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Cross-border loss relief

The return of the CC(C)TB: first critical analysis

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Background

- Absence of cross-border loss relief is important barrier to cross-border investment and EU competitiveness
  - Efficiency
  - Reduce risk
- Several CJ decisions on impact of fundamental freedoms on domestic loss compensation rules in cross-border situations
- High degree of uncertainty
  - Justifications
  - Proportionality test – meaning of final losses
  - Several national courts decisions (e.g. *M&S* saga)
  - Implementation issues (e.g. *Commission v UK*)

Prior attempts

- Prior attempts by the Commission to deal with cross-border loss relief
  - 1969 COM proposal for Directive on common system of taxation for companies of different MS
  - 1970 COM proposal for Regulation on European Company (SE)
  - 1990 COM proposal for Directive to take into account losses of PEs and subsidiaries located in other MS

Prior attempts

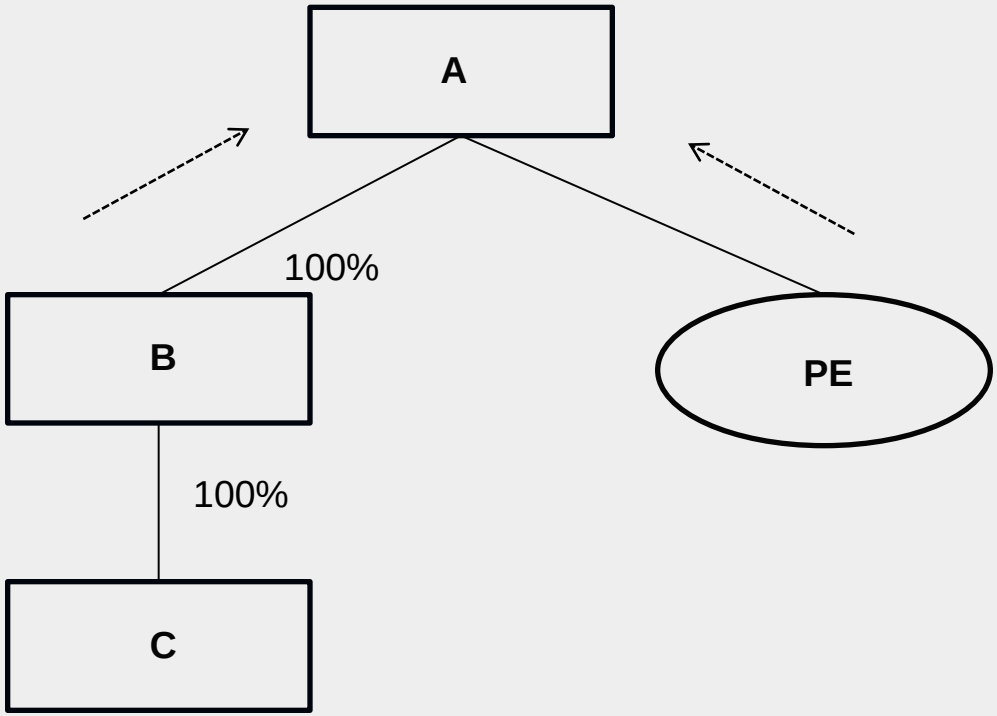
- 1990 COM proposal for Directive to take into account losses of PEs and subsidiaries located in other MS
  - PE losses
    - Deduction with recapture (automatic after 5 years or if PE is sold, wound up or transformed)
    - (Or credit method)
  - Losses of subsidiaries
    - 75% holding (lower minimum allowed) + majority of voting rights
    - To be taken into account on a pro rata basis through deduction with recapture (automatic after 5 years or if subsidiary is sold, wound up or transformed or holding below minimum)

Main features

- CCTB proposal includes provision allowing for cross-border loss relief (Art. 42)
  - Temporary provision: transition period in which CCTB is applicable

- Available for:
  - Qualifying subsidiaries and PE located in other MS
  - Qualifying subsidiary
    - Immediate subsidiary
    - Meets ownership and control test under Article 3 (1)
    - Loss import in proportion of shareholding

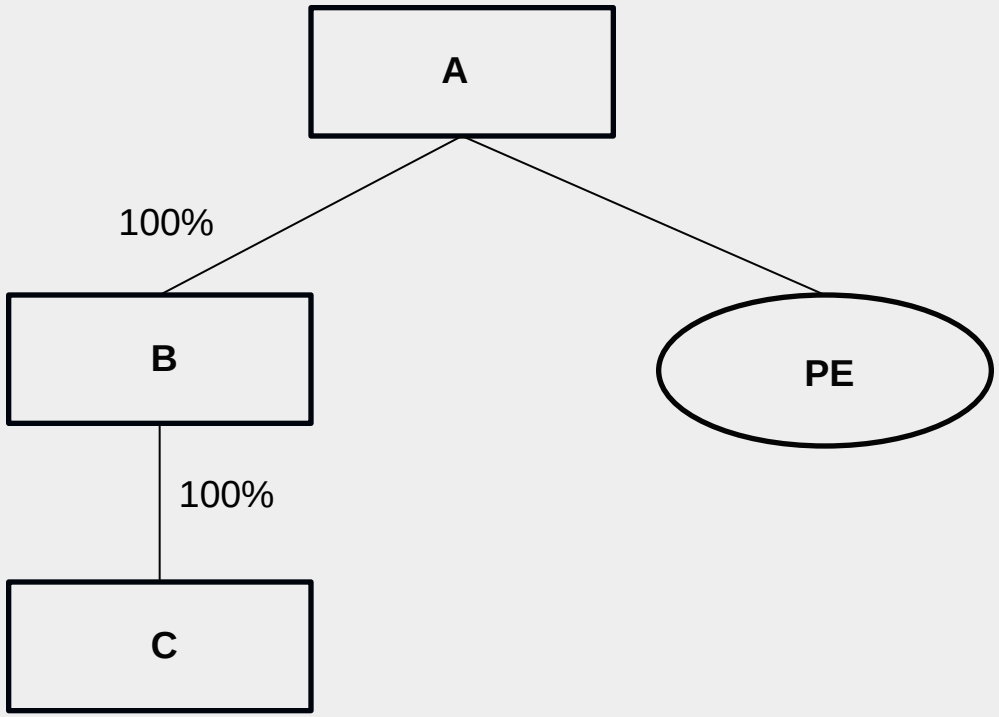
Scope



Main features

- Deduction/recapture mechanism
  - Cash-flow advantage
  - Automatic recapture
    - 5 years
    - subsidiary or PE is sold, wound up or transformed
    - Parent company does not meet control/ownerhip test (Art. 3 (1))
- Priority to “own” losses
- No cascade effect

No cascade effect



Scenario A

- B has profits but loss carry forward available
- C Losses

Scenario B

- B has profits (+80)
- C losses (-100)

Some final remarks

- Interaction with national group taxation systems
- CJ case-law
- CCTB with no CCCTB?