

Direct taxes: The European Commission formally requests Germany to end discrimination relating to the treatment of group companies (Organgesellschaften) formed in other EU/EEA states but having its place of effective management in Germany.

The Commission considers that Germany has not respected its obligations under the Treaty on the Functioning of the European Union ("TFEU") insofar as under the provisions of German law, a company that has been set up in accordance with the company law of another Member State, which has its registered office outside Germany and place of effective management in Germany, cannot function as a group company within a fiscal unity for corporation tax law and trade tax law purposes (Organschaft).

A capital company that is formed in another country and moves its management to Germany – thus becoming fully liable to tax in Germany – cannot join the fiscal unity because of the legal situation set out above. The company therefore forfeits the tax benefits resulting from the allocation of the group company's income to the parent company (offsetting of profits and losses within the fiscal unity). It is consequently disadvantaged in comparison with domestic competitors and may be deterred from establishing business in Germany.

The Commission is of the opinion that Germany has failed to fulfil its obligations under Article 49 TFEU and Article 36 of the EEA Agreement, i.e. the freedom of establishment.

Background:

The incriminated provisions are paragraphs 14 and 17 of the Corporation Tax Act (KStG) and paragraph 2 of the Trade Tax Act (GewStG). The case concerns only the double requirement in paragraph 14 KStG that company seat and place of effective management have to be in Germany. It does not deal with the question of cross-border loss compensation.

The request takes the form of a reasoned opinion (second step of the infringement procedure provided for in Article 258 TFEU). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Union.

The Commission's case reference number is 2008/4909.