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

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
Creditors: - Participants in transparent shareholders may be taxed
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

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