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Cross border mergers and acquisitions: a critical analysis of the legal framework. motives and obstacles from a European Union perspective

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CROSS BORDER MERGERS & ACQUISITIONS:

A CRITICAL ANALYSIS OF THE LEGAL FRAMEWORK, MOTIVES AND OBSTACLES FROM A EUROPEAN UNION PERSPECTIVE

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List of Abbreviations

CBMs - Cross-Border Mergers

CBMD - Cross-Border Mergers Directive

CJEU - Court of Justice of the European Union

EC - Treaty of Rome

ECJ - European Court of Justice

EU - European Union

NCA - National competition authority

SE - European Company (Societas Europaea)

TFEU - Treaty on the functioning of the European Union

Abstract

The companies have an important role to play in the European Union internal market and if they are well governed, they can achieve their goals and succeed in the business environment. Where there are successful businesses, the market concerned will be well functioning and successful as well.

The mergers and acquisitions can play a significant role to assist the companies expand and develop their products and services. Especially Cross-Border mergers and acquisitions, as one of the most important but also complicated strategic corporate actions, they remain an important tool for business restructuring. The Cross-Border mergers can further promote the Single Market without barriers in the European Union.

In this dissertation, we discuss the application of the Cross-Border Mergers Directive (2005\56\EC) of European Union facilitating the cross-border mergers between limited liability companies situated in different Member States in the light also of the fundamental freedom of establishment following the SEVIC ruling of the European Court of Justice's (ECJ). We will further examine the tax implications of M&As as well as the EU regulations applicable to cross-border mergers from a market competition perspective and the tools available to the European Commission for the fight of abuse of competition rules.

Our principal aim and core of this dissertation is to provide a comprehensive understanding of the motives that encourage companies to go through a Merger or Acquisition either national or cross-border and the importance of the personal motives

of the two management organs of the companies, being the shareholders and the managers.

Finally we will present the importance of the legal and regulatory environment for the successful completion of an M&A and the obstacles that may arise from poor post-merger integration as there can be no complete understanding of the motives behind Mergers and Acquisitions if we do not present also the obstacles than can hinder this complicated procedure.

Introduction

The single market is one of the greatest achievements of the European Union. It gave the opportunity to companies to grow as they wish and trade into a large market without custom duties or tariffs within European Union members. Small and big businesses alike, have the potential to expand and become more competitive.

With a view to create a truly unified market without restrictions of the free movement of people, goods, services and capital, also known as the four freedoms, the European Union made a further step to facilitate the companies incorporated in EU Member States. The Cross-Border Mergers Directive (2005\56\EC)[1] constitute an important tool for corporate restructuring. When we refer to corporate restructuring we refer mostly to buying or selling shares between companies, change of ownership, introduction of new operations, and similar acts done in an attempt to make the company adapt to market demands and become more profitable.

In this dissertation we will present the legal framework that facilitates the Cross Border Mergers in Europe and further analyse the motives that encourage such corporate restructuring but also the obstacles that can arise during the process or after a merger is completed.

The dissertation is separated in two parts. In Part I, we will present the European Union legislation with respect to Cross-Border Mergers with particular attention to Cross-Border Mergers Directive of 2005 in order to establish the legal

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[1] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02005L0056-20140702, last access 16\06\2016

framework governing such transactions. We begin our analysis with some important definitions and key concepts of Mergers and Acquisitions and we continue with some valuable historical review of the development of the Mergers & Acquisitions in USA during various merger waves but also the M&A waves that existed in Europe. Reference is also made to the landmark decision European Court of Justice in SEVIC[2] where for the first time it was acknowledged that Cross Border Mergers are a part of the freedom of establishment. As a part of the legal framework of such activities, we will also highlight some important tax and market competition issues that influence greatly any corporate restructuring.

The second part is the core of the dissertation where we present the motives that encourage companies to enter into a merger or acquisition whether it is a national merger or a cross-border. There is great literature and case law with respect to mergers and acquisitions especially for large entities that have also attracted the attention of the media and we shall use such cases as examples for each of the motives to be discussed in this dissertation. By presenting each motive along with a relevant merger or acquisition case, we will make an attempt to understand the drivers behind M&A activities of real firms.

Our analysis is structured in two categories of motives being the Strategic motives and the Management motives. Each motive may have different effects on the value of the company and thus on the shareholders wealth and the managers can even pursue goals that benefit themselves or generally they do not create value for the company on the long term. We will evaluate the different types of synergies and various

[2] SEVIC SYSTEMS AG v Amtsgericht Neuwied [2005], Case C-411/03, para. 19

motives involved with the expansion of the business through entering into a new market or acquiring new technology and products. We will also discuss the personal managerial motives and their effect on the business with reference to real world merger cases.

There can be no complete understanding of the motives behind Mergers and Acquisitions if we do not present also the obstacles than can hinder the M&A procedure or cause the merger to fail to deliver the desired results. In part two following the discussion for the motives behind mergers and acquisitions, we shall also present the obstacles of M&A activities with particular attention to the cultural differences of the merged firms but also the complicated due diligence procedure.

PART I : THE DEVELOPMENT OF EU LEGISLATION FOR CROSS-BORDER MERGERS AND ACQUISITIONS.

Introduction

Following the attempts of the last decades for European Union (EU) integration between Member States, it is only natural that harmonisation of the company law within the EU attracted significant attention. The single market is one of the greatest achievements of the EU integration procedure. There can be no unified community market if the companies based in EU cannot do business with other Member States freely without restrictions. Companies which are seeking to enter into a new market can benefit greatly with corporate restructuring such as a Cross-Border merger.

Nowadays, the companies are making efforts to increase their profitability and become more competitive with European or even global presence. For many years, the only available reference for Cross - Border Mergers was the freedom of establishment pursuant to Art. 49 TFEU (Treaty for the Functioning of European Union) which was quite problematic due to the fact that the national laws of Member States had different provisions for Cross - Border Mergers. Some Member States preferred other methods of restructuring such as takeovers and other Member States, such as Germany, where Cross - Border Merger activities were prohibited (Papadopoulos 2008, p. 1-2).

In this chapter we analyse the community laws laid down for Cross - Border Mergers along with the relevant legislation for competition issues and tax treatment of such transactions. We will begin with the definitions of Mergers and Acquisitions with reference also to the different types of M&As. We will also present a historical review of the development of the EU legislation with respect to Cross - Border Mergers with reference also to the freedom of establishment as the starting point and first legal basis of the Cross - Border Mergers.

1.1. Key Concepts of Cross- Border Mergers and Acquisitions

When we refer to Mergers and Acquisitions we mean all these aspects of corporate strategies, management and financial strategies dealing with buying and selling shares and/or companies, in an attempt to combine different companies which can promote the financial situation of a company or help a company to establish its presence into a new market without the need to create a new entity.

Even though the terms Mergers and Acquisitions are often used as synonymous, in fact they have different meaning.

1.1.1 Merger

When we refer to merger we mean the union of two or more companies into one single entity. The merging companies are not going into liquidation[3]. The assets and liabilities of the absorbed companies are becoming assets and liabilities of the resulting company. From a financial perspective, a merger is the process during which two or more companies are dissolved without going into a liquidation, with a view to create a single bigger and more powerful entity.

[3] Liquidation is the process for bringing a company to an end by liquidating its assets and distributing the proceeds to the claimants of the business, such as debtors and the remainder to the members of the firm.

1.1.2 Acquisition

When a company purchases the shares of another company, this is what we call an acquisition. During this process, one company can acquire partial or total shares in the acquired company either by paying cash or through purchase of shares in the stock market. The company that is being acquired, also called target company, no longer exists after its acquisitions and its assets become the assets of the acquiring company.

1.1.3 Types of Mergers and Acquisitions

The Mergers and Acquisitions are categorized based on their industrial organization namely:

Horizontal

The Horizontal M&As involve the consolidation of two or more companies which are in direct competition producing similar products and services, with a view to straighten the position of the resulting or purchasing company in a particular market.

A recent example of 2016 is the merger of two company registries that existed in Ras Al Khaimah in Dubai being the Rak Free Trade Zone Authority and the Rak Investment Authority (RAKIA).[4] Both these authorities were in direct competition for many years selling the same products (being the offshore type of company) and services in the same area, in the free zone of Ras Al Khaimah. The main reason for the merger of the two registries was to upgrade the service standards but it also came as a

[4] The RAK International Corporate Centre (RAK ICC) is a new entity created following the merger of RAK IC (companies registered by RAK Free Trade Zone Authority) and RAK Offshore (registered by Rak Investment Authority RAKIA). The website of the RAK ICC can be found at: https://www.rakicc.com/about-us/

response to the increased competition from other Free Zones such as Ajman Free Zone, Jumeira Lake Towers (JLT), Jebel Ali (JAFZA), Fujairah Free Zone etc which made it very difficult for two different offshore company registries to survive under the same Free Zone.

Vertical

Such M&As involve companies independent from each other, operating in different stages of the production process. They promote the vertical integration of the production, facilitating a better control on the distribution channels of materials and final products which can achieve a better control on the prices of the products and also a reduction of the production costs.

An example of a vertical integration is again the very recent case (February, 2014) of acquisition of whats-up application by FACEBOOK. [5] The Facebook platform has been without a doubt, a very successful formula. It comes also without a doubt though that many consumer demands when it comes to technological changes may remain unfulfilled as new trends and applications make their appearance. The new methods of communication, the customer behaviour patterns but also the new technologies and inventions may challenge the old successful formulas like Facebook. The Whats-up application is experiencing a huge customer engagement reaching up to 450 million users and the customers seem to enjoy this new kind of communication. From the above it is evident that Mr. Mark Zuckerberg (the founder of Facebook)

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[5] Interesting article of BBC for this popular acquisition can be found at: http://www.bbc.com/news/business-26266689

through the biggest social network acquisition to date, has made a clever move in an attempt to avoid being outdated with the new trends.

Diagonal (conglomerates)

These type of mergers intent to dispense the risk involved in particular activities the reduction of costs and the promotion of synergies. The diagonal M&As are created between companies with unrelated/heterogeneous business activities. These mergers are not very popular nowadays as no potential economic benefit can arise for either the purchasing firm or the acquired firm due to the fact that they are strategically unrelated. A popular diagonal merger was the acquisition of American Broadcasting Company (ABC) by Walt Disney back in 1995. (FabriKant 1995).

Another categorization which can be presented and it is also relevant to this dissertation, is based on the nationality of the companies going through an M&A. We have two groups under this categorization, the national M&As where the merging companies have the center of their activities within the same national territory and the Cross Border M&As where the participating companies are from different countries. The latest type will be broadly discussed in the present dissertation.

For a merger to be considered as Cross-Border, it is necessary for at least two of the companies participating to the merger to have their registered office, central administration or principal place of business at a different Member State.

1.2. Historical review

Until recently, the European company law did not appear to represent one of the most spectacular fields of law especially when it comes to Cross - Border mergers. In fact, when we refer to European Law, it is mostly the Lisbon Treaty and the transformation from the EC Treaty into the Treaty on Functioning of the European Union (TFEU) that attracted significant attention of the academic community.

For a long time, the only available legal source for Cross - Border Mergers was the direct reference to the freedom of establishment as per article 49 TFEU. The freedom of establishment has been based on Articles 43 and 48 of the previous EC Treaty which provides that restrictions on the freedom of establishment of nationals of Member State on a different Member State are not permitted. [6]

The Mergers and Acquisitions are not a new trend in the business and economic developments. Especially in the United States of America, there have been 5 basic waves[7] of M&As influenced mostly by rapid developments in the international sphere, investment opportunities following major war periods, important technological advances etc. These five waves were present during the following periods:

1895 – 1904: The majority of the M&As of that period failed to produce the desired results mostly because of the absence of restrictive measures which enabled the companies to resort to abusive practices. The industrial environment of that period became a battlefield between powerful monopolies. An important tool against the cartel

[6] Article 43 EC Treaty

[7] Institute for Mergers Acquisitions and Alliances, available at: https://imaa-institute.org/m-and-a-us-united-states/#m-and-a-waves

and monopoly practices of that period was the Sherman Act (1890).[8] The Supreme Court ruled that any anti-competitive M&As that are in violation of the Sherman Act will be dismissed. Eventually, the financial crisis of 1903 and the subsequent crash of the stock market in 1904, brought this first M&A wave to its end.

1922 – 1929: The outbreak of World War I, and the economic development that followed, encouraged the second wave of M&As. During this wave, an additional statutory law emerged in order to preserve the competitive environment. The Clayton Act (1914), encouraged the mergers of companies that were oligopolies and not monopolies.[9] The Crash of '29 and the great depression[10] that followed, was the end of the second wave.

1965 – 1973: This wave was encouraged by the powerful economy that was build following the World War II. The antimonopoly measures are even more strict during this period and there is another law preserving the competition, the Celler – Kefauver (1950). During this period we have very few horizontal and vertical M&As and the diagonal M&As are more prominent with the consolidation of heterogeneous activity companies. This wave ended following the oil crisis of 1973 which resulted in a global economic recession.

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[8] This regulation concerned the prohibition of any contract disrupting the trade between different countries and states

[9] Unlike the previous wave which encouraged the monopolies.

[10] This was the most devastating stock market crash of the USA and it is also known as Black Tuesday of 29th of October 1929.

1981 – 1989: During this period there have been rapid technological changes, the investment banks were on the rise and there was an increased participation of foreign companies to the local market. This wave has been frozen in 1987 due to Crash of stock market and eventually ended following the bank real estate crisis and the collapse of bond market which constituted the main source of funding of the M&As of that period.

1992 – 2001: This huge wave of M&As was the largest both in terms of numbers of transactions and value. The globalization, the extended use of internet and the improved corporate governance, encouraged the increase of M&A activities. The banking and telecommunication services are the leading players on the concentrations of this wave while the liberalization of international trade led the business activities of the companies to other countries. Due to the stock market crash of this decade which caused recession in the global economy, the M&A activities were interrupted once again.

For Europe, many factors contributed to the increase of M&A activities. Among others, we can identify the most important factors being the implementation of the single market, the increase of international competition, the demands for privatization of industries such as telephone services and electricity, the need for technological advances and the reorganization of the banking sector. All these factors played an important role on the development of the Cross Border Mergers and Acquisitions and also the enactment of a special Directive governing such activities, the Cross Border Mergers Directive. We can identify various M&A waves in Europe as well.[11]

1987 – 1992: This wave was inspired by the globalization of the world economy with a focus on horizontal M&As. The liberalization of the financial services and the technological developments that occurred, led to similar wave of M&As as in USA during the same period.

1995 – 2001: The liberalization of the EU market along with the privatizations of the financial institutions, electricity and telephone companies, encouraged the second wave of M&As in Europe. A popular acquisition of that period was the acquisition of the German telecommunications group Mannesman by the British Vodafone Airtouch. During this period there is an increase in national M&As but the Cross Border mergers make their appearance as well. This wave came to an end because of the crisis and economic recession of 2001.

2004 – today: It seems there is a new wave developing in Europe the last decade especially within the energy industry. The new wave is mostly encouraged from the poor growth prospects and the ongoing development of emerging economies.

Each of the waves we have discussed above, developed and ended during each period for different reasons and under different legal, social and economic conditions. Some of

[11] Institute for Mergers Acquisitions and Alliances available at: https://imaa-institute.org/mergers-and-acquisitions-statistics/

the characteristics of M&As are changing over the years although, some others remain the same allowing us to study them and try to understand the dynamics behind the motives of M&A activities.

1.3. The Cross-Border Merger Directive of 2005/56/EC

The importance of the M&As and their potential contribution to the completion of the European market and its competitiveness made the European Commission to consider the promotion of cross border mergers between companies seated in different Member States as a necessary step in establishing a single market.

As we have seen above, in the past, the possibility of a company to enter into a Cross Border Merger had to be seen in the context of the freedom of establishment under articles 49 and 54 TFEU. In 2005 though, in the landmark decision of SEVIC SYSTEMS AG v Amtsgericht Neuwied [2005], the European Court of Justice (ECJ) ruled that:

> "*cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidations between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment*"[12]

The importance of this decision is the fact that ECJ explicitly acknowledged for the first time that Cross Border Mergers are a part of the freedom of establishment.

[12] SEVIC SYSTEMS AG v Amtsgericht Neuwied [2005], Case C-411/03, para. 19

One of the very fist attempts for a Directive regulating the Cross-Border mergers, dates back to 14th of December 1984.[13] The Commission proposed the implementation of such directive (Gerven 2010, p. 4) although the idea was not implemented for many years as the employee participation in the decisions of the merged companies caused a lot of disagreement in the European Parliament. The problem with the employee participation was solved following the enactment of the Council Regulation No. 2157/2001 of 8th of October 2001 on the Statute for a European Company[14] and the Council Directive 2001/86/EC of 8th of October 2001 supplementing the Statute of the European Company with regard to the involvement of the Employees. Thus, following the above Directive, a Cross Border Merger can be achieved by setting up a European Public Limited Liability company, the so called Societas Europae.

The Cross - Border Mergers Directive of 2005/56/EC was not the first Directive which regulated merger activities. There have been also the Third Company Law Directive[15], which only regulated the mergers of public limited liability companies within the same Member State. The Sixth Company Law Directive[16] that followed, regulated the national divisions of public limited liability companies.

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[13] Official Journal C23 of 25th of January 1985, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.1985.023.01.0011.01.ENG&toc=OJ:C:1985:023:TOC

[14] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:294:0001:0021:en:PDF

[15] Third Council Directive 78/855\EEC based on Article 54(3) (g) of the Treaty for the merger of public limited liability companies (1978), available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31978L0855

[16] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, available at http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31982L0891

On 18th of November 2003, the European Commission proposed a directive on Cross-Border Mergers of companies with share capital. [17] The Member States had a deadline for transposition of the Directive into national law until 15th of December 2007. (Art. 19 Dir.)

As per Article 1 of the Directive[18] the Cross Border Merger Directive (CBMD) applies to the member countries of European Economic Area (EEA) and regulates the cross border mergers of limited liability companies incorporated in accordance with the law of a EU or EEA Member State which have their registered office, central administration or principal place of business in the European Economic Area. In order for the merger to be considered cross-border, it is necessary for at least two of the participating companies to be governed by the laws of two different Member States.

The Cross - Border Mergers Directive, facilitates the merger of Limited Lability companies. An LTD company is a business entity that exist in every jurisdiction with some variations between each country. Some examples of such Limited Liability companies are the LTD that exist in many countries such as UK, Cyprus, Ireland, Hong Kong, the BV's in Netherlands, the SARL in Switzerland and France, the GmbH in Austria and Germany, the s.r.o in Czech Republic and Slovakia, Aps in Denmark, the SRL in Italy and Romania.

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[17] Proposal for a Directive of the European Parliament and of the Council on cross border mergers of companies with share capital - COM (2003) O703 Final, Available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52003PC0703

[18] Directive 2005/56/EC of the European Parliament and of the council of 26 of October 2005 on Cross-Border mergers of limited liability companies, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02005L0056-20140702

1.3.1 Different types of mergers under the Cross Border Merger Directive

The CBMD distinguishes between three types of mergers as follows (Article 2.2.):

a) Merger by absorption, where one participating company absorbs the other participating company or companies,

b) Merger by the creation of a new company, where all the participating companies cease to exist and a new company is established,

c) Merger with subsidiary, where the subsidiary is merged with its parent company

1.3.2 Effects of Merger

As we have seen above, there are various ways to merge two or more companies. The most important fact though is to understand what are the effects of a merger for each of the participating companies (Article 14).

First of all, the assets but also the liabilities of the absorbed company or companies, are transferred to the resulting company. The absorbed companies cease to exist without going into liquidation. The employees are also protected following a merger as all rights and obligations of employees who were under employment contract with the absorbed company are transferred to the resulting company. The rights of the members of the absorbed companies do not cease to exist but these members are becoming the new members of the resulting company.

1.3.3 Merger procedures under Cross-Border Merger Directive

The Cross Border Merger Directive of Limited Liability companies, sets out the procedures for cross border mergers between member states, including:

1) The preparation of the common draft terms (Article 5) of the merger which includes amongst others the names and registered office of the merging companies and the draft terms of the resulting company.

As per Article 5 of Cross Borer Merger Directive:

> *"The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger. The common draft terms of cross-border merger shall include at least the following particulars:*
>
> *(a) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;*
>
> *(b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;*
>
> *(c) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;*
>
> *(d) the likely repercussions of the cross-border merger on employment;*
>
> *(e) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;*
>
> *(f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;*
>
> *(g) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;*
>
> *(h) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;*

(i) the statutes of the company resulting from the cross-border merger;

(j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16;

(k) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;

(l) dates of the merging companies' accounts used to establish the conditions of the cross-border merger."

2) Following the preparation of the common draft terms, the management or the administrative organ of each merging company must also prepare a report for the shareholders explaining the economic and legal aspects and expected outcome of the proposed merger along with expected implications for the members, the creditors and employees. (Article 7)

3) Except of the management report, it is necessary to prepare also an independent expert report (Article 8) on the implications of the merger. The independent expert report must be presented to the members at least one month before the date of the general meeting to be convened by each company for the approval of the common draft terms.

The expert's report must outline the expert's opinion on the draft terms and it is necessary to indicate the methods used to arrive to the conclusions. The expert is entitled to request any information he might need from each merging company such as copies of documents or financial statements, certificates and minutes book. (Gerven 2010, p. 22).

It is possible to avoid the preparation of the expert's report if the shareholders of all the merging companies waive their right to an expert's report. (Article 8(4))

4) The final stage on each merger is the approval of the common draft terms by the general meeting of each of the merging companies.

Following the approval of the common draft terms by the general meeting, each company must apply to the Court for the issuance of a certificate which states that the pre merger formalities have been fulfilled. This is otherwise called, pre-merger certificate.

The Courts that will have jurisdiction to examine the legality of the cross border merger will be the Courts of the Member State where the resulting company will be situated. If the court is satisfied with the procedures followed, it will issue a Court Order approving the merger and set the date on which such merger is considered to be effective.

1.4. Tax rules applicable to Cross – Border Mergers

As we have seen earlier, the Cross-Border Mergers involve a transfer of assets and liabilities of the involved companies (the absorbed companies) to the resulting company. In the past, there was no tax-neutral regime for CBM. When the transfer involved also actual transfer of the assets in another Member state, the merger in this case would have causes the country of origin to lose potential tax revenue when the merging company becomes resident in another Member State for tax purposes. Even though in the domestic transactions there has been a tax neutral regime where the capital gains on the assets or shares were carried over to the new entity, in the Cross-Border mergers no such tax neutral treatment existed. This fact has been an obstacle for the cross border reorganizations of businesses even within the European Community.

The starting point for a directive facilitating a tax-neutral regime for Cross-Border Mergers was drafted by the European Commission on 15th of January 1969. The proposed directive prohibited taxation in case of intra-community[19] mergers. On 23rd of July 1990, the European Council adopted the Parent-Subsidiary Directive which aimed to eliminate the double taxation of dividend payments that are done cross-border, between companies situated in different Member States.[20]

On 23rd of July 1990, the European Council also adopted the Directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares conserving companies of different Member States. (90/434/EEC)[21]. The so called Merger Tax Directive, has been adopted in order to remove obstacles to cross-border mergers and reorganisations involving companies situated in two or more Member States.[22] As per Article 1, the Merger Tax Directive applies to a range of transactions namely, mergers, divisions and partial divisions, transfer of assets and exchanges of shares involving companies from different Member States. The

[19] The term "intra-community merger" relates to mergers where all companies of the merger are are situated in EU Member States.

[20] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0435:en:HTML

[21] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31990L0434

[22] Official Journal L 225 , 20/08/1990 P. 0001 – 0005 Available at http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0434:en:HTML

Article 3 (a) of the Merger Tax Directive provides in the annex listed in its text, the list of companies for which the Directive applies.

One of the most important tax relief provided by the Merger Tax Directive is related to the taxation of capital gains with respect to transfer of assets and liabilities. The Directive clearly provides on Article 4 (1), that no taxation is allowed on capital gains. As per the Article 6, the transferring company can transfer tax loses to the permanent establishment of the receiving company only to the extend that such transfer of losses is allowed by the particular Member State on a domestic merger.

The scope of the Merger Tax Directive based on the list of companies that were included in its annex, proved to be very narrow. Thus three years later, on 26th of July 1993 the European Commission amended the Merger Directive in order to include not only the listed companies in the annex of the Directive but to cover also all companies resident in a Member State which are subject to corporation tax. Another attempt to improve the companies covered by the Merger Tax Directive was also the proposal that came into force on 24th of March 2005[23] which provided for amendments of the Directive 90/434/EEC to extent the list of entities to be covered by the Merger Tax Directive, such as the European Company (SE).

The European Free Trade Association Surveillance authority[24] recently on May 2013 brought to EFTA court a case of discriminatory treatment of taxation for cross

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[23] Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005L0019

[24] The Surveillance authority monitors the EFTA States being Norway, Iceland and Liechtenstein in order to ensure timely implementation of the EEA regulations and directives.

border merger in Iceland.[25] This case reveals that even after the implementation of the Merger Tax Directive, various obstacles might still arise from a tax perspective with respect to Cross-Border Mergers. The current tax regime for CBM is not perfect as variations still exist between Member States, although as the European Union integration proceeds further, it is expected that all discrepancies will disappear.

Finally, it is important to note that the Member States may refuse to apply the Merger Tax Directive in situations where the merger is not carried out for real commercial reasons and has tax evasion or avoidance purpose. In fact, the Merger Tax Directive with this particular provision could create problems for the effective exercise of the freedom of establishment. (Article 11 of the Merger Tax Directive)[26]

Article 11, paragraph 1 provides that:

> *'1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III, IV and IVb where it appears that the merger, division, partial division, transfer of assets, exchange of shares or transfer of the registered office of an SE or an SCE:*
>
> *(a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 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 tax evasion or tax avoidance as its principal objective or as one of its principal objectives;*

[25] EFTA Surveillance Authority, 'Internal Market: Iceland to be brought to Court for taxation of cross-border mergers', Available at: http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/1988

[26] Council Directive 2005/19/EC

(b) results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.'

A company may only avoid the tax penalties if it can prove that the merger is carried for valid commercial purposes and that the companies participating into the merger do not have any tax evasion or tax avoidance as a principal objective (Papadopoulos, 2011, p. 20).

1.5 The Cross Border Mergers and Acquisitions in view of EU Competition law

The competition policy of the European Union, ensures that the companies can compete equally in the internal market. This creates a wider choice for consumers and can provide them with reduce d prices and improved quality of products. These are the reasons why the EU fights anticompetitive behaviour and review the Cross Border mergers as well. The Mergers can be a very power tool to bend the competition rules if they are used with a certain way and this what EU is trying to avoid.

The violation of competition regulations not only happen at a national level where the relevant national competition authority (NCA) will deal with the matter. Because of the globalisation and the growth of the internal market within EU, the violations of the competition are often affecting many countries in Europe. The European Commission has the authority to investigate and also take decisions and impose fines to the abusers of competition rules.

The Commission keeps an eye on situations where companies create cartels to share the market or use their position to prevent other competitors to enter the market.

The antitrust and merger control rules of the EU focus on the following activities (The EU explained: Competition, 2014)[27]:

- Fight the cartels
- Prevention of abuse of power from big firms preventing the competition
- Extensive review of proposed mergers
- Assessment of government support towards companies that can negatively affect the competition.

The EU merger regulations provide to the European Commission the necessary tools to prohibit mergers and acquisitions that can threaten the competition. We can identify two laws for merger decisions in EU and they are the following:

- The EU merger regulation which came into force on 1st of May 2004[28] which contains the rules for assessing concentrations
- The implementing regulation[29] which governs mostly procedural matters such as the deadlines and notifications.

The reason that some types of mergers can reduce the competition is when they are used to create an even stronger player to the market. If only one large firm dominates the market, then the consumers will have to pay higher prices for lower quality products as there will be less innovation involved in the production of the goods.

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[27] The EU explained: Competition. (2014). *European Commission*. [online] Available at: http://europa.eu/pol/index_en.htm http://europa.eu/!bY34KD [Accessed 28 Jan. 2017].

[28] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

[29] Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

The national competition authorities and the European Commission are trying to ensure that when companies join forces through merger, the balance of the particular market will not be upset with negative effects to the competition. The authorities also try to avoid the creation of a very large player in the market as his dominant position can be used to exclude other competitors from entering a market.

The European Commission mostly scrutinise large companies with high turnovers. There are certain thresholds[30] in place and any merger that is below the thresholds, they are only reviewed by the national competition authorities (NCAs). Thus such large firms that will operate cross border and wish to go through a merger, they must first inform the Commission and request authorisation for such action.

Conclusions of Part I

On this first part of the dissertation, we have set out the EU rules concerning the Cross Border Mergers and Acquisitions along with the various tax issues and competition considerations. Given the fact that the subject of the present dissertation is approached from a European Union perspective, it was deemed necessary to provide an analysis of the existing legal framework that governs these activities within Europe.

We have started our analysis by presenting some important definitions with respect to Cross Border Mergers and Acquisitions as these terms will be mentioned many times throughout this dissertation.

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[30] For example in the Republic of Cyprus the threshold is based on the following criteria:
At least two parties each have worldwide turnover of €3.5m; and
At least two of the participating undertakings have turnover in Cyprus; and
Combined turnover in Cyprus of €3.5m; or
Concentration is declared as being of major importance by the Minister

We couldn't omit to provide a historical review of the development of the Mergers and Acquisitions through the years starting from USA as the first waves of M&As are coming from big US firms and their analysis gives us vital information of what were the drivers for the M&As in previous decades. The historical review reveals the motives of the very first M&A activities thus the information provided during the first part of the dissertation will be valuable for the second part where the motives of M&As will be broadly discussed.

As we have seen above, the Cross Border Merger Directive of Limited Liability companies has been a remarkable piece of legislation as for the first time, there is a legal framework that governs the Cross Border Mergers and many grey areas that existed in the past, now ceased to constitute a problem. The landmark decision of SEVIC still applies today alongside with the Cross Border Merger Directive and it proved useful in cases where other types of entities were involved in a merger (i.e. partnerships).

At the end of the part one of this dissertation, we have set out the basic legislation that governs the tax treatment of the mergers and we have also presented the powers of the European Commission to control and assess mergers of large firms in an attempt to protect the competition. Even though the mergers can increase the competition when there are medium or small companies involved without extremely high turnover, they can present a serious threat to the competition when large firms are involved. It is a reality that mergers are a very powerful tool and if used improperly by companies that are already dominant in a market or they have great market share, they can endanger the competition by creating a very large player who will eventually create a monopoly in the particular market.

The above mentioned legal framework for the Cross Border Mergers it is an evidence that European Union continue its course towards the EU integration and the unified market. Remains to be seen if the EU will continue to modernise the companies laws within the Member States.

In the second part of this dissertation that follows, we will present an extensive analysis of the reasons that companies decide to merge and what they are trying to achieve. Except of the motives though, there can be also various obstacles for a company to achieve its goal to merge with another company and these are also discussed in part two of this dissertation.

PART II

MOTIVES AND OBSTACLES OF CROSS-BORDER MERGERS AND ACQUISITIONS

Introduction

In the previous chapter, we discussed the legislation governing the Cross-Border Mergers in Europe and its development through the years. We also referred to the importance of the Cross Border Mergers Directive and its role in the expansion of M&A activities in Europe.

In this chapter though, we will examine the reasons the Limited Liability companies are entering into such a complicated procedure as a Cross-Border Merger. What they need to achieve and how they are attempting to achieve it?

Many mergers and acquisitions have one basic underlying motive which is to increase the profitability of the company and the shareholders wealth. There are numerous other reasons why a company decides to merge. The prevailing view with the existing academic literature is that M&As are part of the process for more efficient allocation of resources in the economy. They are also considered as an element of business strategic planning with a view to increase the profits of the business.

The transformation of a private single owner company into a different more complicated type of entity with a view to undertake new business activities or expand existing ones it is deemed necessary for the survival of many businesses. At the same time, powerful companies decide to merge in an attempt to gain greater market share, creating a more competitive and cost efficient entity. The potential benefits that can be achieved when two companies work together instead of separately, make many companies to take the decision to merge in an attempt to survive in the today's competitive European but also the global market.

Another motive discussed in literature, suggests that the main reason a company enters into such a complicated process as an M&A is to gain a competitive advantage in a particular market. To accomplish this task, the company must pursue synergies with the target company. When we refer to synergies we mean the efficient operation of the integrated business along with the competitive advantage that can be achieved. The synergies can create great benefits for the business as the value of the two companies together is greater than the individual value of each company separately.

While Cross - Border Mergers have many common characteristics with domestic mergers, at the same time they present some distinctively different and also valuable opportunities. They provide the opportunity to enter into a different market, access different and better technology and resources and they can contribute to a company's competitive advantage.

We can have many different categories of motives and in the literature each author uses his own system but the main motives discussed in existing research are quite the same. An interesting categorisation of the motives is the one proposed by Motis (2007) who classified the merger motives into two main categories depending on who is the recipient of the potential gain to be achieved with a merger. The rationale of the mergers according to Motis can be either the desire to raise the value of the company and thus the future profits of the shareholders or motives that benefit primary the managers by increasing their wealth but not necessarily the firm's value.

The authors Mueller and Sirrower (2003), they have evaluated mergers of USA firms of years 1978 -1990 and they have concluded in 4 possible motives that encourage M&A activities. These have been the synergies, the corporate control, the manager's motives and the hubris hypothesis. The corporate control motive involved the acquiring of a business and the replacement of its executives with more efficient ones in an attempt to gain market value. The authors favored the manager motives and hybris motives and they rejected the synergies motive, although, the synergies are valued in other studies as being an important driver for M&As.

The authors Mukherjee, Kiymaz and Baker (2004), during the period 1990 -2001, they have conducted a shorter scale of research (75 USA companies) based on questionnaires addressed to CEOs. The results of their research was that M&As main motive is to establish synergies. They authors found that the firms favor the horizontal mergers which take place with consolidation between competitors producing similar or the same products and they expressed the view that diversification is the best method to decrease losses during economic crisis.

On the other hand, Ghosh (2004) during the period 1985 -1999 following a very large research of 2,200 USA firms, reached the conclusion that the primary motive for M&As is to achieve a greater market share.

Another interesting USA study identified 12 motives for M&As and at the top 5 where the following: a) the awareness that a company is undervalued, b) the desire to growth fast, c) an attempt to respond to market demands for different products, d) to minimise the risks involved with an internal expansion and also e) to increase the share value. (Kishore 2009).

Following a research for the application of the Cross-Border Mergers Directive in Europe conducted by Bech - Bruun and an international consultancy firm under the name Lexidale[31], they have identified 5 main motives behind cross border mergers. Given the studies of other academics we mentioned earlier, it comes without surprise that the first motive they have identified were again the synergies. Following many interviews and consultations with shareholders from all Member States, they have reached the understanding that the cross border mergers are conducted for the same reason as the domestic ones, to get advantage from synergies. The reduction of operational costs of maintaining one instead of two different companies along with the reduction of the regulatory compliance to only one regulator instead of two, appeared as second and third motives of CBMA respectively. The research revealed that the tax planning is amongst the top 5 reasons for CBMA as well as a company can benefit from a more favourable tax regime following a merger. Finally, the fifth motive that has been identified under this study is the benefit that can be achieved by a more business friendly regulatory environment [32]

In this dissertation we will present the motives under two categories depending on the drivers behind an M&A which can be either a strategic movement which usually involves also a financial purpose, i.e. for the increase of the value of the company or the motive can be purely a manager's decision where the motives are of a more private

[31] The participants in this study were the Scandinavian law firm Bech-Bruun with a lot of experience with mergers and acquisition and the consultancy firm Lexidale which operates a network of law firms, economist and scholars in all Member States with experience in market analysis and comparative regulatory research.

[32] Study on the application of the cross-border mergers directive (2013) Bech Bruun, Lexidale International policy consulting, p7. Available at: http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf

character and they do not always increase the value of the company. Given the above, the motives to be discussed will be presented under the following categories:

Strategic motives and Management motives

2.1 Strategic Motives

The strategic motives focus mostly on the development of the company. They can be easily justified and the majority of the strategic motives are in fact the most important or influential motives for a Cross Border Merger. Strategic motives can involve competitive advantages, presence in a new market and even access to resources or technologies that does not exist in the home country of the company.

2.1.1. Synergies

Sirower (1997) defines synergies as *"increases in competitiveness and resulting cash flows beyond what the two companies are expected to accomplish independently"*

According to Bruner (2004) the word Synergy comes from the greek work for cooperation. The synergies suggest that the value of two companies combined together is greater than the value of each company alone.

Due to the large number of mergers that fail to deliver the desired results, there are some researchers that question the synergies and claim that the M&As actually destroy value rather than create it. Following an analysis by Global Management

Consultancy Hay Group (2007)[33], only 9% of the M&As are considered to be completely successful.

Regardless the above, there is a reason why the synergies are considered by many authors as the main drivers in Mergers & Acquisitions. In synergy, we can achieve a win – win situation which is something that is not easily achieved from other drivers of M&As. The shareholders of the acquired company can receive profits from premium from the acquisition[34] (if the acquisition price of course exceeded the market value of the business) and the shareholders of the resulting company will benefit from the increased value created by the synergies.

We can identify five types of synergies. (Godbole 2009). In this dissertation we shall present the three more important ones, being the tax synergy, financial synergy and operational synergy.

Tax synergy

This synergy involves the merger of a profitable business with a firm that has losses. The benefit for the profitable company is that it can get tax benefits by writing off accumulative losses of the acquired firm against its own profits (Whitaker, 2016 p. 371). It is an interesting fact that the losses of a target company may be a source of value in an acquisition for the reason mentioned above.

[33] Important information for Hay Group study: Hay Group's Dangerous Liaisons report combines the results of a three-phase research program and believed to be the most detailed study of European M&As ever conducted. Hay Group conducted interviews with 200 senior European business leaders who have experienced a major merger or acquisition during the past three years. It then carried out desk research into the 100 largest M&As to take place in Europe over the same period.

[34] The shareholders of the absorbed company receive payment from the resulting company. Such payment may be given in the form of shares in the resulting company, in cash or other values, or a combination of these.

Operation synergy

The operating synergy often results from a reduction of costs which is achieved by combining two companies. Such cost reductions can be achieved through economies of scale. The economies of scale occur mostly in large enterprises and the main reason for the M&A is the reduction of production cost. Following an M&A, the company can avoid fixed double costs and redundant personnel and thus become a more organized entity with reduced operational costs while increasing its profits. An a example of a successful merger based on economies of scale has been the merger of Exxon with Mobil (Weston, 2002) which were two of the largest US based oil companies in the world. Both companies knew the industry very well thus they could predict when the economies of scale will be successful as they knew what costs needed to be reduced without the risk to lose market share.

This synergy is an indication that when companies who operate in different industries decide to merge, it can be challenging to predict what costs need to be reduced without having adverse effects on the company itself. As per Gaughan (2005), when two strong firms with similar market power over a particular industry merge, they have great potential for success as each company has very good knowledge of the business of the other company because they are in the same industry.

Financial synergy

This synergy is often the basis for acquisitions of small target firms by larger companies. Smaller firms may have potential for growth and better profitability but may not have access to enough capital to fund its expansion. Such a firm has the option to merge with a larger company that has access to capital.

The financial synergy also involves economies of scope involve the expansion of the firm into new sectors of business activity. The firm provides to the consumers new differentiated services and products and gradually the company covers an extended part of the consumption needs of a particular economy. This way the extra costs for the manufacturing of a new product from start and advertise it to the market are avoided.

2.1.2 Enter into a New Market

The desire of a company to enter into a new market is one of the most discussed motives in the existing literature and not without reason. It is important to understand what drives the desire of a firm to enter into a new market on the first place. It can be many reasons and most of them are of great strategic importance.

A relatively small company even if it produces a very good product, it can face difficulties to reach a potential market. As a result, the company cannot sell its products to other markets and the firm is sadly restricted within its own national market with limited chances to ever reach its full potential.

Also, quite often there are multiple entry barriers in place that can restrict the access of a firm into a new market. These are either imposed by the particular foreign country regulations which makes it difficult for new firms to access the local market or due to the very competitive market profile of a particular industry.

Acquiring a firm that already exists in the potential new market, eliminates most of the entry barriers. If for instance two small/medium companies from different

EU countries merge, they will be able to access more markets under their new form. With the acquisition of an existing business in the market where the company desires to enter, the firm can benefit from existing customers, products, suppliers and even existing relations with governmental officials.

2.1.3 Diversification

With reference to diversification we basically mean the existence of different business activities within the same company. This motive is closely related with the entrance into new markets, discussed above, as by entering into a new market the firm can achieve a geographical diversification which can confer various benefits.

If a company is expecting that the business in one sector will be reduced the following years, they may option to purchase a company having different business activity in order to avoid going out of business. The company can chose to purchase another firm which deals with different line of business in an attempt to reduce its exposure to business specific risks. This kind of risk is even more relevant to Private Limited Liability companies as the argument is that the owner alone in such company is exposed to all the risk thus the need for diversification is stronger.

We can also say that diversification is the ability of the company to sell new products into new markets (Sudarsanam S. 2003). The access to existing knowledge of the business executives and the production of the target company is an additional advantage for the acquiring firm which is no longer slave to seasonal sales of its individual industry product. The company can also achieve a greater loyalty from its customers by offering different products and thus covering various consumer needs.

By the acquisition of a firm with an existing product, the company can also avoid the risk and expenses involved for the development of a new product from scratch.

2.1.4 Increase Market Power

Because of the growth that can be achieved by entering into a new market and the diversification discussed above, the acquiring firm can gain market power. When a company enters an economy of largest scale it can become more efficient and effective in the use of their resources. The market power can be especially important in consolidation of global industries.

We can see various examples of such consolidation and their importance for increased market power in the global automobile industry for example with the merger of Renault with Nissan. Prior the merger, Nissan was a declining company which presented lack of strategic future, poor handling of finances. On the other hand, Renault was a profitable expanding company with views to be global and until that time it was mostly concentrated on Western Europe. Nissan had strong market presence in US and Asia. The two companies together they combined their technologies and their access to different markets and as a result they have gained market power.

2.1.5 Access to Resources and Technologies

We have all discussed at least once in our life, on the fact that many companies have moved their production factories in China. The purpose of such action is of course the cheap employee rates and also the access to technology.

It can be a motive of great importance for a company to merge with another company at a different member state in an attempt to close gaps in its technologies. One company may possess the technology and resources necessary for the second company to achieve a broad line of advanced products.

A case study might be useful here in order to understand this motive better. There has been a famous case of the takeover of Motorola Mobility by Google in 2011.[35]

There have been two basic benefits of this deal:

1. Both companies together could accelerate innovation technologies and as a result, they could sale their mobile phones at lower prices but with better technology.
2. Google had the perfect software - the Android and Motorola had the best devices to install this software but also strong patents to protect it from the competition (i.e. Apple).

The takeover was really about Google gaining control of a wide variety of patents and other technologies that Motorola possessed, in an attempt to protect the Android operating system. [36]

2.1.6 Better Growth Opportunities - Creation of Strong Financial Groups

The Cross Border M&As constitute the response to the international market trend for the creation of strong firms and big company groups. A bigger company or group has

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[35] Google subsequently sold Motorola to Lenovo in 2014.

[36] Malik Saadi, (2011) The strategic rationale behind Google's acquisition of Motorola, available at http://telecoms.com/opinion/the-strategic-rationale-behind-googles-acquisition-of-motorola/

better chances to survive in the globalized economy and withstand the international competition but also to adjust faster to the international monetary turbulence and other country pressures both inside and outside the economic monetary union (EMU). It is important to note that some of the most popular M&As were driven by the desire to create a big financial group. .

Back in 2006, one of the biggest banks in Cyprus makes an offer to acquire Egnatia Bank and Marfin Financial group in Greece (European Foundation for the Improvement of Living and Working Conditions, 2008, page 22).[37] All three banks were of equal size during the time of the merger, employing almost the same numbers of employees. This merger came as a response to the international competitive environment and also to the desire of the banks involved into this triple merger to create a strong financial group with views to expand their business in Southeastern Europe and Balkan countries. Following the merger, the group has been renamed to Marfin Popular Bank Public Co Ltd and its profitability increased significantly the following years.[38]

2.1.7. Competitive Advantages

One of the most interesting motives is the desire of the companies to gain competitive advantage. The most important question here though is how the M&A activities affect

[37] European Foundation for the Improvement of Living and Working Conditions, 2008,. *ERM Case Studies: The Consequences Of Mergers And Acquisitions*. Ireland: N.p., 2008. Web. 30 Nov. 2016.

[38] In March 2013, during the financial crisis of Cyprus, Marfin Popular Bank Public Co Ltd collapsed and was split into two banks, the “good” part of the bank which included insured deposits of 100,000 Euro merged with Bank of Cyprus and the “bad” part which included all overseas operations as well as shares, bonds and uninsured deposits over 100,000 Euro. The non-secured depositors were subject to the bail-in (widely known as “haircut” of deposits) that has been imposed to the “bad” bank and as a result they became its new shareholders

the competition. The truth is that such activities can have conflicting effects to the competition. On the one hand, the M&A activities tend to increase monopolies within an economy and as a result they reduce the beneficial effects of the competition. On the other hand though, where a monopoly already exists, the mergers can increase the competition as smaller companies engage into M&As in an attempt to increase in size and compete in equal terms with larger "players" into a particular market.

It is the job of the European Commission and NCA Authorities of each member state to review and scrutinise the potential mergers for violations of competition laws as we have seen in the part I of this dissertation.

2.1.8 Privatisation Motives

The new era in European Union brought a demand for privatization of government owned businesses. The motive behind such action is to find a company (usually it is a foreign – owned company) who is capable to take over the government owned business with a view to develop its activities, invest in new products, modernize the operations and to expand (European Foundation for the Improvement of Living and Working Conditions, 2008, page 4).[39] In Cyprus we recently had the discussions for the privatization of the CYTA (Cyprus Telecommunication Authority).

[39] European Foundation for the Improvement of Living and Working Conditions, 2008,. *ERM Case Studies: The Consequences Of Mergers And Acquisitions*. Ireland: N.p., 2008. Web. 30 Nov. 2016.

2.2. Management Motives

There can be many reasons for failure of a merger. The main issue might be the fact that the merger has been motivated for the wrong reasons by the management of the company. In real world, the firms have two management organs being the shareholders and the managers. Quite often, these two organs of control, they can come to disagreement as to the primary goals of the company and how these will be pursued. The shareholders wish the value of the company to increase as this will directly affect their dividends. The managers though, they can have more personal motives that do not primarily increase the company's value. We can present various examples of such situations.

2.2.1. Agency Problems

When there is separation of principals, being the shareholders, with the representatives of the company, otherwise called agents, we say that there is a principal-agent problem. The decisions that affect the efficiency of the business are taken by the managers/ agents and often their motivation is to increase their personal wealth and not to benefit the firm by increasing its value and the return of its shares. They merely try to increase the size of the company in an attempt to increase their income, privileges and influence and the fastest way for them to achieve this is with an M&A (Mueller D.C 1980).

The conflicts usually arise when on the one hand, the shareholders are trying to increase the firm's value and on the other hand, the managers seek to increase their wages. When such situation exists, the managers are searching for personal gains at the expense of shareholders gains thus the principal - agency problems arise.

2.2.2 Manager own Motives for Personal Gain

This motive is closely related to the principal - agency problems mentioned above. It might be a personal ambition of the managers to pursue a merger and when this does happens, usually the financial incentives are tied to short term growth without much future long term planning. This can negatively affect the company's value as it is the wealth of the managers that it is considered first and not the growth of the company itself. The personal reputation of the managers it is often one of the goals as well. This can be also associated with the fear that the managers will be considered as conservative if they don't follow the Merger trend for expansion purposes. The poor long term planning in such occasions results in a decrease of the company's wealth.

2.2.3 Arrogance of the Managers

This is an interesting motive. The arrogance of the managers it is often one of the main reasons of engagement into an M&A. The managers of the firm in such case they believe that they can manage better the target company than the existing managers. This merger driver was first proposed by Roll (1986). This motive suggests that the managers are overconfident and they believe that they can better manage the other company. As a result of their confidence over their managerial abilities, they end up overpaying for a target firm which leads to financial losses for the acquiring company. The shareholders of the acquiring firm will be the losers of such a deal as they will see their dividends to diminish because of the mistake of the managers.

2.2.4 The Empire Building Hypothesis

This hypothesis was first expressed by Mueller (1969). They hypothesis states that the managers motives are to create the company they wish to lead. Their goal is to grow the company fast and the fastest way available is through a merger or an acquisition. Usually the managers will move too fast though and the financial goals are tied only to short term growth without adequate future planning. This can negatively affect the company's value at the long term.

2.2.5 Improved Management

Following this motive, the managers are trying to increase the shareholder value with the replacement of inefficient management of the acquired company. (Sirower 1997). The idea behind this motive is that some M&As are driven by the belief that the managers of the acquiring company can manage better the acquired company and its resources.

2.2.6 Misleading information

It might be surprising but many M&As are driven by false or misleading information. The announcement from a business of its intention to go through an M&A, regardless of its final outcome, can cause the share value of the company to increase. Many M&As are happening just because of a wrongful assessment of the value of the target company. A company that is interested to acquire another firm, based on information it acquires, believes that the target firm has potential and proceeds with the merger without proper investigation.

2.3 Obstacles for Mergers and Acquisitions

Mergers and acquisitions, while on paper might seem as a rational choice on keeping an organization alive and relevant in a cutthroat world, usually does not live up to its promises. Following our extended analysis for the motives that encourage the Mergers and Acquisitions, we will also present the various obstacles that can prevent the completion of a Merger & Acquisition or end up in a failure to deliver the desired results. As we have seen above, there can be many benefits and various reasons justifying the decision of a company to go through a Cross Border Merger or Acquisition. Nevertheless, given the fact that most studies find that the failure rate for such activities is between 70 – 90%, it is important to understand what can go wrong with these transactions.

As per a KPMG study in 1999, "*eighty-three percent of mergers were unsuccessful in producing any business benefit as regards shareholder value*." The study on the success and failures on M&A has been researched extensively throughout the years and the issues still remain the same as evidenced by the large KPMG study For instance, one of the main obstacles in mergers and acquisitions is the lack of attention on the integration process; mainly what steps will be taken by the new management well before the completion of a deal.

The most common elements of successful mergers consist of the prioritization of three key components in pre-deal phase being, the synergy evaluation, the integration project planning and due diligence (KPMG, 1999). By implementing these three key components into the decision process of mergers and acquisitions, such deals have more chances for success in the long-term.

The obstacles can be found in other areas as well such as the relationship between the employees and the management, legal barriers, cultural differences etc. It is important to remember that with a merger or acquisition it is not only the two companies that are combined to produce a common mission but inevitably the consolidation of the companies also brings together many people who have their own personalities, traits, working habits and ambitions. Ignoring this fact and failing to involve all areas of management of the firm into the process is a serious indication that the merger or acquisition will strangle to deliver the desired results.

2.3.1. Integration Project Planning and Synergy Evaluation

Integration project planning, along with synergy evaluation, is amongst the main keys to merger success. By implementing integration, the management of the company can better evaluate how the synergies (such as the similarities of both organizations) will be attained and how to stabilise the combined business so to preserve the current values of both organizations.

In a recent survey report released by KPMG in 2015, Dan Tiemann, KPMG USA Group Leader in Deal Advisory and Strategy stated "d*eveloping a 100 day plan with a road map for the first few months can greatly improve integration results and enhance the changes of deal success*."

A failure by the management to properly plan the integration procedure and evaluate the synergies to be created can have negative effects on the company and as a result the merger will negatively affect the shareholders value as well.

2.3.2. Due Diligence

The definition of "Due Diligence" has slightly different meaning whether it is used as a legal term or as financial term and nowadays has been adapted for use in various different situations. The term refers primarily to the investigation of different matters pertaining to an individual (such as a banks due diligence) or a company (legal due diligence) and it implies that the person who conducted the investigation has made a "diligent" effort to collect and disclose the information necessary for a particular matter.[40]

The information collected when it comes to an individual evaluated by the bank for a bank account opening can include apart from his personal documents (ID,

[40] The Due Diligence conducted by the banks in Europe until the year 2012 has been quite fragmented and not overly enhanced. As from 2013 though, new regulations have been introduced by the banks in an attempt to battle the money laundering. The Due Diligence procedures nowadays have become pretty enhanced at the banking sector and this era has spread to other sectors as well (i.e. forex companies, business consulting firms, law firms etc.). It is quite remarkable that the enhanced Due Diligence procedures are now implemented by various classical offshore jurisdictions as well, the so called "tax heavens" such as BVI, Seychelles and Belize.

passport, proof of address, reference letters), his source of funds his current employment status, details from his previous employment if it is relevant for the particular investigation and information on whether he was a politically exposed person or not. When the investigation is about a company, the due diligence can involve the collection and evaluation of company's documents, decisions passed by the board, various agreements entered by the company, the financial status, details on assets held by the company etc.

Due diligence is essential in every M&A deal as the management need to investigate all facts that can affect the value of the company that is being merged. This can include "*market reviews, risk assessments, and the assessment of management competencies as well as areas to concentrate on for synergies or operational impact*" (KPMG, 1999). The due diligence conducted for M&A can also focus on various areas such as the financial data of the target firm, legal matters and the strategic position as well as any assets of the target firm.

The creation of an effective due diligence plan can be very challenging on its own as management has to assess the future revenue streams of the merged organization, providing nothing else goes wrong as well as issues surrounding the quality of earnings and cost synergy analysis.

2.3.3 Legal barriers

Cross Border Mergers and Acquisitions are definitely complex transactions as they involve companies from different countries which are usually governed by different local regulations and company laws. It is unavoidable that at least some legal barriers will appear due to the difference in legislation of each country and such uncertainty constitutes an important risk for companies which intent to go through a cross border merger or acquisition.

The Cross Border Merger Directive discussed in Part I of this dissertation, came as a response to such legal barriers at least for mergers that are carried out between EU companies. The Directive facilitates the procedures necessary for such transaction eliminating the grey areas that existed before and thus minimize also the risks involved. Although, the fact that the Directive allows the Member States high freedom with its transposition into national law, we can still find different regulations between different Member States which can cause complications during a cross border merger.

2.3.4 Cultural differences

The influence of culture on cross-border mergers cannot be underestimated. The culture can have negative effects for a business if the companies that undergo the Merger or Acquisition are coming from two different cultures that do not properly integrate. In such situations, the company's fundamental ways of operation are completely different and easily misinterpreted, which causes employees to feel frustrated, leading to demoralization and defections (Stafford and Miles, 2013)

We can understand the influence of culture if we study the case of Wal-Mart's acquisition of Wertkauf and Interspar. Wal-Mart as a successful business in the territory of USA, attempted to enter the European market with this strategic acquisition of two companies established in Germany. Even though the company was a successful business in USA, it was facing serious problems with its presence in Europe following the acquisition. The acquisition in this case has been unsuccessful as the cultural differences in management and operation methods were not evaluated properly. It was not only the fact that Wal-Mart appointed an American CEO in Germany who was not willing to cooperate and understand the German retail market. (Stankevičiūtė, Grunda and Bartkus, 2012), but he was also offensive to the employees. In this case the Human resource managers of Wal-Mart failed to analyze the cultural business differences of the German target companies and take necessary steps for better integration.

Such effects could have easily been avoided if there was better communication and understanding of the different cultures from the very beginning. During the planning process of the merger, the top management as well as the human recourse managers of each company must take the time to analyze the difference between the two working cultures and create a game plan on how to promote the best practices from each of the participating companies through open dialogue between its employees. Only then would the merged organization stand a stronger chance to move forward and remain sustainable after the merger is complete

The cultural understanding is an essential element in cross-border deals. A survey conducted by Bain & Company found that the cultural management is the single most important M&A success element (Whitaker, 2016 p. 140). When the culture is undervalued and not considered by the managers in a cross border deal, the success rates of the merger are expected to drop.

The Human resource managers of each company need to always consider culture issues when it comes to Cross-Border M&As. The culture differences that can take place within a company has the strongest effects on the employees as they are the ones experiencing the changes that have resulted from integrating with a firm with different culture employees and/or managers.

2.3.5. Relationship Between the Management and Employees

Very often, lack of communication between management and employees of the merged organization causes discord between the two sides. The employees of the merged organization is often left in the dark on what path the merger will bring and this in turn creates distrust and uncertainty in the workplace, which leads to a rise in dysfunctional behavior such as: lower employee engagement levels, increased dissatisfaction, disloyalty and power struggles.

Conclusions of Part II

On this second part of the dissertation we focused on the motives behind Merger and Acquisition activities as well as the obstacles that can arise during the process but also before and after the merger or acquisition is completed.

At the beginning of part II, we have presented a literature review of both USA and Europe authors from different periods in an attempt to understand which motives were the strongest drivers behind M&A activities according to the research of each author. The literature review has been quite useful in order to identify the most common motives of Mergers and Acquisitions according to the existing research of notable authors and further analyse such motives in this dissertation.

The motives have been presented under two categories depending on the drivers behind a Merger or an Acquisition. The motives are presented either as a strategic movement driven by the desire to gain market power or enter into new markets and such strategic motives also involve a financial purpose which is to increase company's value and subsequently, the shareholders wealth. The second category involved motives that can be purely a manager's decision which is often an attempt for personal gain of the managers themselves and they do not create value for the company.

In this dissertation we have presented the strongest motives and our selection is based on the literature review where we found that through the years, the most important driver behind M&As have been the synergies. We have provided an extensive analysis of the different types of synergies along with the desire of the companies to expand their business and gain market power in an attempt to survive in the globalised market. We have also presented the manager motives as quite often the manager's need for personal gain have been stronger than their desire to increase the value of the company in the long term and such poor decisions they have eventually destroyed the value of the company.

In this part we have also identified the most important obstacles that can arise during the M&A procedure. We highlighted the importance of the synergy evaluation as it was one of the most prominent motives through the years, but we have also presented the importance of due diligence of the transaction along with the legal barriers that can arise. The culture differences is considered to be of vital importance for the successful integration of an M&A and as we have seen in the cases discussed on this dissertation, whenever the companies failed to evaluate the culture differences, the outcome of the merger was not successful.

The Mergers and Acquisitions definitely entail complex procedures and detailed analysis of various aspects of the deal although, despite the motives behind them, such activities can easily fail to deliver the desired results for many reasons whether they are personal motives of the managers or simply poor integration and due diligence procedures.

Final Conclusions

Given the fact that nowadays the scepticism as to the European idea is on the rise, it is necessary to point out the enormous opportunities and the flexibility the European law can offer to entrepreneurs and to businesses.

From 2001 onwards, the European company law has developed remarkably. Initially, under the Societas Europaea (SE) regulations, only public firms were entitled to engage into a cross-border merger. Following the CEVIC ruling by the ECJ, this situation has changed for the benefit of small and medium sized entities. Limited liability companies are now covered by the Cross -Border Mergers Directive as well and this directive provides the procedural framework for other legal forms like partnerships to conduct a Cross Borer Merger by reference to the freedom of establishment. As a result, today we have a mixture of regulations, directives and case law which provides the legal framework for all kinds of businesses.

The Cross - Border Mergers are an important strategy employed by many firms in Europe and worldwide. Following our analysis, it is evident that the existing legislation and case law, still does not allow for full cross-border mobility of companies established in European Member states. The Cross-Border Merger Directive, although a remarkable legislation that facilitates the cross border mergers of limited liability companies, its application for a Cross Border Merger remains complicated and expensive route for companies especially when it comes to small and medium sized enterprises. The European Company regime (SE) can only be used for public companies thus it cannot provide any support to small and medium size enterprises either.

On part II of this dissertation we have presented a broad list of rationales behind mergers and acquisitions and we have used various cases in an attempt to explain the reasons behind such activities. Most authors favoured the synergies as the most important driver behind M&As although we believe that each motive has its own role to play to the merger process as quite often, various motives can apply at the same time as the rationale behind the merger of two or more companies.

Mergers and Acquisitions are a strategic concept of corporate restructuring which involves buying and selling shares and combining two or more companies with a common purpose which can take the form of financial assistance or aid a firm to grow much faster. We have reached the conclusion through our analysis that the Mergers and Acquisitions can create significant restructuring and facilitate fast growth in various industries by generating an increased competition in the economy.

Following our historical review of the motives of M&As through different decades both in Europe and in USA, we have seen that motives behind M&As can be influenced by the general business environment and legislative changes and not only by individual motives of managers or shareholders. Thus, the main drivers of M&As will continue to produce developments in corporate restructuring influenced by outside factors and their intensity remains to be evaluated.

The various obstacles we identified on part II of this dissertation will continue to present a threat for corporate restructuring. It is important to note that especially the culture considerations will always play an important role in cross-border mergers and there are many examples where the culture has been underestimated and led to a failed integration procedure. As we have seen from the case of Wal-Mart's flawed entry into Germany and subsequently into Daimler-Benz's dominance, one may conclude that given the very strong cultural values of both the Germans and the Americans involved in that particular deal, they never seem to be able to compromise when they went through the M&A. The role of culture in this case proved to be essential for the successful completion of the merger. Other obstacles can be very important as well especially the Due Diligence given the increased compliance regulations worldwide which are led by the rapid developments in the banking sector.

The legal environment along with the corporate governance of each Member State is expected to continue to develop towards a completely unified market facilitating the free movement of companies and new M&A waves are expected to develop but the scope and intensity of any new waves remains to be seen in the future.

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ANNEXES

ANNEX I

DIRECTIVE 2005/56/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 October 2005

on cross-border mergers of limited liability companies (Text with EEA relevance)

DIRECTIVE 2005/56/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 26 October 2005
on cross-border mergers of limited liability companies
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44 thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Economic and Social Committee (1),
Acting in accordance with the procedure laid down in Article 251 of the Treaty (2),
Whereas:
(1)
There is a need for cooperation and consolidation between limited liability companies from different Member States. However, as regards cross-border mergers of limited liability companies, they encounter many legislative and administrative difficulties in the Community. It is therefore necessary, with a view to the completion and functioning of the single market, to lay down Community provisions to facilitate the carrying-out of cross-border mergers between various types of limited liability company governed by the laws of different Member States.
(2)
This Directive facilitates the cross-border merger of limited liability companies as defined herein. 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.
(3)
In order to facilitate cross-border merger operations, it should be laid down that, unless this Directive provides otherwise, each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger. None of the provisions and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the free movement of capital save where these can be justified in accordance with the case-law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements.
(4)
The common draft terms of the cross-border merger are to be drawn up in the same terms for each of the companies concerned in the various Member States. The minimum content of such common draft terms should therefore be specified, while leaving the companies free to agree on other items.
(5)
In order to protect the interests of members and others, both the common draft terms of cross-border mergers and the completion of the cross-border merger are to be publicised for each merging company via an entry in the appropriate public register.
(6)
The laws of all the Member States should provide for the drawing-up at national level of a report on the common draft terms of the cross-border merger by one or more experts on behalf of each of the companies that are merging. In order to limit experts' costs connected with cross-border mergers, provision should be made for the possibility of drawing up a single report intended for all members of companies taking part in a cross-border merger operation. The common draft terms of the cross-border merger are to be approved by the general meeting of each of those companies.
(7)
In order to facilitate cross-border merger operations, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of the completion and legality of the cross-border merger should be carried out by

the national authority having jurisdiction over the company resulting from the cross-border merger. The national authority in question may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the cross-border merger takes effect, this being the law to which the company resulting from the cross-border merger is subject, should also be specified.

(8)

In order to protect the interests of members and others, the legal effects of the cross-border merger, distinguishing as to whether the company resulting from the cross-border merger is an acquiring company or a new company, should be specified. In the interests of legal certainty, it should no longer be possible, after the date on which a cross-border merger takes effect, to declare the merger null and void.

(9)

This Directive is without prejudice to the application of the legislation on the control of concentrations between undertakings, both at Community level, by Regulation (EC) No 139/2004 ([3]), and at the level of Member States.

(10)

This Directive does not affect Community legislation regulating credit intermediaries and other financial undertakings and national rules made or introduced pursuant to such Community legislation.

(11)

This Directive is without prejudice to a Member State's legislation demanding information on the place of central administration or the principal place of business proposed for the company resulting from the cross-border merger.

(12)

Employees' rights other than rights of participation should remain subject to the national provisions referred to in Council Directive 98/59/EC of 20 July 1998 on collective redundancies ([4]), Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ([5]), Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community ([6]) and Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees ([7]).

(13)

If employees have participation rights in one of the merging companies under the circumstances set out in this Directive and, if the national law of the Member State in which the company resulting from the cross-border merger has its registered office does not provide for the same level of participation as operated in the relevant merging companies, including in committees of the supervisory board that have decision-making powers, or does not provide for the same entitlement to exercise rights for employees of establishments resulting from the cross-border merger, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights are to be regulated. To that end, the principles and procedures provided for in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) ([8]) and in Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees ([9]), are to be taken as a basis, subject, however, to modifications that are deemed necessary because the resulting company will be subject to the national laws of the Member State where it has its registered office. A prompt start to negotiations under Article 16 of this Directive, with a view to not unnecessarily delaying mergers, may be ensured by Member States in accordance with Article 3(2)(b) of Directive 2001/86/EC.

(14)

For the purpose of determining the level of employee participation operated in the relevant merging companies, account should also be taken of the proportion of employee representatives amongst the members of the management group, which covers the profit units of the companies, subject to employee participation.

(15)

Since the objective of the proposed action, namely laying down rules with common features applicable at transnational level, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(16)

In accordance with paragraph 34 of the Interinstitutional Agreement on better law-making [10], Member States should be encouraged to draw up, for themselves and in the interest of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

This Directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different Member States (hereinafter referred to as cross-border mergers).

Article 2

Definitions

For the purposes of this Directive:

1)

'limited liability company', hereinafter referred to as 'company', means:

(a)

a company as referred to in Article 1 of Directive 68/151/EEC [11], or

(b)

a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others;

2.

'merger' means an operation whereby:

(a)

one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or

(b)

two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or

(c)

a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

Article 3

Further provisions concerning the scope

1. Notwithstanding Article 2(2), this Directive shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in points (a) and (b) of Article 2(2) to exceed 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger.

2. Member States may decide not to apply this Directive to cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of 'limited liability company' as laid down in Article 2(1).

3. This Directive shall not apply to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption.

Article 4

Conditions relating to cross-border mergers

1. Save as otherwise provided in this Directive,

(a)

cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States, and

(b)

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. The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable.

2. The provisions and formalities referred to in paragraph 1(b) shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 16. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.

Article 5

Common draft terms of cross-border mergers

The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger. The common draft terms of cross-border merger shall include at least the following particulars:

(a)

the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;

(b)

the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;

(c)

the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;

(d)

the likely repercussions of the cross-border merger on employment;

(e)

the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

(f)

the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;

(g)

the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;

(h)

any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;

(i)

the statutes of the company resulting from the cross-border merger;
(j)
where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16;
(k)
information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;
(l)
dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

Article 6

Publication

1. The common draft terms of the cross-border merger shall be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC for each of the merging companies at least one month before the date of the general meeting which is to decide thereon.

2. For each of the merging companies and subject to the additional requirements imposed by the Member State to which the company concerned is subject, the following particulars shall be published in the national gazette of that Member State:
(a)
the type, name and registered office of every merging company;
(b)
the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;
(c)
an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

Article 7

Report of the management or administrative organ

The management or administrative organ of each of the merging companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees.

The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting referred to in Article 9.

Where the management or administrative organ of any of the merging companies receives, in good time, an opinion from the representatives of their employees, as provided for under national law, that opinion shall be appended to the report.

Article 8

Independent expert report

1. An independent expert report intended for members and made available not less than one month before the date of the general meeting referred to in Article 9 shall be drawn up for each merging company. Depending on the law of each Member State, such experts may be natural persons or legal persons.

2. As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts, appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging companies or of the company resulting from the cross-border merger or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members.

3. The expert report shall include at least the particulars provided for by Article 10(2) of Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies (12). The experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

4. Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed.

Article 9

Approval by the general meeting

1. After taking note of the reports referred to in Articles 7 and 8, the general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger.
2. The general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.
3. The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company if the conditions laid down in Article 8 of Directive 78/855/EEC are fulfilled.

Article 10

Pre-merger certificate

1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law.
2. In each Member State concerned the authority referred to in paragraph 1 shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.
3. If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the cross-border merger in accordance with Article 9(1), the possibility for the members of that merging company to have recourse to such procedure, to be initiated before the court having jurisdiction over that merging company. In such cases, the authority referred to in paragraph 1 may issue the certificate referred to in paragraph 2 even if such procedure has commenced. The certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members.

Article 11

Scrutiny of the legality of the cross-border merger

1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 16.
2. To that end each merging company shall submit to the authority referred to in paragraph 1 the certificate referred to in Article 10(2) within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting referred to in Article 9.

Article 12

Entry into effect of the cross-border merger

The law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect. That date must be after the scrutiny referred to in Article 11 has been carried out.

Article 13

Registration

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.

The registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.

Article 14

Consequences of the cross-border merger

1. A cross-border merger carried out as laid down in points (a) and (c) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:

(a)

all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;

(b)

the members of the company being acquired shall become members of the acquiring company;

(c)

the company being acquired shall cease to exist.

2. A cross-border merger carried out as laid down in point (b) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:

(a)

all the assets and liabilities of the merging companies shall be transferred to the new company;

(b)

the members of the merging companies shall become members of the new company;

(c)

the merging companies shall cease to exist.

3. Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger.

4. The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect.

5. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

(a)

by the acquiring company itself or through a person acting in his or her own name but on its behalf;

(b)

by the company being acquired itself or through a person acting in his or her own name but on its behalf.

Article 15

Simplified formalities

1. Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired:

—

Articles 5, points (b), (c) and (e), 8 and 14(1), point (b) shall not apply,

—

Article 9(1) shall not apply to the company or companies being acquired.

2. Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the

national law governing either the acquiring company or the company being acquired so requires.

Article 16

Employee participation

1. Without prejudice to paragraph 2, the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office.

2. However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply, where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger as referred to in Article 6, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of Article 2(k) of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not

(a)

provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation, or

(b)

provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.

3. In the cases referred to in paragraph 2, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights shall be regulated by the Member States, *mutatis mutandis* and subject to paragraphs 4 to 7 below, in accordance with the principles and procedures laid down in Article 12(2), (3) and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:

(a)

Article 3(1), (2) and (3), (4) first subparagraph, first indent, and second subparagraph, (5) and (7);

(b)

Article 4(1), (2), points (a), (g) and (h), and (3);

(c)

Article 5;

(d)

Article 6;

(e)

Article 7(1), (2) first subparagraph, point (b), and second subparagraph, and (3). However, for the purposes of this Directive, the percentages required by Article 7(2), first subparagraph, point (b) of Directive 2001/86/EC for the application of the standard rules contained in part 3 of the Annex to that Directive shall be raised from 25 to 33 1/3 %;

(f)

Articles 8, 10 and 12;

(g)

Article 13(4);

(h)

part 3 of the Annex, point (b).

4. When regulating the principles and procedures referred to in paragraph 3, Member States:

(a)

shall confer on the relevant organs of the merging companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in paragraph 3(h), as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration;

(b)

shall confer on the special negotiating body the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the Member State where the registered office of the company resulting from the cross-border merger will be situated;

(c)

may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding these rules, determine to limit the proportion of employee representatives in the administrative organ of the company resulting from the cross-border merger. However, if in one of the merging companies employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third.

5. The extension of participation rights to employees of the company resulting from the cross-border merger employed in other Member States, referred to in paragraph 2(b), shall not entail any obligation for Member States which choose to do so to take those employees into account when calculating the size of workforce thresholds giving rise to participation rights under national law.

6. When at least one of the merging companies is operating under an employee participation system and the company resulting from the cross-border merger is to be governed by such a system in accordance with the rules referred to in paragraph 2, that company shall be obliged to take a legal form allowing for the exercise of participation rights.

7. When the company resulting from the cross-border merger is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of subsequent domestic mergers for a period of three years after the cross-border merger has taken effect, by applying mutatis mutandis the rules laid down in this Article.

Article 17

Validity

A cross-border merger which has taken effect as provided for in Article 12 may not be declared null and void.

Article 18

Review

Five years after the date laid down in the first paragraph of Article 19, the Commission shall review this Directive in the light of the experience acquired in applying it and, if necessary, propose its amendment.

Article 19

Transposition

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 December 2007.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 20

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 26 October 2005.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

D. ALEXANDER

(1) OJ C 117, 30.4.2004, p. 43.
(2) Opinion of the European Parliament of 10 May 2005 (not yet published in the Official Journal) and Council Decision of 19 September 2005.
(3) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).
(4) OJ L 225, 12.8.1998, p. 16.
(5) OJ L 82, 22.3.2001, p. 16.
(6) OJ L 80, 23.3.2002, p. 29.
(7) OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).
(8) OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).
(9) OJ L 294, 10.11.2001, p. 22.
(10) OJ C 321, 31.12.2003, p. 1.
(11) First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8). Directive as last amended by the 2003 Act of Accession.
(12) OJ L 295, 20.10.1978, p. 36. Directive as last amended by the 2003 Act of Accession.

ANNEX II

COUNCIL DIRECTIVE 2005/19/EC

of 17 February 2005

amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States

COUNCIL DIRECTIVE 2005/19/EC
of 17 February 2005
amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Parliament (1),
Having regard to the opinion of the European Economic and Social Committee (2),
Whereas:
(1)
Directive 90/434/EEC (3) introduced common rules applicable to business restructuring which are neutral from the point of view of competition.
(2)
The objective of Directive 90/434/EEC is that taxation of the income, profits and capital gains from business reorganisations should be deferred and Member States taxing rights safeguarded.
(3)
One of the aims of Directive 90/434/EEC is to eliminate obstacles to the functioning of the internal market, such as double taxation. In so far as this is not fully achieved by the provisions of that Directive, Member States should take the necessary measures to achieve this aim.
(4)
The experience gained following implementation of Directive 90/434/EEC in January 1992 has demonstrated different ways in which the Directive can be improved and how the beneficial effects of the common rules as adopted in 1990 could be extended.
(5)
On 8 October 2001 the Council adopted Regulation (EC) No 2157/2001 on the Statute for a European Company (SE) (4) and Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees (5). Similarly, on 22 July 2003 the Council adopted Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) (6) and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (7). One of the most important features of these instruments is that both the SE and the SCE will be able to transfer their respective registered offices between Member States without being dissolved and going into liquidation.
(6)
The transfer of the registered office is a means of exercising freedom of establishment as provided for in Articles 43 and 48 of the Treaty. No assets are transferred and the company and its shareholders do not derive any income, profits or capital gains from it. The company decision to reorganise its business by transferring its registered office should not be hampered by discriminatory tax rules or by restrictions, disadvantages or distortions arising from national tax legislation which is contrary to Community Law. The transfer of the registered office of an SE or an SCE from one Member State to another may not always lead to the SE or SCE ceasing to be resident in the first Member State. The tax residence of the SE or SCE continues to be determined by national legislation and tax treaties.
(7)
The transfer of the registered office of a company, or an event connected with that transfer, that brings about a change in tax residence, may give rise to some form of taxation in the Member State from which the office is transferred. Taxation may also occur in a case where the transfer of the registered office, or an event connected with that transfer, does not lead to a change in tax residence. In order to deal with that eventuality as far as the SE or SCE is concerned, a number of new rules have been introduced into Directive 90/434/EEC. In a case where, following the transfer of the registered office, the assets of the SE or of the SCE remain effectively connected with a permanent establishment belonging to the SE or SCE and situated in the Member State from which the registered office was transferred, that permanent

establishment should enjoy benefits similar to those provided for in Articles 4, 5 and 6 of Directive 90/434/EEC. Those articles concern tax-exempted provisions and reserves, and the take-over of losses. Moreover, in accordance with Treaty principles, the taxation of shareholders on the occasion of the transfer of the registered office should be excluded. Having regard to the obligation on Member States under the Treaty to take all necessary measures to abolish double taxation, it is not necessary at this stage to establish common rules governing the tax residence of the SE or SCE.

(8)

Directive 90/434/EEC does not deal with losses of a permanent establishment in another Member State recognised in the Member State of residence of an SE or SCE. In particular, where the registered office of an SE or SCE is transferred to another Member State, such transfer does not prevent the former Member State of residence from reinstating losses of the permanent establishment in due time.

(9)

Directive 90/434/EEC does not cover a type of division where the company transferring branches of activity is not dissolved. Article 4 of that Directive should therefore be extended to cover such cases.

(10)

Article 3 of Directive 90/434/EEC defines the companies falling within its scope and the Annex thereto lists the forms of company to which the Directive applies. However, certain forms of company are not listed in that Annex even though they are resident for tax purposes in a Member State and are subject to corporation tax there. In the light of the experience, this appears to be an unjustifiable lacuna and the scope of the Directive should therefore be extended to cover entities which can carry out cross-border activities in the Community and which meet all the relevant requirements.

(11)

Since the SE is a public limited liability company and since the SCE is a cooperative society, both similar in nature to other forms of company already covered by Directive 90/434/EEC, the SE and the SCE should be added to the list set out in the Annex to Directive 90/434/EEC.

(12)

The other new companies included in the list of the Annex to this Directive are corporate taxpayers in their Member State of residence but some of them are considered fiscally transparent by other Member States. In order for the benefits of Directive 90/434/EEC to be effective, Member States treating non-resident corporate taxpayers as fiscally transparent should apply the benefits of the Directive to them. However, given the difference in tax treatment by Member States of these particular corporate taxpayers, Member States should have the option not to apply the relevant provisions in the Directive when taxing a direct or indirect shareholder of those taxpayers.

(13)

Where shareholders of companies entering into the transactions governed by Directive 90/434/EEC are treated as fiscally transparent, persons having an interest in the shareholder should not suffer taxation on the occasion of restructuring transactions.

(14)

Some doubts exist as to the application of Directive 90/434/EEC to the conversion of branches into subsidiaries. In these operations, the assets connected to a permanent establishment and constituting a 'branch of activity', as defined in Article 2(i) of Directive 90/434/EEC, are transferred to a newly set up company which will be a subsidiary of the transferring company and it should be made clear that this transaction, being the transfer of assets from a company of a Member State of a permanent establishment located in a different Member State to a company of the latter Member State, is covered by the Directive.

(15)

The current definition of 'exchange of shares' in Article 2(d) of Directive 90/434/EEC does not state whether the term encompasses further acquisitions beyond that granting a simple majority of voting rights. It is not uncommon for company statutes and voting rules to be drafted in such a way that further acquisitions are needed before the acquirer can obtain complete control over the target company. The definition of 'exchange of shares' should therefore be amended to state that that term covers all such further acquisitions.

(16)

In the case of mergers and divisions, the receiving company may derive gains from the difference in value between the assets and liabilities received and the shares that it may have held in the transferring company that are annulled following these operations. Article 7 of Directive 90/434/EEC provides for the exemption of these capital gains since these profits may be derived just as easily in the form of distributed profits from the transferring company that would have been exempted under Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [(8)]. The objectives of both Directive 90/434/EEC and Directive 90/435/EEC coincide with regard to this particular issue but the conditions required are not the same. Directive 90/434/EEC should therefore be amended to assimilate its requirements to those of Directive 90/435/EEC and to take into account the lower shareholding threshold included in that Directive.
(17)
Given the extension of Directive 90/434/EEC to include partial divisions and the transfer of a registered office of an SE or an SCE, the scope of the provision regarding the countering of tax avoidance and tax evasion should be amended accordingly.
(18)
Directive 90/434/EEC should therefore be amended accordingly,
HAS ADOPTED THIS DIRECTIVE:
Article 1
Directive 90/434/EEC is hereby amended as follows:
1.
the title shall be replaced by the following:
2.
Article 1 shall replaced by the following:
‘Article 1
Each Member State shall apply this Directive to the following:
(a)
mergers, divisions, partial divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved,
(b)
transfers of the registered office from one Member State to another Member State of European companies (Societas Europaea or SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001, on the statute for a European Company (SE) [(9)], and European Cooperative Societies (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [(10)].’;
3.
Article 2 shall be amended as follows:
(a)
The following paragraph shall be added:
‘(b)(a)
“partial division” shall mean an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;’
(b)
Paragraph (d) shall be replaced as follows:
‘(d)
“exchange of shares” shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;’
(c)

The following paragraph shall be added:
‘(j)
“transfer of the registered office” shall mean an operation whereby an SE or an SCE, without winding up or creating a new legal person, transfers its registered office from one Member State to another Member State’;
4.
the eighth indent of Article 3(c) with respect to Italy shall be replaced as follows:
‘—
imposta sul reddito delle società in Italy,’
5.
the heading of Title II shall be replaced by the following:
6.
Article 4 shall be replaced by the following:
‘Article 4
1. A merger, division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.
For the purpose of this Article the following definitions shall apply:
(a)
“value for tax purposes”: the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger, division or partial division but independently of it;
(b)
“transferred assets and liabilities”: those assets and liabilities of the transferring company which, in consequence of the merger, division or partial division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.
2. Where paragraph 1 applies and where a Member State considers a non-resident transferring company as fiscally transparent on the basis of that State’s assessment of the legal characteristics of that company arising from the law under which it is constituted and therefore taxes the shareholders on their share of the profits of the transferring company as and when those profits arise, that State shall not tax any income, profits or capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.
3. Paragraphs 1 and 2 shall apply only if the receiving company computes any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger, division or partial division had not taken place.
4. Where, under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred computed on a basis different from that set out in paragraph 3, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.’;
7.
Article 6 shall be replaced by the following:
‘Article 6
To the extent that, if the operations referred to in Article 1, paragraph a, were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the take-over of such losses by the receiving company’s permanent establishments situated within its territory.’;
8.
in Article 7, paragraph 2 shall be replaced by the following:
‘2. The Member States may derogate from paragraph 1 where the receiving company has a holding of less than 20 % in the capital of the transferring company.

From 1 January 2007 the minimum holding percentage shall be 15 %. From 1 January 2009 the minimum holding percentage shall be 10 %.';
9.
Article 8 shall be replaced by the following:
'Article 8
1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.
2. On a partial division, the allotment to a shareholder of the transferring company of securities representing the capital of the receiving company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.
3. Where a Member State considers a shareholder as fiscally transparent on the basis of that State's assessment of the legal characteristics of that shareholder arising from the law under which it is constituted and therefore taxes those persons having an interest in the shareholders on their share of the profits of the shareholder as and when those profits arise, that State shall not tax those persons on income, profits or capital gains from the allotment of securities representing the capital of the receiving or acquiring company to the shareholder.
4. Paragraphs 1 and 3 shall apply only if the shareholder does not attribute to the securities received a value for tax purposes higher than the value the securities exchanged had immediately before the merger, division or exchange of shares.
5. Paragraphs 2 and 3 shall apply only if the shareholder does not attribute to the sum of the securities received and those held in the transferring company, a value for tax purposes higher than the value the securities held in the transferring company had immediately before the partial division.
6. The application of paragraphs 1, 2 and 3 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.
7. In this Article the expression "value for tax purposes" means the value on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.
8. Where, under the law of the Member State in which he is resident, a shareholder may opt for tax treatment different from that set out in paragraphs 4 and 5, paragraphs 1, 2 and 3 shall not apply to the securities in respect of which such an option is exercised.
9. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account when taxing shareholders any cash payment that may be made on the merger, division, partial division or exchange of shares.';
10.
Article 10 shall be replaced by the following:
'Article 10
1. Where the assets transferred in a merger, a division, a partial division or a transfer of assets include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company, the Member State of the transferring company shall renounce any right to tax that permanent establishment.
The Member State of the transferring company may reinstate in the taxable profits of that company such losses of the permanent establishment as may previously have been set off against the taxable profits of the company in that State and which have not been recovered.
The Member State in which the permanent establishment is situated and the Member State of the receiving company shall apply the provisions of this Directive to such a transfer as if the Member State where the permanent establishment is situated were the Member State of the transferring company.
These provisions shall also apply in the case where the permanent establishment is situated in the same Member State as that in which the receiving company is resident.
2. By way of derogation from paragraph 1, where the Member State of the transferring company applies a system of taxing worldwide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division, partial division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital

gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.';
11.
the following Title shall be inserted:
'TITLE IVa
Special case of transparent entities
Article 10a
1. Where a Member State considers a non-resident transferring or acquired company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply the provisions of this Directive when taxing a direct or indirect shareholder of that company in respect of the income, profits or capital gains of that company.
2. A Member State exercising the right referred to in paragraph 1 shall give relief for the tax which, but for the provisions of this Directive, would have been charged on the fiscally transparent company on its income, profits or capital gains, in the same way and in the same amount as that State would have done if that tax had actually been charged and paid.
3. Where a Member State considers a non-resident receiving or acquiring company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply Article 8 paragraphs 1, 2 and 3.
4. Where a Member State considers a non-resident receiving company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, that Member State may apply to any direct or indirect shareholders the same treatment for tax purposes as it would if the receiving company were resident in that Member State.';
12.
the following Title shall be inserted.
'TITLE IVb
Rules applicable to the transfer of the registered office of an SE or an SCE
Article 10b
1. Where,
(a)
an SE or an SCE transfers its registered office from one Member State to another Member State, or
(b)
in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State,
that transfer of registered office or the cessation of residence shall not give rise to any taxation of capital gains, calculated in accordance with of Article 4(1), in the Member State from which the registered office has been transferred, derived from those assets and liabilities of the SE or SCE which, in consequence, remain effectively connected with a permanent establishment of the SE or of the SCE in the Member State from which the registered office has been transferred and play a part in generating the profits or losses taken into account for tax purposes.
2. Paragraph 1 shall apply only if the SE or the SCE computes any new depreciation and any gains or losses in respect of the assets and liabilities that remain effectively connected with that permanent establishment, as though the transfer of the registered office had not taken place or the SE or the SCE had not so ceased to be tax resident.
3. Where, under the laws of that Member State, the SE or the SCE is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities remaining in that Member State computed on a basis different from that set out in paragraph 2, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.
Article 10c
1. Where,
(a)
an SE or an SCE transfers its registered office from one Member State to another Member State, or
(b)

in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State,

the Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the SE or the SCE before the transfer of the registered office are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by a permanent establishment of the SE or the SCE which is situated within the territory of the Member State from which the registered office was transferred.

2. To the extent that a company transferring its registered office within the territory of a Member State would be allowed to carry forward or carry back losses which had not been exhausted for tax purposes, that Member State shall allow the permanent establishment, situated within its territory, of the SE or of the SCE transferring its registered office, to take over those losses of the SE or SCE which have not been exhausted for tax purposes, provided that the loss carry forward or carry back would have been available in comparable circumstances to a company which continued to have its registered office or which continued to be tax resident in that Member State.

Article 10d

1. The transfer of the registered office of an SE or of an SCE shall not, of itself, give rise to any taxation of the income, profits or capital gains of the shareholders.

2. The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of the securities representing the capital of the SE or of the SCE that transfers its registered office.'

13.

In Article 11, paragraph 1 shall be replaced by the following:

'1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III, IV and IVb where it appears that the merger, division, partial division, transfer of assets, exchange of shares or transfer of the registered office of an SE or an SCE:

(a)

has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 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 tax evasion or tax avoidance as its principal objective or as one of its principal objectives;

(b)

results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.'

14.

The Annex shall be replaced by the text in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply both with the provisions of this Directive regarding the transfer of the registered office of an SE or of an SCE, and with the entry (a) in the Annex to this Directive by 1 January 2006. Member States shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive, as regards the provisions other than those referred to in paragraph 1, by 1 January 2007. Member States shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive is addressed to the Member States.

Done at Brussels, 17 February 2005.

For the Council

The President

J.-C. JUNCKER

(1) Opinion delivered on 10 March 2004 (not yet published in the Official Journal).
(2) OJ C 110, 30.4.2004, p. 30.
(3) OJ L 225, 20.8.1990, p. 1. Directive as last amended by the 2003 Act of Accession.
(4) OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).
(5) OJ L 294, 10.11.2001, p. 22.
(6) OJ L 207, 18.8.2003, p. 1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p. 68).
(7) OJ L 207, 18.8.2003, p. 25.
(8) OJ L 225, 20.8.1990, p. 6. Directive as last amended by Directive 2003/123/EC (OJ L 7, 13.1.2004, p. 41).
(9) OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).
(10) OJ L 207, 18.8.2003, p. 1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p. 68).

ANNEX

'ANNEX

LIST OF COMPANIES REFERRED TO IN ARTICLE 3(a)

(a)

companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;

(b)

companies under Belgian law known as “société anonyme”/“naamloze vennootschap”, “société en commandite par actions”/“commanditaire vennootschap op aandelen”, “société privée à responsabilité limitée”/“besloten vennootschap met beperkte aansprakelijkheid”“société coopérative à responsabilité limitée”/“coöperatieve vennootschap met beperkte aansprakelijkheid”, “société coopérative à responsabilité illimitée”/“coöperatieve vennootschap met onbeperkte aansprakelijkheid”, “société en nom collectif”/“vennootschap onder firma”, “société en commandite simple”/ “gewone commanditaire vennootschap”, public undertakings which have adopted one of the abovementioned legal forms, and other companies constituted under Belgian law subject to the Belgian Corporate Tax;

(c)

companies under Czech law known as: “akciová společnost”, “společnost s ručením omezeným”;

(d)

companies under Danish law known as “aktieselskab” and “anpartsselskab”. Other companies subject to tax under the Corporation Tax Act, in so far as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to “aktieselskaber”;

(e)

companies under German law known as “Aktiengesellschaft”, “Kommanditgesellschaft auf Aktien”, “Gesellschaft mit beschränkter Haftung”, “Versicherungsverein auf Gegenseitigkeit”, “Erwerbs- und Wirtschaftsgenossenschaft”, “Betriebe gewerblicher Art von juristischen

Personen des öffentlichen Rechts", and other companies constituted under German law subject to German corporate tax;
(f)
companies under Estonian law known as: "täisühing", "usaldusühing", "osaühing", "aktsiaselts", "tulundusühistu";
(g)
companies under Greek law known as "ανώνυμη εταιρεία", "εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)";
(h)
companies under Spanish law known as "sociedad anónima", "sociedad comanditaria por acciones", "sociedad de responsabilidad limitada", and those public law bodies which operate under private law;
(i)
companies under French law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "sociétés par actions simplifiées", "sociétés d'assurances mutuelles", "caisses d'épargne et de prévoyance", "sociétés civiles" which are automatically subject to corporation tax, "coopératives", "unions de coopératives", industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to the French Corporate Tax;
(j)
companies incorporated or existing under Irish laws, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;
(k)
companies under Italian law known as "società per azioni", "società in accomandita per azioni", "società a responsabilità limitata", "società cooperative", "società di mutua assicurazione", and private and public entities whose activity is wholly or principally commercial;
(l)
under Cypriot law: "εταιρείες" as defined in the Income Tax laws;
(m)
companies under Latvian law known as: "akciju sabiedrība", "sabiedrība ar ierobežotu atbildību";
(n)
companies incorporated under the law of Lithuania;
(o)
companies under Luxembourg law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "société coopérative", "société coopérative organisée comme une société anonyme", "association d'assurances mutuelles", "association d'épargne-pension", "entreprise de nature commerciale, industrielle ou minière de l'État, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public", and other companies constituted under Luxembourg law subject to the Luxembourg Corporate Tax;
(p)
companies under Hungarian law known as: "közkereseti társaság", "betéti társaság", "közös vállalat", "korlátolt felelősségű társaság", "részvénytársaság", "egyesülés", "közhasznú társaság", "szövetkezet";
(q)
companies under Maltese law known as: "Kumpaniji ta' Responsabilita Limitata", "Soċjetajiet en commandite li l-kapital tagħhom maqsum f'azzjonijiet";
(r)
companies under Dutch law known as "naamloze vennootschap", "besloten vennootschap met beperkte aansprakelijkheid", "Open commanditaire vennootschap", "Coöperatie", "onderlinge waarborgmaatschappij", "Fonds voor gemene rekening", "vereniging op coöperatieve grondslag" and "vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt", and other companies constituted under Dutch law subject to the Dutch Corporate Tax;
(s)

companies under Austrian law known as “Aktiengesellschaft”, “Gesellschaft mit beschränkter Haftung”, “Erwerbs- und Wirtschaftsgenossenschaften”;

(t)

companies under Polish law known as: “spółka akcyjna”, “spółka z ograniczoną odpowiedzialnością”;

(u)

commercial companies or civil law companies having a commercial form as well as other legal persons carrying on commercial or industrial activities, which are incorporated under Portuguese law;

(v)

companies under Slovenian law known as: “delniška družba”, “komanditna družba”, “družba z omejeno odgovornostjo”;

(w)

companies under Slovak law known as: “akciová spoločnosť ”, “spoločnosť s ručením obmedzeným”, “komanditná spoločnosť ”.

(x)

companies under Finnish law known as “osakeyhtiö”/“aktiebolag”, “osuuskunta”/“andelslag”, “säästöpankki”/“sparbank” and “vakuutusyhtiö”/“försäkringsbolag”;

(y)

companies under Swedish law known as “aktiebolag”, “försäkringsaktiebolag”, “ekonomiska föreningar”, “sparbanker”, “ömsesidiga försäkringsbolag”;

(z)

companies incorporated under the law of the United Kingdom.’

ANNEX III

Council Directive 90/435/EEC

of 23 July 1990

on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

COUNCIL DIRECTIVE 2011/96/EU
of 30 November 2011
on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
(recast)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national parliaments,
Having regard to the opinion of the European Parliament (1),
Having regard to the opinion of the European Economic and Social Committee (2),
Acting in accordance with a special legislative procedure,
Whereas:
(1)
Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (3) has been substantially amended several times (4). Since further amendments are to be made, it should be recast in the interests of clarity.
(2)
In the light of the judgment of the Court of Justice of 6 May 2008 in Case C-133/06 (5), it is considered necessary to redraft the wording of the second subparagraph of Article 4(3) of Directive 90/435/EEC, for the purpose of clarifying that the rules referred to therein are adopted by the Council acting in accordance with the procedure provided for in the Treaty. It is furthermore appropriate to update the Annexes to that Directive.
(3)
The objective of this Directive is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.
(4)
The grouping together of companies of different Member States may be necessary in order to 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. Such operations should not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is therefore necessary, with respect to such grouping together of companies of different Member States, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.
(5)
Such grouping together may result in the formation of groups of parent companies and subsidiaries.
(6)
Before the entry into force of Directive 90/435/EEC, the tax provisions governing the relations between parent companies and subsidiaries of different Member States varied appreciably from one Member State to another and were generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State. Cooperation between companies of different Member States was thereby disadvantaged in comparison with cooperation between companies of the same Member State. It was necessary to eliminate that disadvantage by the introduction of a common system in order to facilitate the grouping together of companies at Union level.
(7)
Where a parent company by virtue of its association with its subsidiary receives distributed profits, the Member State of the parent company must either refrain from taxing such profits, or tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits.

(8)
It is furthermore necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax.
(9)
The payment of profit distributions to, and their receipt by, a permanent establishment of a parent company should give rise to the same treatment as that applying between a subsidiary and its parent. This should include the situation where a parent company and its subsidiary are in the same Member State and the permanent establishment is in another Member State. On the other hand, it appears that situations where the permanent establishment and the subsidiary are situated in the same Member State can, without prejudice to the application of the Treaty principles, be dealt with on the basis of national legislation by the Member State concerned.
(10)
In relation to the treatment of permanent establishments Member States may need to determine the conditions and legal instruments in order to protect the national tax revenue and fend off circumvention of national laws, in accordance with the Treaty principles and taking into account internationally accepted tax rules.
(11)
When corporate groups are organised in chains of companies and profits are distributed through the chain of subsidiaries to the parent company, double taxation should be eliminated either by exemption or tax credit. In the case of tax credit the parent company should be able to deduct any tax paid by any of the subsidiaries in the chain provided that the requirements set out in this Directive are met.
(12)
This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Part B of Annex II,
HAS ADOPTED THIS DIRECTIVE:
Article 1
1. Each Member State shall apply this Directive:
(a)
to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;
(b)
to distributions of profits by companies of that Member State to companies of other Member States of which they are subsidiaries;
(c)
to distributions of profits received by permanent establishments situated in that Member State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment is situated;
(d)
to distributions of profits by companies of that Member State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries.
2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.
Article 2
For the purposes of this Directive the following definitions shall apply:
(a)
‘company of a Member State’ means any company which:
(i)
takes one of the forms listed in Annex I, Part A;
(ii)
according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Union;
(iii)
moreover, is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes;
(b)

‘permanent establishment’ means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law.

Article 3

1. For the purposes of applying this Directive:

(a)

the status of parent company shall be attributed:

(i)

at least to a company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 10 % in the capital of a company of another Member State fulfilling the same conditions;

(ii)

under the same conditions, to a company of a Member State which has a minimum holding of 10 % in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State;

(b)

‘subsidiary’ means that company the capital of which includes the holding referred to in point (a).

2. By way of derogation from paragraph 1, Member States shall have the option of:

(a)

replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights;

(b)

not applying this Directive to companies of that Member State, which do not maintain for an uninterrupted period of at least 2 years holdings qualifying them as parent companies, or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least 2 years.

Article 4

1. Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the Member State of the parent company and the Member State of its permanent establishment shall, except when the subsidiary is liquidated, either:

(a)

refrain from taxing such profits; or

(b)

tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.

2. Nothing in this Directive shall prevent the Member State of the parent company from considering a subsidiary to be fiscally transparent on the basis of that Member State’s assessment of the legal characteristics of that subsidiary arising from the law under which it is constituted and therefore from taxing the parent company on its share of the profits of its subsidiary as and when those profits arise. In this case the Member State of the parent company shall refrain from taxing the distributed profits of the subsidiary.

When assessing the parent company’s share of the profits of its subsidiary as they arise the Member State of the parent company shall either exempt those profits or authorise the parent company to deduct from the amount of tax due that fraction of the corporation tax related to the parent company’s share of profits and paid by its subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.

3. Each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company.
Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5 % of the profits distributed by the subsidiary.
4. Paragraphs 1 and 2 shall apply until the date of effective entry into force of a common system of company taxation.
5. The Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, shall, at the appropriate time, adopt the rules to apply as from the date of effective entry into force of a common system of company taxation.

Article 5

Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.

Article 6

The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary.

Article 7

1. The term 'withholding tax' as used in this Directive shall not cover an advance payment or prepayment (*précompte*) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company.
2. This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.

Article 8

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive as from 18 January 2012. They shall forthwith inform the Commission thereof.
When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive together with a correlation table between them and this Directive.

Article 9

Directive 90/435/EEC, as amended by the acts listed in Annex II, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex II, Part B.
References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 10

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 11

This Directive is addressed to the Member States.
Done at Brussels, 30 November 2011.
For the Council
The President
J. VINCENT-ROSTOWSKI

(1) Opinion delivered on 4 May 2011 (not yet published in the Official Journal).
(2) OJ C 107, 6.4.2011, p. 73.
(3) OJ L 225, 20.8.1990, p. 6.
(4) See Annex II, Part A.
(5) [2008] ECR I-03189.

ANNEX I
PART A

List of companies referred to in Article 2(a)(i)

(a)

companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [1] and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2] and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [3] and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [4];

(b)

companies under Belgian law known as 'société anonyme'/'naamloze vennootschap', 'société en commandite par actions'/'commanditaire vennootschap op aandelen', 'société privée à responsabilité limitée'/'besloten vennootschap met beperkte aansprakelijkheid', 'société coopérative à responsabilité limitée'/'coöperatieve vennootschap met beperkte aansprakelijkheid', 'société coopérative à responsabilité illimitée'/'coöperatieve vennootschap met onbeperkte aansprakelijkheid', 'société en nom collectif'/'vennootschap onder firma', 'société en commandite simple'/'gewone commanditaire vennootschap', public undertakings which have adopted one of the abovementioned legal forms, and other companies constituted under Belgian law subject to Belgian corporate tax;

(c)

companies under Bulgarian law known as: 'събирателно дружество', 'командитно дружество', 'дружество с ограничена отговорност', 'акционерно дружество', 'командитно дружество с акции', 'неперсонифицирано дружество', 'кооперации', 'кооперативни съюзи', 'държавни предприятия' constituted under Bulgarian law and carrying on commercial activities;

(d)

companies under Czech law known as: 'akciová společnost', 'společnost s ručením omezeným';

(e)

companies under Danish law known as 'aktieselskab' and 'anpartsselskab'. Other companies subject to tax under the Corporation Tax Act, in so far as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to 'aktieselskaber';

(f)

companies under German law known as 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'Versicherungsverein auf Gegenseitigkeit', 'Erwerbs- und Wirtschaftsgenossenschaft', 'Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts', and other companies constituted under German law subject to German corporate tax;

(g)

companies under Estonian law known as: 'täisühing', 'usaldusühing', 'osaühing', 'aktsiaselts', 'tulundusühistu';

(h)

companies incorporated or existing under Irish law, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;

(i)

companies under Greek law known as 'ανώνυμη εταιρεία',·'εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)'·and other companies constituted under Greek law subject to Greek corporate tax;

(j)

companies under Spanish law known as: 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada', public law bodies which operate under private law. Other entities constituted under Spanish law subject to Spanish corporate tax ('Impuesto sobre Sociedades');

(k)

companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', 'sociétés par actions simplifiées', 'sociétés d'assurances mutuelles', 'caisses d'épargne et de prévoyance', 'sociétés civiles' which are automatically subject to corporation tax, 'coopératives', 'unions de coopératives', industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to French corporate tax;

(l)

companies under Italian law known as ‘società per azioni’, ‘società in accomandita per azioni’, ‘società a responsabilità limitata’, ‘società cooperative’, ‘società di mutua assicurazione’, and private and public entities whose activity is wholly or principally commercial;

(m)

under Cypriot law: ‘εταιρείες’ as defined in the Income Tax laws;

(n)

companies under Latvian law known as: ‘akciju sabiedrība’, ‘sabiedrība ar ierobežotu atbildību’;

(o)

companies incorporated under the law of Lithuania;

(p)

companies under Luxembourgish law known as ‘société anonyme’, ‘société en commandite par actions’, ‘société à responsabilité limitée’, ‘société coopérative’, ‘société coopérative organisée comme une société anonyme’, ‘association d’assurances mutuelles’, ‘association d’épargne-pension’, ‘entreprise de nature commerciale, industrielle ou minière de l’Etat, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public’, and other companies constituted under Luxembourg law subject to Luxembourg corporate tax;

(q)

companies under Hungarian law known as: ‘közkereseti társaság’, ‘betéti társaság’, ‘közös vállalat’, ‘korlátolt felelősségű társaság’, ‘részvénytársaság’, ‘egyesülés’, ‘szövetkezet’;

(r)

companies under Maltese law known as: ‘Kumpaniji ta’ Responsabilita’ Limitata’, ‘Soċjetajiet en commandite li l-kapital tagħhom maqsum f’azzjonijiet’;

(s)

companies under Dutch law known as ‘naamloze vennootschap’, ‘besloten vennootschap met beperkte aansprakelijkheid’, ‘open commanditaire vennootschap’, ‘coöperatie’, ‘onderlinge waarborgmaatschappij’, ‘fonds voor gemene rekening’, ‘vereniging op coöperatieve grondslag’, ‘vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt’, and other companies constituted under Dutch law subject to Dutch corporate tax;

(t)

companies under Austrian law known as ‘Aktiengesellschaft’, ‘Gesellschaft mit beschränkter Haftung’, ‘Versicherungsvereine auf Gegenseitigkeit’, ‘Erwerbs- und Wirtschaftsgenossenschaften’, ‘Betriebe gewerblicher Art von Körperschaften des öffentlichen Rechts’, ‘Sparkassen’, and other companies constituted under Austrian law subject to Austrian corporate tax;

(u)

companies under Polish law known as: ‘spółka akcyjna’, ‘spółka z ograniczoną odpowiedzialnością’;

(v)

commercial companies or civil law companies having a commercial form and cooperatives and public undertakings incorporated in accordance with Portuguese law;

(w)

companies under Romanian law known as: ‘societăți pe acțiuni’, ‘societăți în comandită pe acțiuni’, ‘societăți cu răspundere limitată’;

(x)

companies under Slovenian law known as: ‘delniška družba’, ‘komanditna družba’, ‘družba z omejeno odgovornostjo’;

(y)

companies under Slovak law known as: ‘akciová spoločnosť’, ‘spoločnosť s ručením obmedzeným’, ‘komanditná spoločnosť’;

(z)

companies under Finnish law known as ‘osakeyhtiö’/‘aktiebolag’, ‘osuuskunta’/‘andelslag’, ‘säästöpankki’/‘sparbank’ and ‘vakuutusyhtiö’/‘försäkringsbolag’;

(aa)

companies under Swedish law known as ‘aktiebolag’, ‘försäkringsaktiebolag’, ‘ekonomiska föreningar’, ‘sparbanker’, ‘ömsesidiga försäkringsbolag’, ‘försäkringsföreningar’;

(ab)

companies incorporated under the law of the United Kingdom.

PART B

List of taxes referred to in Article 2(a)(iii)

—

impôt des sociétés/vennootschapsbelasting in Belgium,

—

корпоративен данък in Bulgaria,

—

daň z příjmů právnických osob in the Czech Republic,

—

selskabsskat in Denmark,

—

Körperschaftssteuer in Germany,

—

tulumaks in Estonia,

—

corporation tax in Ireland,

—

φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα in Greece,

—

impuesto sobre sociedades in Spain,

—

impôt sur les sociétés in France,

—

imposta sul reddito delle società in Italy,

—

φόρος εισοδήματος in Cyprus,

—

uzņēmumu ienākuma nodoklis in Latvia,

—

pelno mokestis in Lithuania,

—

impôt sur le revenu des collectivités in Luxembourg,

—

társasági adó, osztalékadó in Hungary,

—

taxxa fuq l-income in Malta,

—

vennootschapsbelasting in the Netherlands,

—

Körperschaftssteuer in Austria,

—

podatek dochodowy od osób prawnych in Poland,

—

imposto sobre o rendimento das pessoas colectivas in Portugal,

—

impozit pe profit in Romania,

—

davek od dobička pravnih oseb in Slovenia,

—

daň z príjmov právnických osôb in Slovakia,

—

yhteisöjen tulovero/inkomstskatten för samfund in Finland,

—

statlig inkomstskatt in Sweden,

—
corporation tax in the United Kingdom.

(1) OJ L 294, 10.11.2001, p. 1.
(2) OJ L 294, 10.11.2001, p. 22.
(3) OJ L 207, 18.8.2003, p. 1.
(4) OJ L 207, 18.8.2003, p. 25.

ANNEX II
PART A
Repealed Directive with list of its successive amendments
(referred to in Article 9)
Council Directive 90/435/EEC
(OJ L 225, 20.8.1990, p. 6).

Point XI.B.I.3 of Annex I to the 1994 Act of Accession
(OJ C 241, 29.8.1994, p. 196).

Council Directive 2003/123/EC
(OJ L 7, 13.1.2004, p. 41).

Point 9.8 of Annex II to the 2003 Act of Accession
(OJ L 236, 23.9.2003, p. 555).

Council Directive 2006/98/EC
(OJ L 363, 20.12.2006, p. 129).
Annex, point 7 only
PART B
List of time limits for transposition into national law
(referred to in Article 9)

Directive	**Time limit for transposition**
90/435/EEC	31 December 1991
2003/123/EC	1 January 2005
2006/98/EC	1 January 2007