The Supreme Court dismissed these arguments by simply holding that Miroiterie Vauclusienne had lost its legal existence when it merged with Pilkington Sud and that a person can incur criminal liability only in connection with its own conduct.

The Supreme Court therefore confirmed that there can be no vicarious criminal liability following a merger.

It is worth noting that the Supreme Court did not make an exception for fraud (where the merger is designed to avoid criminal liability), whereas fraud was one of the foremost grounds for the decision of the Court of Appeals.

However, there is little doubt that French courts would condemn the new company in case of proven fraud.

The acquiring company and its advisers should also be mindful of the fact that if the merger occurs after the acquired company has been finally found guilty, the enforcement of fines, confiscation, and payment of court costs will be possible despite the acquired company's winding up, because the Penal Code expressly reserves this right.

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GERMANY

German Tax Reform 2000 – impact on mergers and acquisitions and investment activity

The changes introduced by the Tax Reform Act 2000 are likely to benefit large stock corporations, such as Deutsche Bank AG and Allianz AG, and small and medium-sized enterprises (SMEs) alike.

The changes are also likely to encourage companies and investors to reconsider the way in which they hold shares or invest in German companies so as to ensure that their shareholding structures are able to take advantage of the tax exemptions for capital gains introduced by the changes.

Exemption from capital gains tax

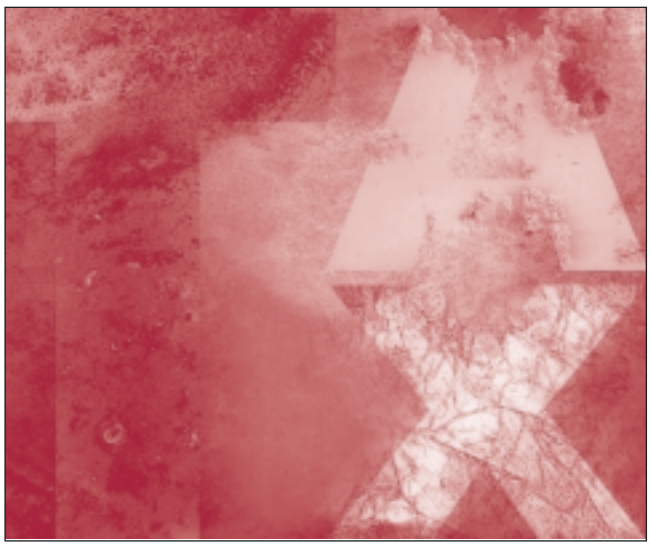
One of the key reforms introduced by the Act is that, from the year 2002, the gain arising on a sale of shares in a German limited liability company ("GmbH") or a German stock corporation ("Aktiengesellschaft") will not be taxable if the seller itself is a GmbH or an Aktiengesellschaft or the German branch of a foreign corporation.

The reform was introduced in order to reduce the cross-shareholdings between large stock corporations in Germany, the so-called "Deutschland AG", and to encourage greater investment in the German corporate sector. The removal of taxation on long term gains (many of the cross-shareholdings date back to the immediate post-war era) should encourage the big stock corporations to divest their cross-shareholdings and reinvest the gains in new businesses, leading to an increase in mergers and acquisitions and investment activity.

Individual shareholders will still be able to sell shares in a German or a foreign corporation without any liability to tax on the gain arising from the sale where the shareholding is not substantial. However, whereas previously a shareholding of 10% or more was considered to be substantial, in future a shareholding of 1% or more will be considered substantial.

Reduction of corporate tax rate

A number of other changes to the system of taxation of corporations and shareholders are likely to increase cross-border investment in Germany.



The corporate tax rate has been reduced to a uniform rate of 25%, so bringing the German tax system into line with those of the other major European economies and making Germany a more acceptable European alternative for foreign investors than previously.

Abolition of imputation tax credits

The former system of imputation tax credits for dividends has been replaced by the new half-income system of taxation, the "Halbeinkünfteverfahren", again bringing the German tax system into line with those of a number of other European countries. Under the former system, a German resident individual shareholder received as a tax credit against his liability to personal income tax an amount equal to the corporate tax paid by the distributing corporation. The system disadvantaged foreign investors since tax credits were not available to them.

Under the new system, designed to promote profit retention instead of profit distribution, tax credits will no longer be available. Instead, one-half of the dividend distributed to a resident individual shareholder will be taxed at the shareholder's individual progressive income tax rate while the other half will be tax-exempt.

Choice of structure

The reforms also offer SMEs the opportunity to structure their investments in a tax efficient manner. The new regulations are a particularly interesting development for any business which is operated through a limited partnership ("Kommandit-gesellschaft") where the general partner, or the one partner which has unlimited liability, is in turn a GmbH. A Kommanditgesellschaft can be converted into a GmbH or an Aktiengesellschaft before it sells any shares held by it in a GmbH or an Aktien-gesellschaft, thus avoiding any liability to tax on any gain arising from the sale.

The choice of the most tax efficient shareholding structure for a business will ultimately depend on a number of different factors, some of which are identified below.

Losses arising on the sale of shares of limited liability companies or stock corporations will no longer be deductible for tax purposes if the seller is a GmbH or Aktiengesellschaft as opposed to a partnership. However, while losses arising on the disposal of interests held through limited partner-ships will reduce the tax base of the sellers, gains will be taxed at the individual progressive income tax rate. Therefore, on balance, it seems likely that structuring disposals of shares through Gmbhs or Aktiengesellschaften will be more tax efficient.

The tax advantages for a corporate seller of shares in a GmbH or and Aktiengesellschaft need to be contrasted with the position of the buyer for whom it is likely to be more tax efficient to buy an interest in a partnership rather than shares in a GmbH or an Aktiengesellschaft. Furthermore, the purchase of an interest in a partnership will lead to an increased depreciation charge.

In turn, the previous common practice of restructuring a GmbH or an Aktiengesellschaft into a partnership after acquisition in order to increase the depreciation basis (the so called "Step-Up") will no longer be available and, therefore, the practice is likely to be dropped.

Anyone considering restructuring a business to derive benefits from the new regulations is likely to be advised to do so before the end of 2001 to take full advantage of the changes for mergers and acquisitions transactions from the beginning of 2002.

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SPAIN

Taxation of mergers and acquisitions in Spain

Introduction

A merger under Spanish law will in principle be liable to both *Impuesto de Sociedades* (corporation tax) on any capital gain arising on shares which are transferred and *I.T.P.-A.J.D.* (transfer tax and stamp duty) on the nominal value of any increase in capital.

By comparison, the transfer of an undertaking of a Spanish company will be liable to I.V.A. (V.A.T.) on the value of the assets transferred in addition to corporation tax on any capital gain arising on the transfer and stamp duty on the value of the trans-action and, therefore, will be a more expensive option.

A spin-off (or a division), whereby a company divides its assets into two or more different parts and transfers each to a new company in exchange for shares in the new company, is likely to be more tax efficient than a simple transfer of an undertaking (or