



## Shortcomings in the EU Merger Directive

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3 June 2017



## Five Main Shortcomings

1. Objective Is Not Stated Precisely
2. Minimum Harmonization  $\neq$  Common Tax System
3. Exhaustive Lists Are Used as Legislative Technique
4. Interplay with Outcomes under Negative Harmonization Is Unclear
5. Definitions Not Fully Aligned with Corporate Law

## The Merger Directive's Objective Is Not Stated Precisely

- Preventing the “imposition of tax in connection with mergers, divisions, partial divisions, transfers of assets or exchanges of shares”
  1. Imposition of *which* taxes? *Zwijnenburg* (C-352/08)
  2. “In connection with” means *when*? *3D I Srl* (C-207/11)

## The Merger Directive's Objective Is Not Stated Precisely

- “Create within the [Union] conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market”
  1. “Companies from two or more Member States” vs “shareholder”
  2. Substance requirements?

## Minimum Harmonization Does Not Lead to a Common Tax System

- Creating a “common tax system”
- Achieve “neutrality from the point of view of competition”

Why only cross-border restructuring operations?

- Member States are free to extend the Merger Directive’s scope
- This does not ensure a common tax system

## Exhaustive Lists Are Used as Legislative Technique

- Operations covered (Articles 2(a) – 2(e) and 2(k))
- Qualifying legal forms (Annex I, Part A)

*Gaz de France* (C-247/08): flawed technique

Preferable to use general terms or criteria, with exemplary lists for purposes of legal certainty

## The Interplay Between the Merger Directive and the Outcomes Reached Through Negative Harmonization Is Unclear

- Primary EU law (a.o. *SEVIC*, C-411/03): same tax treatment to *cross-border* restructuring operations as *domestic* restructuring operations
- Role of secondary EU law: legal certainty (difficult to assess justification grounds)
- Article 4 and *National Grid* (C-371/10) and *A Oy* (C-123/11)

## The Definitions of Qualifying Restructuring Operations in the Merger Directive Are Not Fully Aligned with Corporate Law

- Definitions of e.g. merger, division in Merger Directive  $\neq$  corporate law
- Definitions are not automatically interchangeable
- Not always possible *fiscally* what is possible *legally*
- Not always possible *legally* what is possible *fiscally*
- “Business restructurings” ((C)CCTB)?



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