme for young innovative companies allowing, in this area, a minimum European standard to be offered to all SMEs operating in the common market.

This Book has a twofold objective: first, to introduce a simplified system for taxing the results of SMEs with operations in other Member States, so that direct tax rules do not pose a barrier to expanding these operations. Second, a common incentive scheme would be proposed for Young Innovative Companies in Europe, in line with the recommendations made by the Commission back in 1994, which stressed the essential role of SMEs in European economic growth.

TITLE ONE: INCOME TAXATION

General comment: To date, the Commission's work has consisted of proposing a mechanism for taxing SMEs carrying out transnational activities in a single Member State or "Home State Taxation" (see in particular 23 December 2005). Subsequently, a project for a common consolidated corporate tax base (CCCTB, 2011, 2016 and 2018) aimed to harmonise the corporate tax base and the allocation of the tax base between Member States. These initiatives continued with the proposal for a Directive published by the Commission on 12 September 2023, proposing a new set of rules for determining the tax base of large groups of companies operating in several Member States. The system developed by Title I is at the crossroads between taxation according to the rules of the State of residence and establishing a uniform tax base. This is an opt-in system intended only for European SMEs with cross-border operations within the EU via subsidiaries or branches. It can be implemented in three stages: (1) consolidating group results in accordance with the rules of the State in which the parent company is resident; (2) applying an apportionment formula for this result between the various Member States concerned; and (3) applying a national rate. This system does not require any general harmonisation of the tax base.

CHAPTER 1: SCOPE OF WORK

Comments: The proposed system respects the principle of subsidiarity and sovereignty. More specifically, and to the extent that the current system would have the effect of consolidating the group's results for tax purposes, it seemed appropriate to restate the consolidation thresholds set out in the two directive proposals of 25 October 2016 relating to the implementation of a common consolidated corporate tax base. Indeed, these thresholds are the result of a compromise between (i) Member States, such as France, which require a high minimum participation rate for their internal tax consolidation scheme, and (ii) Member States, such as Germany, which apply a lower participation rate (i.e. in Germany, a company at the head of a group only has to exercise the majority of voting rights in its subsidiary in order to benefit from the group scheme). Parent companies and their subsidiaries in which they hold, directly or indirectly, more than (i) 50% of the voting rights and (ii) 75% of the capital or rights to the profits are included in the scope of consolidation.

Article 13.1.1.1: Entities covered

(1) The rules of this title shall apply to a company that is established under the laws of a Member State, including its permanent establishments in other Member States, where the company meets all of the following conditions:

1. it meets the SME criteria listed in European Union law on State aid for small and medium-sized enterprises;
2. it has one of the types of company listed in European Union law on the system of taxation applicable to parent companies and subsidiaries of different Member States;
3. it is subject to one of the corporate taxes listed in European Union law on the system of taxation applicable to parent companies and subsidiaries of different Member States, or to a similar tax introduced subsequently; and
4. it qualifies as a parent company or qualifying subsidiary as referred to in Article 13.1.1.3 of this title and/or it has one or more permanent establishments as referred to in Article 13.1.1.4 of this title.

(2) The rules of this Title shall not apply to a shipping company under a special tax regime.

Article 13.1.1.2: Residence for tax purposes

(1) A company's residence for tax purposes is in the Member State in which it has its place of effective management.

(2) A resident taxpayer shall be subject to corporate tax on all income derived from any source, whether inside or outside the Member State where it is resident for tax purposes.

Article 13.1.1.3: Parent company and qualifying subsidiaries

(1) A qualifying subsidiary means every immediate and lower-tier subsidiary in which the parent company holds the following rights:

1. it has a right to exercise more than 50 % of the voting rights; and
2. it has an ownership right amounting to more than 75 % of the subsidiary's capital or it owns more than 75 % of the rights giving entitlement to profit.

(2) For the purpose of calculating the thresholds referred to in paragraph 1 in relation to lower-tier subsidiaries, the following rules shall be applied:

1. once the voting-right threshold is reached in respect of a subsidiary, the parent company shall be considered to hold 100 % of such rights; and
2. entitlement to profit and ownership of capital shall be calculated by multiplying the interests held, directly and indirectly, in subsidiaries at each tier. Ownership rights amounting to 75 % or less held directly or indirectly by the parent company, including rights in companies resident in a third country, shall also be taken into account in the calculation.

Article 13.1.1.4: Scope of the group

(1) A resident taxpayer shall form a group with:

1. all its qualifying subsidiaries that are resident in a Member State for tax purposes, including the permanent establishments of those subsidiaries where such permanent establishments are situated in a Member State; and
2. all its permanent establishments that are situated in a Member State.

(2) A company in insolvency or liquidation may not become a group member. A taxpayer in respect of which a declaration of insolvency is made or that is liquidated shall leave the group immediately.

(3) "Principal taxpayer" means one of the following:

1. a resident taxpayer that forms a group with its qualifying subsidiaries, with one or more of its permanent establishments located in another Member State or Member States or with one or more permanent establishments of a qualifying subsidiary that is resident in a third country;
2. a resident taxpayer designated by the group that is composed of only two or more resident taxpayers which are immediate qualifying subsidiaries of the same parent company resident in a third country;
3. a resident taxpayer that is the qualifying subsidiary of a parent company resident in a third country, where that resident taxpayer forms a group with only one or more permanent establishments of its parent; or
4. a permanent establishment designated by a non-resident taxpayer that forms a group with only its permanent establishments located in two or more Member States.

CHAPTER 2: DETERMINING THE CONSOLIDATED TAX BASE IN ACCORDANCE WITH THE NATIONAL RULES OF THE STATE IN WHICH THE PARENT COMPANY IS RESIDENT

Comments: The tax base will be determined solely according to the domestic law of the State in which the parent company is resident; thus, any differences concerning, for example, the depreciation period for assets or the deduction of certain expenses would be eliminated.
In addition, this recourse to national law allows SMEs to apply tax rules that they understand well to all their operations within the EU.

Article 13.1.2.1: Elimination of intra-group transactions

(1) Profits and losses resulting from intra-group transactions are excluded from the calculation.

(2) Groups shall apply a consistent and documented method for recording intra-group transactions. Groups may change the method only for valid commercial reasons and only at the beginning of a tax year.

Article 13.1.2.2: Terms and effects of consolidation

(1) The consolidated tax base of the members of a group is established in accordance with the national rules of the State in which the parent company is resident.

(2) The consolidated tax base shall be apportioned in accordance with Chapter III, whether it is positive or negative.

Article 13.1.2.3: Withholding taxes and other source taxation

(1) No withholding taxes or other source taxation shall be imposed on intra-group transactions.

CHAPTER 3: APPORTIONMENT OF THE CONSOLIDATED TAX BASE

Comments: The tax base so determined will be apportioned on the basis of a simple formula taking into account sales, payroll, assets and personal "data" used for commercial purposes. Each Member State will apply its national corporation tax rate to the share of profits allocated to it.
In addition, this consolidated tax base resolves the major tax obstacles encountered by SMEs (transfer pricing).

Article 13.1.3.1: General rules

(1) The consolidated tax base, whether positive or negative, shall be shared between the group members in each tax year on the basis of a formula for apportionment.

(2) This formula gives equal weight to the sales, labour, asset and data factors, and is as follows:

$$\text{Qte-part A} = \left(\frac{1}{4} \frac{\text{Chiffr aff}^{A}}{\text{Chiffr aff}^{Group}} + \frac{1}{4} \left(\frac{1}{2} \frac{\text{Mass sal}^{A}}{\text{Mass sal}^{Group}} + \frac{1}{2} \frac{\text{Nb empl}^{A}}{\text{Nb empl}^{Group}} \right) + \frac{1}{4} \frac{\text{Immob}^{A}}{\text{Immob}^{Group}} + \right.$$

$$\left. \frac{1}{4} \left(\frac{1}{2} \frac{\textit{Données collectées}^{A}}{\textit{Données collectées}^{Group}} + \frac{1}{2} \frac{\textit{Données exploitées}^{A}}{\textit{Données exploitées}^{Group}} \right) \right) * \text{Assiette imposable consolidée}$$

(3) The calculations for sharing the consolidated tax base shall be done at the end of the tax year of the group.

(4) Where one or more factors do not apply because of the nature of a taxpayer's activities, all other applicable factors should be proportionately reweighted in the formula to ensure that all applicable factors retain fully equal weight.

Article 13.1.3.2: Safeguard clause

(1) Where the parent company or a competent authority considers that the outcome of the apportionment of the consolidated tax base to a group member does not fairly represent the extent of the business activity of that group member, the parent company or competent authority may request the use of an alternative method for calculating the tax share of each group member. An alternative method can be used only if, following consultations among the competent authorities and, where applicable, discussions held in accordance with Articles 13.1.5.4.4 and 13.1.5.4.5, all these authorities agree to that alternative method.

Article 13.1.3.3: Transparent entities

(1) The factors used in calculating the apportioned share of a group member holding an interest in a transparent entity shall include the sales, labour, assets and the data of the transparent entity, in proportion to the taxpayer's participation in the profits and losses of that entity.

Article 13.1.3.4: Composition of the "sales factor"

(1) The "sales factor" shall consist of the total sales and provision of services allocated to a group member, including permanent establishments that are considered to exist pursuant to Article 4, as its numerator and the total sales of the group as its denominator.

(2) Sales shall mean the proceeds of all sales of goods and supplies of services after discounts and returns, excluding value added tax, other taxes and duties. Exempt revenues, interest, dividends, royalties and proceeds from the disposal of fixed assets shall not be included in the sales factor, unless they are revenues earned in the ordinary course of trade or business. Intra-group sales of goods and supplies of services shall not be included in the sales factor.

Article 13.1.3.5: Sales by destination

(1) Sales of goods shall be included in the sales factor of the group member located in the Member State where the dispatch or transport of the goods to the person acquiring

them ends. Where that place cannot be determined or the member of the group has no taxable nexus, the sales of goods shall be attributed to the group member located in the Member State of the last identifiable location of the goods.

(2) Supplies of services shall be included in the sales factor of the group member located in the Member State where the services are physically carried out or actually supplied.

(3) Exempt revenues, interest, dividends and royalties and the proceeds from the disposal of fixed assets that are included in the sales factor shall be attributed to the beneficiary of those revenues, interest, dividends, royalties and proceeds.

(4) Where there is no group member in the Member State where the goods are delivered or the services are supplied, or where goods are delivered or services are supplied in a third country, the sales of goods and supplies of services shall be included in the sales factor of all group members in proportion to their labour, asset and data factors.

(5) Where there is more than one group member in the Member State where the goods are delivered or the services are supplied, the sales shall be included in the sales factor of all group members located in that Member State in proportion to their labour, asset and data factors.

Article 13.1.3.6: Composition of the labour factor

(1) The labour factor shall consist, as to one half, of the total amount of the payroll of a group member as its numerator and the total amount of the payroll of the group as its denominator, and as to the other half, of the number of employees of a group member as its numerator and the number of employees of the group as its denominator. Where an individual employee is included in the labour factor of a group member, the payroll relating to that employee shall be allocated to the labour factor of the same group member.

(2) The number of employees shall be measured at the end of the tax year.

(3) The definition of an employee shall be determined by the national law of the Member State where the employment is exercised.

Article 13.1.3.7: Allocation of employees and payroll

(1) Employees shall be included in the labour factor of the group member from which they receive remuneration.

(2) However, where employees physically exercise their employment under the control and responsibility of a group member other than that from which they receive remuneration, those employees as well as the amount of payroll related to them shall be included in the labour factor of the former group member.

(3) This rule shall only apply where all of the following conditions are met:

1. the employment lasts for an uninterrupted period of at least three months; and
2. those employees represent at least 5% of the overall number of employees of the group member from which they receive remuneration.*

(4) Payroll shall include all costs of salaries, wages, bonuses and all other employee compensation, including related pension and social security costs borne by the employer

as well as expenses of the employer corresponding to the cost of persons as referred to in paragraph 1.

(5) Payroll costs shall be valued at the amount of expenses that are treated as deductible by the employer in a tax year.

Article 13.1.3.8: Composition of the asset factor

(1) The asset factor shall consist of the average value of all fixed tangible assets owned, rented or leased by a group member as its numerator and the average value of all fixed tangible assets owned, rented or leased by the group as its denominator.

(2) In the five years that follow a taxpayer joining an existing or new group, its asset factor shall also include the total amount of costs incurred for research, development, marketing and advertising by the taxpayer over the six years that preceded its joining the group.

Article 13.1.3.9: Allocation of assets

(1) Assets are included in their economic owner's asset factor. Where the economic owner cannot be identified, the asset shall be included in the asset factor of the legal owner.

(2) However, an asset that is not effectively used by its economic owner shall be included in the factor of the group member that effectively uses that asset, provided that the asset represents more than 5% of the value for tax purposes of all fixed tangible assets of the group member that effectively uses it.

(3) Except in the case of leases between group members, leased assets shall be included in the asset factor of the group member that is the lessor or the lessee of the asset. The same shall apply to rented assets.

Article 13.1.3.10: Valuation

(1) Land and other non-depreciable fixed tangible assets shall be valued at their historic cost.

(2) Depreciable fixed tangible assets are valued at their net book value at the end of the tax year.

(3) Where, as a result of one or more intra-group transactions, an asset is included in the asset factor of a group member for less than a tax year, the value to be taken into account shall be calculated having regard to the number of months that the asset was included in the asset factor of that group member.

(4) The renter or lessee of an asset of which it is not the economic owner shall value that rented or leased asset at eight times the net annual rental or lease payment due, less any amounts receivable from sub-rentals or sub-leases.

(5) A group member renting out or leasing an asset of which it is not its economic owner shall value that asset at eight times the net annual rental or lease payment due.

(6) An asset sold by a group member to a person outside the group following an intra-group transfer in the same or the previous tax year shall be included in the asset factor

of the transferring group member for the period between the intra-group transfer and the sale to the person outside the group, except where the group members concerned demonstrate that the intra-group transfer was made for genuine commercial reasons.

Article 13.1.3.11: Composition of the data factor

(1) The collection and use of personal data for commercial purposes means any information collected or used for commercial purposes and relating to an identified or identifiable natural person. An "identifiable natural person" is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

(2) One half of the data factor shall be made up, in the numerator, of the total amount of personal data of users of online services and platforms collected in each Member State by a member of the group and, in the denominator, of the total amount of personal data of users of online services and platforms collected in each Member State by the group.

(3) The other half of the data factor shall consist of the total amount of personal data of users of online services and platforms operated in each Member State by a member of the group as the numerator and the total amount of personal data of users of online services and platforms operated in each Member State by the group as the denominator.

CHAPTER 4 DEALINGS BETWEEN THE GROUP AND OTHER ENTITIES

Comments: Passive income (dividends, interest, royalties or property income) is excluded from the group's consolidated income. The economic basis underlying the allocation of the tax base must not lead to an allocation of income that ignores how the members of the group carry on their business within the European Union.

Article 13.1.4.1: Group members' income from foreign sources

(1) Income received by a member of the group and taxed in another Member State or in a third country, in particular dividends, interest, royalties or property income, is excluded from the group's consolidated income. They are added to the income of the relevant group member after the tax base has been apportioned.

(2) The corresponding tax credits can only be offset against the income tax of the relevant group member, after the tax base has been apportioned.

(3) Group members with such income will be required to file two returns, the first in the State in which the parent company is resident and the second in the State in which they are located, respectively, for the particular categories of relevant income.

Article 13.1.4.2: Withholding tax

Revenues paid by a group member to a recipient outside the group may be subject to a

withholding tax, in accordance with the applicable rules of national law and any applicable double tax convention, in the Member State where the group member is resident for tax purposes or situated, as the case may be.

(2) The withholding tax is not apportioned between Member States. It is exclusively for the benefit of the State in which the income originates.

CHAPTER V: TAXATION, ADMINISTRATION AND PROCEDURES

Comments: The proposed taxation mechanism involves enhanced and unprecedented cooperation between tax administrations, both in terms of setting up groups and monitoring them (for example, the possibility of coordinated audits).

SECTION 1: TAXATION

Article 13.1.5.1.1: Tax liability

(1) The tax liability of each group member shall be the outcome of the application of the national tax rate to the apportioned share in accordance with Article 13.1.3.1.

SECTION 2: JOINING AND LEAVING THE CONSOLIDATED GROUP

Article 13.1.5.2.1: Notice to create a consolidated group

(1) The parent company shall give a notice of the creation of a consolidated group to the competent tax authority for its State on behalf of the remaining group members at least three months before the beginning of the tax year in which the group shall begin applying the rules of this Title.

(2) The notice referred to in the first paragraph shall cover all group members.

Article 13.1.5.2.2: Review of the notice

(1) Within seven days of receiving the notice, the principal tax authority of the parent company shall transmit it to the competent authorities of all Member States in which group members are resident for tax purposes or situated in the form of a permanent establishment. Those authorities may submit their views and any relevant information on the validity and scope of the notice to the principal tax authority within one month of its transmission.

(2) The competent tax authority of the State of the parent company to which notice of the creation of a consolidated group has been sent in accordance with Articles 13.1.5.2.1 and 13.1.5.2.5 shall review, on the basis of the information contained in the notice, whether the group meets the requirements set out in this Title. The notice is deemed to have been accepted, unless it is rejected by the principal tax authority within three months of receipt.

(3) Provided that the taxpayer has fully disclosed all the information required by Article 13.1.5.2.5, any subsequent determination that the disclosed list of group

members is incorrect shall not invalidate the notice to create a group. Any incorrect notice shall be corrected and all other necessary measures shall be taken from the beginning of the tax year in which the error was discovered.

(4) Where no full disclosure has been made, the principal tax authority, in agreement with the other competent authorities concerned, may invalidate the original notice, in which case amended assessments of the tax liability of the group/group members shall be issued in accordance with the time limits laid down in Article 13.1.5.3.5.

Article 13.1.5.2.3: Term of a group

(1) This Title shall start applying to a group on the first day of the tax year following receipt of the notice to create a group, as referred to in Article 13.1.5.2.2(1), by the competent authorities of all Member States in which group members are resident for tax purposes or situated in the form of a permanent establishment. The principal tax authority shall inform the parent company in this regard.

(2) The thresholds set out in Article 13.1.1.3 must be complied with throughout the tax year.

Article 13.1.5.2.4: Information in the notice to create a group

(1) The following information shall be included in the notice to create a group:

1. identification of all group members;
2. proof of fulfilment of the criteria laid down in Articles 13.1.1.3 and 13.1.1.4;
3. the legal form, statutory seat and place of effective management of the taxpayers; and
4. the tax year of the creation of the group.

Article 13.1.5.2.5: Pre-entry losses

(1) The tax losses of a member of the group, which may be carried forward in accordance with the laws of that member's State at the time of its entry into the group, may be offset against that member's apportioned share of the group's profits in accordance with the rules provided for by the laws of the State in which the parent company is resident.

Article 13.1.5.2.6: Leaving the group

(1) A member is deemed to have left the group on the first day of the tax year in which it no longer complies with the thresholds provided for in Article 3.

(2) The parent company shall give a notice of termination to its tax authority where the group to which it belongs as a whole no longer fulfils the conditions of Article 13.1.1.3(1) and (2), for the application of the rules of this Title.

Article 13.1.5.2.7: Termination of a group

(1) The group shall be terminated on the first day of the tax year in which the event giving rise to termination occurs.

Article 13.1.5.2.8: Self-generated intangible assets

(1) Where a taxpayer who is the owner of one or more self-generated intangible assets leaves the group, an amount equal to the costs incurred in respect of those assets for research, development, marketing and advertising in the previous five years shall be added to the consolidated tax base as it stands at the end of the tax year.

(2) The amount added shall not exceed the value of the assets on the departure of the taxpayer from the group.

(3) Those costs shall be attributed to the leaving taxpayer and treated in accordance with the national corporate tax law that subsequently becomes applicable to that taxpayer or, if that taxpayer joins another group, those costs shall be attributed in the tax year that the taxpayer joined that other group.

Article 13.1.5.2.9: Losses on leaving the group

(1) No losses shall be attributed to a group member leaving a group.

SECTION 3: RETURNS, TAX ASSESSMENTS AND ENFORCEMENT

Article 13.1.5.3.1: Tax year

(1) All group members shall have the same tax year.

(2) In the year in which it joins a group, a taxpayer shall bring its tax year into line with that of the group it is joining.

Article 13.1.5.3.2: Tax returns and tax assessments

(1) The parent company shall file the consolidated tax return of the group with the competent tax authority of the State in which it is resident.

(2) The consolidated tax return shall be treated as an assessment of the tax liability of each group member ("tax assessment"). Where the law of a Member State provides that a tax return has the legal status of a tax assessment and is to be treated as an instrument permitting the enforcement of tax debts, the consolidated tax return shall have the same effect in relation to a group member liable to tax in that Member State.

(3) Where the consolidated tax return does not have the legal status of a tax assessment for the purposes of enforcing a tax debt, the competent authority of a Member State may, in respect of a group member that is resident for tax purposes or situated there in the form of a permanent establishment, issue an instrument of national law authorising enforcement in that Member State. That instrument shall incorporate the data in the consolidated tax return concerning the group member. Appeals shall be permitted against the instrument exclusively on grounds of form and not to the underlying tax assessment.

(4) The parent company shall be responsible for all procedural obligations relating to the taxation of permanent establishments as referred to in Article 13.1.1.4.

(5) The consolidated tax return shall be submitted to the principal tax authority in accordance with the national rules of the State of residence.

Article 13.1.5.3.3: Content of the consolidated tax return

(1) The consolidated tax return shall comprise the following information:

(a) the identity of the parent company;
(b) identification of all group members;
(c) the tax year to which the tax return relates;
(d) the calculation of the tax base of each group member;
(e) the calculation of the consolidated tax base;
(f) the calculation of the apportioned share of each group member;
(g) the calculation of the tax liability of each group member.

Article 13.1.5.3.4: Notification of errors in the consolidated tax return

(1) The parent company shall notify the competent tax authority of the State in which it is resident of errors identified in the consolidated tax return. This tax authority shall issue an amended tax assessment in accordance with Article 13.1.5.3.5(2) where appropriate.

Article 13.1.5.3.4: Failure to file a tax return

(1) Where the parent company fails to file a consolidated tax return, the competent tax authority of the State in which the parent company is resident shall issue a tax assessment based on an estimate and taking into account the available information. The parent company may appeal against that assessment in accordance with its national rules.

Article 13.1.5.3.5: Initial and amended tax assessments

(1) The tax authority of the State in which the parent company is resident and the tax authorities of each of the other members of the group shall issue their initial tax assessments on the basis of the consolidated tax return prepared by the parent company and taking into account the consolidated tax base allocated between the Member States.

(2) Where required, the competent tax authorities shall issue an amended tax assessment not later than three years after the final date for submission of the consolidated tax return or, where no return was submitted before that date, not later than three years following issuance of a tax assessment pursuant to Article 13.1.5.3.4.

(3) An amended tax assessment may not be issued for the same group more than once in any period of twelve months.

Article 13.1.5.3.6: Enforcement

(1) The rules for enforcing the tax assessment are those of the State of each of the members of the consolidated group.

SECTION 4: ADMINISTRATION

Article 13.1.5.4.1: Central database

(1) The consolidated tax return and supporting documents filed by the principal taxpayer shall be kept in a central database to which all the competent authorities shall have access. The central database shall be regularly updated with all further information and documents and all decisions and notices issued by the principal tax authority.

Article 13.1.5.4.2: Record-keeping

(1) Each group member shall keep records and supporting documents to ensure the proper implementation of this Title and to allow audits, as referred to in Article 13.1.5.5.1(1), to be carried out.

Article 13.1.5.4.3: Provision of information to the competent authorities

(1) Each member of the group shall at the request of the competent authority of the Member State in which it is resident or in which its permanent establishment is situated provide all information foreseeably relevant to the determination of its tax liability. In addition, the parent company shall at the request of the tax authority of the State in which it is resident provide all information foreseeably relevant to the determination of the consolidated tax base or of the tax liability of any group member.

Article 13.1.5.4.4: Request for an opinion from the competent authority

(1) Each member of the group may request from the competent authority of the Member State in which it is resident or in which it has a permanent establishment an opinion on the implementation of the rules of this Title on a specific transaction or series of transactions that it plans to carry out. Each group member may also request an opinion on the proposed composition of a group. A taxpayer may also request an opinion on the proposed composition of a group. The competent authority shall take all possible steps to respond to the request within a reasonable time.

(2) The opinion issued by the competent authority shall be binding on it where all relevant information concerning the planned transaction or series of transactions is disclosed, unless the courts of the Member State of the principal tax authority subsequently decide otherwise pursuant to Article 45. A member disagreeing with the opinion may act in accordance with its own interpretation but must draw attention to that fact in the consolidated tax return.

(3) Where two or more group members in different Member States are directly involved in a specific transaction or a series of transactions, or where the request concerns the proposed composition of the group, the competent authorities of those Member States shall agree on a common opinion.

Article 13.1.5.4.5: Communication between competent authorities

(1) Information communicated pursuant to the rules of this Title shall to the extent possible be provided by electronic means, through making use of the common

communication network/common system interface ("CCN/CSI").

(2) A competent authority that receives a request, pursuant to European Union law on administrative cooperation in tax matters, for cooperation or exchange of information concerning a member of the group, shall respond within the time limits set out in Article 7 of this Directive.

Article 13.1.5.4.6: Secrecy clause

(1) All information made known to a Member State pursuant to the rules of this title shall be covered by the obligation of official secrecy in that Member State and enjoy the protection extended to similar information under the domestic legislation of that Member State. That information:

1. may be made available only to the persons directly involved in the tax assessment or in the administrative control of that tax assessment;
2. may in addition be made known only in connection with judicial or administrative proceedings that may involve penalties and are undertaken with a view to, or relating to, the preparation or review of a tax assessment and only to persons who are directly involved in those proceedings; that information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State communicating the information raises no objection;
3. shall in no circumstances be used for purposes other than taxation or in connection with judicial or administrative proceedings that may involve penalties and are undertaken with a view to, or in relation to, the preparation or review of a tax assessment.

(2) In addition, Member States may provide that the information referred to in the first subparagraph be used for the assessment of other levies, duties and taxes covered by Article 2 of European Union law on administrative cooperation in tax matters;

(3) With permission of the competent authority of the Member State communicating information pursuant to European Union law on administrative cooperation on tax matters, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information received may be used for other purposes than those referred to in the first paragraph. Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information.

SECTION 5: AUDITS AND APPEALS

Article 13.1.5.5.1: Audits

(1) The tax authority of the State in which the parent company is resident may initiate and coordinate audits of group members. An audit may also be initiated at the request of a competent authority.

(2) The principal tax authority and the other competent authorities concerned shall

jointly determine the scope and content of an audit and the group members to be audited.

(3) An audit shall be conducted in accordance with the national legislation of the Member State in which it is carried out, subject to such adjustments as are necessary to ensure a proper implementation of the rules of this Title. Those audits may include inquiries, inspections or examinations of any kind for the purpose of verifying the compliance of a taxpayer with the rules of this Title.

Article 13.1.5.5.2: Disagreement between Member States

(1) Where the competent authority of the Member State in which a group member is resident for tax purposes or situated in the form of a permanent establishment disagrees with a decision of the principal tax authority made pursuant to Articles 35 or 36, it may challenge that decision before the courts of the Member State of the principal tax authority within a period of three months.

(2) The competent authority shall have at least the same procedural rights as those enjoyed by a taxpayer under the law of that Member State in proceedings against a decision of the principal tax authority.

Article 13.1.5.5.3: Appeals

(1) The parent company may appeal, amongst others, against the following acts:

1. a decision rejecting a notice to create a group;
2. a notice requesting the disclosure of documents or information;
3. an amended tax assessment;
4. an assessment of the failure to file a consolidated tax return; or
5. an invalidation of the original notice to create a group by the principal tax authority as referred to in Article 23(4).

(2) The appeal shall be lodged within sixty days of the receipt of the act appealed against. An appeal shall not have any suspensory effect on the tax liability of a taxpayer.

(3) By way of derogation from Article 36(2), an amended tax assessment may be issued to give effect to the result of an appeal.

Article 13.1.5.5.4: Administrative and judicial appeals

(1) Administrative and judicial appeals against, in particular,

1. a decision rejecting a notice to create a group;
2. a notice requesting the disclosure of documents or information;
3. initial and amended tax assessments;
4. an assessment of the failure to file a consolidated tax return; and
5. an invalidation of the original notice to create a group by the principal tax authority as referred to in Article 13.1.5.2.2(4),

shall be handled in accordance with the laws of each of the Member States concerned.

TITLE II – EUROPEAN YOUNG INNOVATIVE COMPANY STATUS

General comment: In line with the Commission's recommendations, we propose to focus on tax incentives for growth companies. A new, common scheme would be established for "European Young Innovative Companies". The tax incentive would take the form of a super-deduction – equal to double the eligible expenses incurred – for research and development expenses. It was inspired by the French YIC scheme.
This harmonised scheme would complement national schemes such as the French research tax credit.

CHAPTER I: ELIGIBLE COMPANIES

General comment: European young innovative company status requires that the company have been established for less than five years, and that the majority of its share capital be held by natural persons, to prevent this tax incentive from being appropriated by multinational groups.

Article 13.2.1.1: Companies covered

(1) Any company that meets the requirements set out in Article 49 of this Chapter shall be eligible for European young innovative company status, regardless of whether it has opted for the income tax regime provided for in Title I of this Book.

Article 13.2.1.2: Eligibility requirements

(1) A company qualifies as a young innovative company if it meets all of the following conditions at the same time:

1. the company is an unlisted company and falls within the definition of a small or medium-sized enterprise as defined by European Union law on state aid for small and medium-sized enterprises;
2. it is subject to one of the corporate taxes listed in European Union law on the system of taxation applicable to parent companies and subsidiaries of different Member States;
3. the company has not been registered for more than five years. If there is no mandatory registration requirement, the five-year period begins on the day the company starts trading;
4. more than 50% of the company's share capital must be held by:
   (a) natural persons; or
   (b) companies in which more than 50% of the share capital is held by natural persons; and
5. the company must not be the product of a merger, demerger or partial contribution of assets.

(2) If, at the end of a tax year, the company no longer satisfies one of the requirements referred to in the first paragraph, it shall lose its status as a young innovative company.

CHAPTER 2: ELIGIBLE ACTIVITIES AND EXPENSES

General comment: One of the draft's innovative features is the definition of two common tax concepts, “Eligible Activities” and “Eligible Expenses”, based in particular on recent work by the European Law Institute.

Article 13.2.2.1: Eligible activities

(1) The expenses referred to in Article 51 of this Chapter incurred by a company in the course of its research and development activities are eligible for the deduction provided for in Chapter III of this Title.

(2) The following research and development activities are covered by this Title: experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundation of phenomena and observable facts, without any particular application or use in view (basic research); original investigation undertaken in order to acquire new knowledge, but directed primarily towards a specific practical aim or objective (applied research); and systematic work based on knowledge gained from research and practical experience, and producing additional knowledge, with or without commercial objectives in all areas of knowledge, including the social sciences, digital technology, design and the humanities.

Article 13.2.2.2: Eligible expenses

(1) The research and development expenses eligible for the deduction provided for in Chapter III of this Title is as follows:

1) remuneration for company staff assigned to research and development activities, including the following categories in particular:
    - *(a)* university-educated researchers carrying out research activities under the taxpayer’s management;
    - *(b)* non-university educated researchers with a minimum of four years of documented R&D experience;
    - *(c)* other R&D staff, such as laboratory technicians, with at least two years of documented R&D experience; and
    - *(d)* the support staff needed to support the above categories of R&D staff. Where staff are involved in both R&D and non-R&D activities, staff costs are allocated to eligible R&D activities based on the proportion of time spent on these activities. All costs relating to R&D staff are eligible R&D expenses, except for profit-sharing plans or return on investment. However, to the extent that a profit-sharing plan is based on R&D, the relevant proportion of the profit-sharing can be eligible R&D expenses.

2) other operating expenses because of their relationship with R&D activities. Alternatively, a notional deduction of 50% of research staff expenses could be granted. The services of tax advisers or innovation companies are deductible as provided for under ordinary law, but are not eligible expenses;

3) depreciation or amortisation of fixed assets, whether newly created or acquired, used by the company in its research and development activities; depreciation or amortisation charges relating to newly created or acquired assets (including those used under a lease) used directly for research activities are eligible R&D costs;

4) expenses incurred in a European Union Member State for filing, maintaining and defending patents up to a limit of EUR 20,000, and insurance costs relating to patents up to a limit of EUR 20,000 per year and per taxpayer. Examples of such expenses include the fees of intellectual property advisers, translation costs and taxes;

5) standardisation expenses, only if they relate to scientific methods used for standardisation purposes;

6) technology monitoring associated with research projects is eligible up to EUR 50,000 per year per taxpayer;

7) if the R&D activity is outsourced to third parties within the European Economic Area, this outsourcing expenditure is eligible up to EUR 2,000,000. A company that outsources R&D has priority in claiming tax incentives for R&D (if the outsourcing company can claim tax incentives for R&D, the R&D subcontractor cannot also do so); and

8) grants or subsidies awarded by the government, State bodies or the EU for R&D projects must be deducted from eligible expenses in the year in which the expenses are incurred, regardless of when the grants or subsidies are paid. If these grants or subsidies are repayable, they are added to the base for calculating the tax incentive for the year in which they were paid.

CHAPTER III: CALCULATING THE DEDUCTION

General comment: The super-deduction is equal to double the expenditure; the additional deduction is capped.

Article 13.2.3.1: Amount of the deduction

(1) Research and development expenses incurred by the company are deductible from its taxable results.

(2) In addition to the deduction provided for in the first paragraph, the company may deduct, in respect of each tax year, an amount equal to a further 100% of its research and development expenses.

Article 13.2.3.2: Deduction cap

(1) This additional deduction is capped at EUR 20,000,000.

CHAPTER IV: CONTROLS

General comment: Audits are left to the State in which the company is resident.

Article 13.2.4.1: Competent authority

(1) Audits of the application of young innovative companies shall be carried out by the tax authority of the State in which the company is resident.

Article 13.2.4.2: Applicable law

(1) Such audits shall be carried out in accordance with the national law of the State in which the company is resident.