TAX ASPECTS OF MERGERS IN PROCESS OF REALIZATION CROSS-BORDER MERGERS IN EUROPE

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1. Introduction

European companies and their mergers are regulated by legal acts falling within Internal Market in the European Community. European Community (and EC as a part of the European Union) has been attended to cross-border merges since 1990, when the first directive concerning this issue was passed. There is no surprise that regulation concerning cross-border merges was regulated by the Directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (Directive 90/434/EEC).

As the financial reporting systems in the majority of European countries are closely connected with the tax system, where tax rules are accounting rules but respecting tax purposes of the governmental agencies not individual conditions of companies. Moreover, the majority of European countries use "classical" tax system, where there is the main criticism concerning double taxation (Nobes 2010).

The main aim of the Directive 90/434/EEC was to create for companies of different Member States within the Community conditions analogous to those of an Internal Market and to ensure effective functioning of the common market. Such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. This directive together with the Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Directive 90/435/EEC), were issued in 1990. Both directives should be transposed into the law of member countries till the end of 1992. Issuing directives, there was a fatal mistake; directives did not allow cross-border merges of companies from different Member States. This paradox was commented in Czech academic publication, in rigorous work (Lasak 2009). European regulation should focus on tax aspects of cross-border mergers first. Only a common tax system is able to provide a satisfactory solution in this respect. Whereas the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares. Directive should enable restructuring of companies in European Union regardless of the border of Member States and without tax disadvantage. Ultimately, such a solution would correspond to ideological pillar of the European Union, free movement of capital.

However, another 15 years had gone till the Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies (sometimes referred to as "Tenth Directive") was adopted. The Tenth Directive brought Member States obligation to restate their law system in the way that cross-border mergers between Member States are realizable. The Court of Justice supported harmonization of the cross-border merges by their judgement.

The important case judgment of SEVIC Systems AG (Case C-411/03) has resulted in the addition of new elements to the Court of Justice's jurisprudence on freedom of establishment's interrelationship with Member States' company laws. The Court, while dealing with the SEVIC case, has extended the cross-border mobility of companies by applying the principle of freedom of establishment to cross-border mergers.

The Tenth Directive should bring Member States harmonization of company law so that the cross-border merges would be realized from law aspect. Regulation of cross-border mergers in Europe could bring a lot of advantages into business life, at least if crucial steps in preparatory

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phase of cross-border mergers are unified. The Czech Republic as all other EU member states was bound to implement the Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies (sometimes referred to as “Tenth Directive”) to the Czech legal system in 2007. This directive was made public in Official Journal of the EU on 25 November 2005. The member states were obliged to transpose this Directive to their laws and regulations by 15 December 2007.

This Directive facilitates the cross-border merger of companies existing in at least two different regulatory law systems. Consequently, the Directive does not apply to mergers between companies from the same Member State. The cross-border merger Directive does not affect the applicable provisions of national law. Preparatory phase of cross-border merger is subject to the national laws of the Member State where cross-border merger is realized. The fact that preparatory phase of cross-border merger is subject to the national laws of the Member State could seem to be a positive aspect of European regulation as this allows member states to keep the accounting treatments they have already used and “in the way they have always done it” (Schroeder 2009). Contrary is the case. The example of practical procedures in cross-border mergers into the Czech Republic and out of the Czech Republic is used as a demonstration of very fundamental obstacles that implementation of the 10th EC directive fetches along.

The laws of the Member States are to allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of company. Therefore if the cross-border merger of the Czech company with the Slovak company should be realized, the preparatory phase of cross-border merger for the Czech company is realized in compliance with the Czech jurisdiction and the Slovak company in compliance with the Slovak one. Completion of the cross-border merger and register in the public register is realized in compliance with jurisdiction where the seat of the acquiring company is or will be.

The law of each of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements, in accordance with Article 3 of Directive 68/151/EEC, for publicising completion of the cross-border merger in the public register in which each of the companies is required to file documents.

All Czech share companies and cooperatives may participate in cross-border mergers. According to the Tenth Directive, cross-border mergers shall only be possible between those types of companies which may merge under the national law of the relevant Member States, and a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. Example of merge is between Czech share companies and German AG or French SA. Merge between German AG and Czech limited liability company may be realized only if merge between Czech shareholding company and Czech limited liability company is allowed by the law and then German AG with GmBH is allowed too (according to the article 3, par. 3 of the German Law on merges). In practice, the Czech limited liability company may decide to merge with German GmBH into Slovak AS with the seat in Bratislava. This transaction is allowed only on conditions that all participated jurisdiction allows the transaction concerned, e.g. Czech law, German law and Slovak law.

The objective of this paper is to investigate whether tax aspects of mergers could cause the main obstacles in realization of cross-border merger in Europe. Transposition of the Tenth Directive hasn’t brought harmonisation of Member States’ company law so as to enable the realisation of cross-border mergers from the legal perspective. Main reason for publication of this paper is to prevent other EU member states to increase obstacles in cross-border mergers realization.

A crucial obstacle to cross-border mergers, but also to inter-state mobility in general, has been the taxation of unrealized capital gains and the possibility to carry forward losses. This issue is also referred to as “exit taxation.” In local transactions, Member States provide for a tax deferral, which means that capital gains on assets or shares will be carried over to the new entity and will only be taxed as soon as they are realized. In a cross-border merger situation, such a deferral is normally not provided, because countries might lose their taxation rights in a cross-border transaction if, for example, the merging company is not deemed to be resident for tax purposes anymore. In general, this problem has been solved by the Tax Merger Directive, 83 providing that assets remain connected to a permanent establishment in the jurisdiction. Nevertheless, stakeholders from Finland, France, Iceland, and Slovenia have reported that tax treatment remained a problematic issue in cross-border mergers, and could also lead to using different structures than a cross-border merger to carry out such an operation (Bech-Bruun, Lexidale 2013). Our recommendations are stated in the conclusion.

2. Methodology

There are very unique papers on cross-border mergers like paper on cross-border mergers and acquisitions concerning financial and institutional forces (Coeurdacier) or paper assessing the impact of the main forces driving cross-border mergers, where a unique database for 10 acquiring manufacturing sectors and 10 acquiring service sectors located in 21 countries targeting foreign assets in 31 host countries (over the 1985–2004 period) were constructed (Oestreicher 2010). Since the issue of the 10th EC Directive and the obligation of the Directive transposition into law systems of EU member states, there is a lack of investigation on the countries accounting and law conditions concerning this issue.

Over the past five years, professional literature has included a number of references to a specific type of ownership transactions between companies, which are referred to as cross-border acquisitions and mergers. Hlaváč (2009), analyzed the processes of management of the acquisitions and mergers in international transactions; Lasák (2009) has been analyzing the legal aspects of mergers in relation to Community law, while Otavova (2010), commented on the integration of cross-border mergers and demergers to the legal system. Žárová (2006), describes the differences in the accounting regulations in various EU countries. Bohušová and Svoboda (2009) examined the IFRS and U.S. GAAP convergence in the area of mergers. Of the foreign authors, Burksaitiene (2010), deals with cross-border mergers in developed countries in 2008–2009, Tumpach (2009), deals with the problems involved in the interpretation of accounting regulations. Pala (2010) addresses the legal procedures applied to cross-border mergers in Slovakia. German literature quite frequently deals with the depiction of mergers from the accounting point of view; e.g. Knüppel (2007); with Kulenkamp (2009) and Behrens (2007) examining the EU directives relating to cross-border mergers. In the American literature Gaughan (2007), examines every type of corporate restructuring; from mergers and acquisitions to joint ventures; they are currently being used to revitalize companies in the US and abroad. Roberts (2008), deals with the sale, or purchase, of businesses, and evaluation as applied to M&A transactions.

Despite the relative frequency with which professional literature has dealt with this question, it must be said that business practice uses cross-border mergerss in order to realise the acquisition process rather seldom. The number of international aquisitions often comes to hundreds of cases; however, the specific legal form of the cross-border mergers is used only in extreme cases, as a rule. This is in addition to the more frequently used methods, such as buying shares, securities or purchasing the assets, or even the whole company.

Based on the empirical research, we have used analysis to reach the aim of the reserch. The aim of our research, whose partial results are included in this paper, is to analyse the causes of this state of affairs. Questions were prepared and carefully selected by members of research team. Studying particular cross-border mergers in different Member States, we came to the conclusion that without the direct contact of merging companies, we will not be able to recognize conditions those differ and that may cause inability of cross-border mergers realization. Questions concern accounting procedures, attempts to measurements and some tax aspects of mergers. This approach is one of used common research methods (Crowther 2005). Questions were asked as pre-coded questions; some of them were asked as open questions. Our own research was based on questionnaire. We have therefore addressed for this purpose public accounting and consulting firm Crowe Horwath. This multinational network of independent consultancy companies seemed to be a guarantee of professional approach as for practical realization of cross-border mergers in different Member States. Questionnaires were sent to representatives of consultancy firms in all Member States. The present research was based on the willingness to fulfil the questionnaire. Research returns were 41%. Besides the Czech Republic, answers were collected from the following countries: Austria, Belgium, Cyprus, France, Germany, Hungary, Norway, Poland, Romania, Slovakia. We have determined fundamental questions to be examined in the above mentioned group of European states.

3. DISCUSSIONS

a. Cross-border mergers realized in the Czech Republic

If we concentrate only on cross-border mergers carried out in the Czech Republic in the past few years, then there will not be many statistics. It could be said that although in the past there were a lot of cross-border acquisitions, they were covered by a different legal approach, that were cross-border mergers. Investors, when choosing acquisition strategies, weigh up the existence of the two possibilities for doing business abroad; that of working through a subsidiary, or through a permanent establishment (or a business representative).

Cross-border mergers lead to the merging company, usually, changing into the permanent establishment which represents the company abroad, and it must fulfil certain requirements, which are demanded from it by the legal systems of both states. Doing business through a subsidiary, in comparison to this step, then, is much simpler. This is because the subsidiary simply comes under the legal order of the state in which it is situated. Information about the mutual joining of the companies provides consolidated financial statements, the preparation of which is a long term standard approach, based on precise and clear rules.

An indisputable advantage of doing business abroad through a permanent establishment, is the simplicity with which it can be established and wound up, frequent absence of the requirement of a minimum amount of one’s own capital, simpler organisational structure, lower demand for the arranging of the trade formalities necessary for carrying out certain activities, the possibility of having problem, free financial flow between the one who sets it up and the permanent establishment, and so on. However, if the company decides to do business through a permanent establishment, it must bear in mind that there are attendant complications. A frequent complication is insufficient accounting and tax adjustments for this form of business organisation, both in the state where the permanent establishment is actually situated, and the state from where it is directed (the seat of the successor company).

If we analyse those cross-border mergers carried out in the Czech and Slovak Republics from 1st January, 2008 to 31st December, 2012; according to the following Table I, it must be said that the amount is very low.

Tab. 1. Cross-border mergers carried out in the Czech and Slovak Republics

Calendar year	2008	2009	2010	2011	2012
Number of mergers noted in the Company Register	4	8	15	24	11
Number of mergers completed till Dec 31st 2011	4	7	14	17	11

Source: Author’s own research according to www.obchodnivestnik.cz and www.justice.cz as well as similar sources in the SR

The table contains noted mergers and those mergers which were successfully completed; i.e. written in the Commercial Register. Some of the mergers, however, were not successfully completed.

Tab. 2. Overview and numbers of mergers from the Czech Republic to the EU member state

Mergers from the CZ to the EU member state	2008	2009	2010	2011	2012	Total number of mergers
Cyprus	2	2		3	1	8
Great Britain	1	1				1
Germany		1	1	1		3
Slovakia		2	4	4		10
Netherlands		1		1	1	3
Ireland		1				1
Poland			1			1
Luxemburg				1	1	2
Belgium				3		3
Italy				1		1
Austria				1	1	2
Total	3	6	6	15	4	36

Source: Author's own research according to www.obchodnivestnik.cz and www.justice.cz as well as similar sources in the SR

Tab. 3. Overview and numbers of mergers from the EU member state to the Czech Republic

Mergers from the EU member state to the CZ	2008	2009	2010	2011	2012	Total number of mergers
Slovakia		1	5	3	4	13
Netherlands			2	2		4
Germany			1		1	2
Cyprus				2		2
France	1		1			2
Poland		1			1	1
Hungary			1			1
Luxemburg				2		2
Austria		1			1	
Total	1	3	10	9	7	30

Source: Author's own research according to www.obchodnivestnik.cz and www.justice.cz as well as similar sources in the SR

If we examine the Czech Republic to see which countries are the "favourites" for cross-border merger, then without a doubt we find the Slovak Republic on first position. The other countries, where historically, more than one cross-border merger with Czech companies, can be seen in the tables above. What's the main reason for this fact? The high number of successfully completed mergers has the Netherlands and Cyprus may be attributable to favourable tax regimes in those countries. But why is there a low number of cross-border mergers with the nearer countries such as Poland or Hungary? Answers might be found from the following research results.

b. Research on the reasons for the limited use of cross-border mergers

As we can see from the previous statistical information, cross-border mergers in the Czech Republic do not represent a mass transaction. Business with foreign dimensions is today an almost everyday routine, and the EU guaranteed free movement of goods, services, persons and capital has become a fact of life for most Czech companies. Concerning cross-border merger, however, Czech companies exercise great caution. What could be the reasons for this approach?

When examining obstacles which could put companies off from realising cross-border mergers, we came to conclusion that besides the fact that some accounting aspects of mergers are not harmonised and some legal systems have different approaches to valuating property for business law purposes than they have for accounting purposes, tax aspect of mergers should be focused. Tax regimes are often more favourable to the realisation of inland mergers than they are to cross-border mergers. It can lead to some tax disadvantages. We have devoted our research to the analysis of these causes; we are doing further work on tax aspects.

c. Tax aspects of mergers

Directive 90/434/EC sets the conditions for mergers, business investment and exchange rate of shares. It also applies the joint taxation system for mergers, split of companies, transfers of assets and the exchange rate of shares concerning companies from different member states. Directive 90/434/EC was amended several times and it was replaced by Directive 2009/133/EC of 19 October 2009, with the same structure of articles as the previous one. References in the text are the same for both Directives (Directive on mergers).

The Czech law No. 438/2003 Coll., implemented this Directive upon the Czech Republic's accession to the EU. It is even applied to domestic mergers, including merger of parent companies and subsidiaries. The Directive also delineates the types of companies to which it is to apply. Generally, it concerns companies kept in portfolios (as a rule, capital portfolios), which do not have the possibility of tax relief for legal entities and are considered to be tax residents of the EU.

However, implementation of this Directive brought one big advantage for Czech companies; namely, the possibility of carrying tax losses among capital companies since 2004. The Directive requires this advantage in cross-border transactions, the possibility of carrying the losses among domestic companies is a great advantage (Skalova 2010).

The basic principle of tax neutrality is contained in Article 4 of the Directive. Neither mergers nor splits have, as a consequence, the capital gains tax calculated as the difference between the actual value of the carried over assets and liabilities and their value for tax purposes.

The member states account for this non-taxation of value changes by the fact that the receiving company calculates all new depreciations and profits or losses relating to the carry over of the assets and liabilities according to the regulations which would govern the transferring company, or companies, if the merger or split had not taken place. In the opposite case, the Directive states: "If the recipient company can, according to the laws of the member state containing the transferring state, carry out a calculation of the new depreciations and profits or losses relating to the carry over of the assets and liabilities on another basis, does not uses untaxed changes in value on the assets and liabilities, under which the recipient company has used this possibility."

The Czech Republic has chosen the tax continuity principle; i.e., not taxing capital gains at company or partner level. Revaluation of assets and liabilities at fair values, carried out during mergers and included in the accounts among the liabilities as an increase in own capital, does not have any tax consequences.

The tax value of the merging company's assets is carried over to the successor company, and they are used in other tax judgments in transactions with assets (sale, tax depreciations). This method was chosen not only for cross-border mergers (as stipulated by the Directive), but also for domestic mergers.

In order to be able to prepare some generalization, we are located information on internal tax conditions for mergers in different countries. A lot of countries have chosen advantageous tax regimes for domestic mergers, as can be seen in the following table.

Tab. 4. Internal tax conditions for mergers

	What, from the point of view of income tax, is revaluation in domestic mergers?	During a merger, is it possible to transfer tax losses over to the successor company, in a domestic merger, and under what conditions?
Belgium	n/a	Yes, it can be used by successor companies only against the sum of the „taxable base" of each of the companies, which the given company has in total after the merger
Czech Republic	Not relevant for tax purposes	Yes, under the condition that: it is for five tax periods at most, losses are linked to the activities of the merging company (if the successor company does not perform the activities of the merging company, it is not possible to carry over the losses) and the purpose of the merger should not be the reduction, or avoidance, of tax obligations
France	It is relevant for tax purposes (tax depreciations from new prices, revaluation considered as taxable income); it is possible to apply Article 210 of the tax law and not pay tax on the revaluation	Yes, but the successor must carry out the activity
Cyprus	It is not tax relevant (tax depreciation continues from the original prices used for tax purposes)	Yes, without further limitations
Hungary	It is tax relevant (tax depreciation from the new prices, revaluation is considered to be taxable income); the exception is the "preferential merger"	Yes, without further limitations
Norway	It is not tax relevant (tax depreciation continues from the original prices used for tax purposes)	Yes, if the expired company carries on doing business
Poland	It is not tax relevant (tax depreciation continues from the original prices used for tax purposes)	No
Austria	It is not tax relevant (tax depreciation continues from the original prices used for tax purposes)	Yes, on condition that the successor takes over the carrrying values of the merging company; the losses of the merging company must be compatible with the business taken over/taken over assets – must exist to the decisive day; loss is useful only to the extent that the business/asset from which it arose, exists to the decisive day.
Romania	It is not tax relevant (tax depreciation continues from the original prices used for tax purposes)	No, only the successor company can use tax losos
Slovakia	Companies have the right to choose. Valuation is either not tax relevant, and then it continues from the original prices, or it is tax relevant; the difference between original and new prices comes under income tax.	Yes, on condtion the following consecutive tax periods do not exceed 7. The purpose of the merger may not be the reduction, or avoidance, of tax duties.

Sources: Authors' own research

The Directive is meant for those situations where, in a cross-border merger, the property remains in the state where the original merging company was situated. The Directive does not envisage the shift of property from one state to another, and neither, therefore, the situation where the original state would lose the possibility of taxing the profits gained from carrying out the activities of the expired company. This subject will remain in the territory of the original state. Its business activities, however, will take the legal form of a foreign permanent establishment. For tax purposes it will still be run as an income tax payer.

The Directive does not contain clear provisions for the situation where the merging company's property is not linked to permanent establishment. It does not solve the situation where the merging company's property is „moved from one state (where the merging company is situated) to another (the successor company's seat). Some EU member states, therefore, approach the situation like an operation „ realising capital profit with tax consequences". It concerns, mainly, taxation of payers leaving the particular state (in tax theory this tax is known as „exit tax"). Levying this tax on a company (or individual) leaving a given EU member state is, however, seen by the ECJ as an impediment to the freedom to establish as granted by Article 43 of the EC Treaty [13, p.87].

We can take as an example the decision of the ECJ C-9/02 Lasteyreie du Saillant; where the ECJ upheld the freedom to establish in connection with French tax regulations, according to which unrealised increases of share prices were taxed if the payer moved his place of residence outside France. When Mr Lasteyreie du Saillant moved from France to Belgium, he was taxed on the increased value of his shares, even though he had not yet gained the profit from their sale. The ECJ concluded that these measures limit the freedom to establish, because they have a marked discouraging effect on payers who wish to settle in another member state.

Taxing residents on the basis of profits gained, and on the other hand, taxing departing residents according to the value of their assets before they have gained the profits represents a difference in their treatment, which is an obstacle to the freedom to establish as well as the free movement of persons and capital.

The conclusions reached, while they apply to individuals, could, however have an impact even on companies in the case of cross-border merger. In the case of cross-border merger, valuable property could be brought from the merging companies to the successor companies in other EU member states, where sales of this property could attract lower rates of taxation. The Czech Republic has not, to date, passed any legislation dealing with this problem. It may be stated that Czech businessmen could use this „loophole" in some transactions, leading to the optimisation of their tax burden. Some states, as can be seen from the following table, however, do impose tax upon subjects leaving their jurisdictions.

Tab. 5. Company exit tax

	What is taxed in the case that, in your country, as a result of cross-border merger, there does not remain any permanent establishment?
Belgium	Difference between market value and tax net book value of the assets and liabilities
Czech Republic	Nothing. There is no obligation to tax the difference between the market and tax value
France	Difference between the market value and tax net book value of the assets and liabilities
Cyprus	There is no obligation to tax the difference between the market and tax value
Hungary	Nothing, provided it was not revalued. If assets and liabilities arerevalued in the mening balance sheet, then the diference
Norway	Difference between market value and tax net book value of the assets and liabilities
Poland	Nothing, provided it has a seat in the EU and had at least a 10% share in the merging company (mergers are tax neutral)
Romania	Nothing. There is no obligation to tax the difference between the market and tax value
Slovakia	Nothing. There is no obligation to tax the difference between the market and tax value

Sources: Authors' own research

Other differences arising from transposition of the Directive on cross-border mergers could be found in some other areas between Member States.

Continuation of tax depreciation in cross-border mergers. In Belgium, Poland, Romania, Hungary and Cyprus, acquiring company takes over original company´s tax book value of the disssolved foreign company regardless of whether assets are actually transferred across borders into Belgium, Poland, Romania, Hungary and Cyprus, or whether assets remain in permanent establishment abroad.

In Norway, acquiring company takes over for assets in fair value for tax purposes regardless of whether the assets are actually transferred across borders into Norway or whether assets remain in permanent establishment abroad.

In Slovakia, assets are transferred either in original tax value or new market value, if the dissolved company in its country taxes additionally difference between the market price and the net book value.

The carry over of tax losses from abroad. Directive 2009/133/EC, Article 6, provides that if the Member State would apply provisions allowing the receiving company to takeover the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the takeover of such losses by the receiving company's permanent establishments situated within its territory. This article, however, does not provide that it would be necessary that the loss of the acquired company is always taken by the acquiring company.

The problem is that this rule can be transposed into national legislations of EU member states in different ways:
1. Possibility to take over the loss of the dissolved company whether domestic or foreign, without limitation whether it is a subsidiary or equity unrelated company (e.g. Czech Republic)
2. Possibility to take over the loss of the dissolved company but only of the domestic one (e.g. Finland, details in text).
3. The ability to take over the loss of the acquired company is forbid en (e.g. Poland).

Research shows that transposition of Article 6, Directive 2009/133/EC, has been realized within above mentioned 3 approaches with material differences between them. In the Czech Republic, to take over the loss of the dissolved company to acqurıng one is enabled on condition that there exists proper economic reasons for merger. Acquiring company or permanent establishment may then apply this tax loss against the same activities which were the purpose of this tax loss.

In Belgium, tax loss may be taken over at merger on condition that tax loss may be applied at acquiring company only against part "tax value" of each company, that receives that company after merger. In Romania and Poland, tax loss may not be taken over from dissolved company to acquring one. However, acquring company may apply tax loss after merger is realised. In Norway, tax loss may be taken over from dissolved company to acquring one on conditions that acquiring company take over also activities of dissolved company, where tax loss has been realized. In France, tax loss may be taken over from dissolved company to acquring one on conditions that acquiring company is in business. In Hungary and Cyprus, tax loss may be taken over at merger without requirements. In Slovakia, tax loss may be taken over from dissolved company to acquring one on conditions that the goal of the merger is not to avoid obligation to pay taxes.

As mentined above in the text, Czech Republic transposed provision into the Act on income tax that the acquiring company can take a tax loss company being acquired, whether this will be the company acquired domestic or foreign one. They are thus ensured equal rights to tax residents and non-residents.

The fact that this approach is not in all EU countries the same, it is also evidenced by the judicature of the European Court of Justice, in particular the different approaches to a merger with a domestic subsidiary versus foreign subsidiary testifies in particular the judgment (A Oy Case C-123-11).

In the mentioned case, dissolved Swedish company was a subsidiary of Finish undertaking. Finish law on income taxes doesn't allow to transfer tax loss by parent company when dissolved company has its registered office in other EU state. Transfer of tax loss is, on the other hand, enabled in the case of merge with non-resident company. Finish court asked the European Court two questions:

1. Do Articles 49 TFEU and 54 TFEU require that a receiving company may, in the context of its taxation, deduct the losses of a company which was resident in another Member State and which has merged with the receiving company, when those losses arise from the merged company's activity there in the years prior to the merger and when the receiving company has no permanent establishment in the State of residence of the merged company and, under national law, the receiving company may deduct losses of the merged company only if the latter is a resident company or the losses arose in the permanent establishment situated in that State?
2. If the answer to the first question is in the affirmative, do Articles 49 TFEU and 54 TFEU have a bearing on whether the loss to be deducted is calculated in accordance with the tax legislation of the receiving company's State of residence, or should the losses ascertained pursuant to the law of the State of residence of the company which is to be merged be considered as deductible losses?

Particularly, the second answer is important pro Czech environment, because Czech law on taxes regulates the treatment about transfer of tax loss from abroad. Detailed regulation on determination of such tax loss is not set out. Answers to questions are part of court's statement. Articles 49 TFEU and 56 TFEU do not, preclude national legislation under which a parent company merging with a subsidiary established in another Member State, which has ceased activity, cannot deduct from its taxable income the losses incurred by that subsidiary in respect of the tax years prior to the merger, while that national legislation allows such a possibility when the merger is with a resident subsidiary.

Such national legislation is none the less incompatible with European Union law if it does not allow the parent company the possibility of showing that its non-resident subsidiary has exhausted the possibilities of taking those losses into account and that there is no possibility of their being taken into account in its State of residence in respect of future tax years either by itself or by a third party. The rules for calculating the non-resident subsidiary's losses for the purpose of their being taken over by the resident parent company, in an operation such as that at issue in the main proceedings, must not constitute unequal treatment compared with the rules of calculation which would be applicable if the merger were with a resident subsidiary. From the court ruling, which is in compliance with EU law, it is evident that member state is not obliged to respect the transfer of tax loss from abroad. On the other hand, if member state respects to transfer tax loss from abroad, then the transfer of tax loss must be recalculated according to local tax rules where detailed rules on non-current assets' depreciation charges are stated or enables tax recognition provisions.

Another decided case concerns prevention of companies from abusing favourable tax principles of Directive 90/434 to circumvent or avoid the tax. It's the case Foggia C-126/10. The dispute has happened in Portugal, where favourable tax conditions in Directive 90/434 were transposed even for domestic mergers. Conditions are similar to the Czech Republic. The dispute has been made between Foggia SGPS and the Ministry of Finance concerning the refusal by the latter to authorize a transfer of tax losses following an operation to merge companies belonging to the same group (Riguadiana).

In that regard, the services of the Ministry of Finance stated that, for the years under consideration, Riguadiana had ceased to have a portfolio of holdings, that it had practically no revenue from its activity and that it had invested only in securities. Moreover, the origin of that company's tax losses in the income tax return for 2002, in the amount of around EUR 2 million, is unclear. Although the removal of Riguadiana from the structure of the group may clearly lead to a reduction in administrative and management costs, that positive effect in terms of the cost structure of the group cannot, according to the Ministry of Finance, be considered as being of commercial interest for Foggia SGPS. Foggia SGPS were not satisfied with the rejection and turned to the Portuguese court. The Portuguese court decided to stay proceedings and refers the following questions to the European Courte of Justice:

1) What are the meaning and effect of Article 11(1)(a) of Directive [90/434] and, in particular, what is the meaning of "valid commercial reasons" and "restructuring or rationalisation of the activities" of companies participating in operations covered by Directive [90/434]?
2) Is the view taken by the tax authorities, that there are no serious commercial reasons for the acquiring company's request to transfer tax losses, leading them to conclude that, from the acquiring company's point of view, there was no apparent commercial interest in acquisition, since the acquired company had developed no activity as a holding company and had no financial holdings, and would consequently transfer only substantial losses, although the merger might represent a positive effect in terms of the cost structure of the group, compatible with that provision of Community law?'

It must be emphasised at the outset that the common tax rules laid down by Directive 90/434 cover different tax advantages and apply without distinction to all mergers. The reasons for the proposed transaction are important, however, in giving effect to the option given to Member States, under Article 11(1) of that directive, not to grant the benefit of the provisions of that directive.

In particular, under Article 11(1)(a) of Directive 90/434, as an exception and in specific cases Member States may refuse to apply, or may withdraw the benefit of all or any part of the provisions of that directive, inter alia, where the merger has tax evasion or avoidance as its principal objective or as one of its principal objectives. That same provision also provides that the fact that the operation is not carried out for valid commercial reasons, such as the restructuring or rationalisation of the activities of the companies participating in the operation, may constitute a presumption that the operation has such. Company FOGGIA argued that "valid economic reasons" see that the dissolution of the subsidiary Riguadiana will simplify structure group and structural costs savings groups.

In that regard, it should be added that the cost savings resulting from the reduction of administrative and management costs, when the acquired company disappears, is inherent in any operation of merger by acquisition as this implies, by definition, a simplification of the structure of the group.

By automatically accepting that the saving in the cost structure resulting from the reduction of the administrative and management costs constitutes a valid commercial reason, without taking account of the other objectives of the proposed operation, and particularly the tax advantages, the rule set out in Article 11(1)(a) of Directive 90/434 would be entirely deprived of its purpose, which consists of safeguarding the financial interests of the Member States by providing, in accordance with the ninth recital in the preamble to that directive, the option for those Member States to refuse the benefit of the provisions laid down by the directive in the event of tax evasion or avoidance. Judgement in the case Foggia:

The Court (Fifth Chamber) hereby rulesArticle 11(1)(a) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers concerning companies of different Member States, is to be interpreted as meaning that, in the case of a merger operation between two companies of the same group, the fact that, on the date of the merger operation, the acquired company does not carry out any activity, does not have any financial holdings and transfers to the acquiring company only substantial tax losses of undetermined origin, even though that operation has a positive effect in terms of cost structure savings for that group, may constitute a presumption that the operation has not been carried out for 'valid commercial reasons' within the meaning of Article 11(1)(a). It is incumbent on the national court to verify, in the light of all the circumstances of the dispute on which it is required to rule, whether the constituent elements of the presumption of tax evasion or avoidance, within the meaning of that provision, are present in the context of that dispute.

4. Conclusion

As we stated in the introduction, the objective of this paper is to investigate whether tax aspects of mergers could cause the main obstacles in realization of cross-border merger in Europe. What is evident from our research, it is the fact that some tax aspects of mergers are not harmonised, because the Directive has given too great a discretion to the member states. This refers that realisation of cross-border mergers is impossible. Using Directive on mergers obliges Member States to apply the Directive to all states, if companies from different Member States involve the merge. Directive on mergers, Article 6, provides that if the Member State would apply provisions allowing the receiving company to takeover the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the takeover of such losses by the receiving company's permanent establishments situated within its territory. Article 6, however is not transposed into national legislations of EU member states in the same way. It is evident, that regulation by Directives might bring disadvantages because transposition of Directive into legislation of EU member states could differ. In such cases, European Court of Justice is asked for solution. As an example the merger between Czech and Slovak companies could be used. Czech tax law must allow to transfer unused tax losses of dissolved Czech company to permanent establishment of Slovak acquiring company in the Czech Republic. However, the Directive does not mandate that the Czech tax losses were taken into account by Slovak successor company for the determination of the tax base of the Slovak Republic. The European Court of Justice examines in its judgments, in particular, whether the tax legislation of a State is in contrary to the freedom of establishment, i.e. whether the freedom of establishment is not limited. According to case law, restrictions on freedom of establishment are permitted if it is justified by overriding reasons in the general interest. It may consist in preserving the allocation of tax jurisdictions between Member States. This tax jurisdiction of a particular state is threatened by taking into account the losses incurred in another Member State. Acquiring company in its taxation deduct tax losses of foreign companies. From the judicial act A Oy C-123/11 follows the conclusion that EU law does not preclude such a solution in national tax system, under which domestic suc cessor company in its taxation cannot deduct tax losses to a foreign company which has merged and it is its legal successor. Foreign tax losses arising in the jurisdiction of another Member State and the State acquiring company may not disregard it. If the company decided to take into account tax loss and it allows tax deduction, then this loss must be fundamentally calculated in accordance with the tax regulations. This tax loss will be calculated at a level which would have been shown by a domestic taxpayer in accordance with domestic tax law. This approach ensures equal treatment of domestic and foreign cases. The absence of uncompromising harmonized tax aspects of cross-border mergers causes, that each Member State transposes the Directive within accounting treatments they have already used and under the present conditions unique for each Member State. Individual, unlinked way of transposition of Directive would have no impact if it's not for the topic of cross-border mergers where mutual harmonization is the necessary condition for successful cross-border mergers realization. This argument and slow harmonization process could lead to a wrong conclusion that the topic of cross-border mergers is not important to be solved at all and that cross-border mergers are happened only occasionally for which unified approach is not necessary to be developed.

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Summary

EU Member States expected that the 10th EC Directive bring harmonization of company law so that the cross-border merges would be realized from law aspect. However, transposition of the Tenth Directive hasn't brought harmonisation of Member States' company law so as to enable the realisation of cross-border mergers from the legal perspective. Moreover, focusing on tax aspects of cross-border mergers and studying EC regulation rules for cross-border mergers, it is hard to ignore that there is no conception in providing clear regulation. There is no connection between directives regulating taxes (directives which should eliminate tax burdens in cross-border mergers) and company law regulating cross-border mergers. Therefore research concentrates on the question of the tax burden impact on the cross-border mergers in Europe, particularly partners of companies in the Czech Republic. Conclusion from the research should be generalized for other European countries.

Keywords: cross-border mergers, tax aspects, take over losses.

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