

Cross-border Mergers

of Limited Liability Companies within the EU

Cross-border mergers possible within the whole EU

2004: Regulation European Company 2157/2001 became effective

2005: SEVIC-ruling (C-411/03) of the ECJ

2007: Tenth Council Directive 2005/56 became effective

Does the Merger Directive remove all direct tax obstacles?

- Scope:**
 - Not all companies are covered (e.g. new or EEA companies)
 - Position of dual resident companies is unclear
 - Mergers involving buy out of minority shareholders are not covered
- Capital**
 - Directive does not preclude exit taxation
- Gains:**
 - Merger may result in double taxation of business transferred
- Reserves:**
 - Host state not obliged to take account of transfer of reserves
- Losses:**
 - Directive allows the evaporation of losses transferring company
 - Host state not obliged to take account of transfer of losses
 - Directive allows the evaporation of losses absorbing company
- Holding:**
 - No participation exemption on downstream merger
- Shareholders:**
 - Tax claims on foreign shareholders may evaporate
 - Participants in transparent shareholders may be taxed
- Creditors:**
 - No arrangements on behalf of creditors (company debts)
- PE:**
 - Transfer PE results in immediate taxation and loss recapture
- Dividends:**
 - Dividend withholding tax claims evaporate
- Employee:**
 - Tax benefits depend on continuation of employee participation

Do the European Treaty Freedoms offer additional benefits?

- Applicable?**
 - Transferring and receiving company
 - Shareholders and creditors
 - No discrimination of non-qualifying foreign companies
- Benefits?**
 - Direct exit taxes are not allowed
 - A step-up shall be granted to the receiving company?
 - Freedom of establishment and loss compensation (no loss recapture permanent establishment)

Proposal for a Directive amending the Merger Directive

- Basis: tax neutrality, removing obstacles, safeguarding claims

Commission's Manual on application of Merger Directive