

Survey of the implementation of Council Directive 90/434/EEC

(The Merger Directive, as amended)



## Preface

Ernst & Young Europe is pleased to present the Survey of implementation of Council Directive 90/434/EEC (The Merger Directive) as amended.

The Survey provides an overview of the implementation of the Merger Directive in each of the 27 Member States and highlights areas of potential non-compliance both on a specific country-by-country basis and, to the extent relevant, on a systematic basis within some or all Member States. The analysis is not limited to the question as to whether local legislation in each of the Member States complies with the Merger Directive, but it also covers the compliance of the respective local legislation with EC Primary Law. As agreed, the Survey is limited to the analysis of local tax legislation and does not cover company law or commercial issues. In particular it does not cover the implementation of the Directive on cross-border mergers of limited liability companies.

In accordance with Commissions tender documents we understand that the purpose of the Survey is to provide guidance to the European Commission to enable it to assess the need for:

- (a) further action to ensure compliance with the Member States' obligations under the Merger Directive;
- (b) issuance of further guidance to assist in the application of the individual provisions of the Merger Directive;
- (c) passing of additional legislation within the area covered by the Merger Directive.

The Survey has been prepared for the European Commission as described above. No responsibility for loss occasioned to any other person acting or refraining from acting as a result of this publication can be accepted by the authors or publishers or the European Commission. On any specific matter reference should be made to the appropriate advisor.

The Survey is based on an analysis of the Merger Directive article by article for each of the Member States. It follows a detailed task description agreed with the European Commission by raising several issues under each of the articles.

The Survey has been performed by local Experts of the Ernst & Young EU Competence Group of the 27 Member States during the period from November 2007 to August 2008 and reflects the current stand of local tax legislation in each of the Member States as of 31 January 2008.

We thank the European Commission for this opportunity and for its consideration of our Firm.

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## **A. Survey of the implementation of Council Directive 90/434/EEC (The Merger Directive, as amended)**

### **I. Introduction**

On 23 July 1990 the Council adopted Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

Broadly, the aim of the Merger Directive is to create within the Community conditions analogous to those of an internal market and remove restrictions, disadvantages or distortions arising from the existing tax provisions which disadvantage reorganisations of companies (such as mergers, divisions, partial divisions and other similar types of transactions) where companies of two or more Member States are involved. This objective is attained by creating a system which allows deferring the taxation of income, profits and capital gains where the businesses are reorganized, provided that certain conditions are met.

The Merger Directive applies to particular types of companies only. A company for the purposes of the Merger Directive is any company which

- (a) takes one of the forms listed in the Annex 1 of the Directive. Broadly these are various types of companies incorporated under the laws of 27 Member States. Since 1 January 2006 the Merger Directive also applies to the European Company (Societas Europaea (SE)) and the European Cooperative Society (Societas Cooperativa Europaea (SCE));
- (b) is considered to be resident for tax purposes in a Member State 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 Community;
- (c) is subject to one of the taxes as defined by Article 3(c) or to any other tax which may be substituted for any of these taxes.

#### **1. Implementation and applicability of the Directive in 27 EU Member States**

According to Article 249 EC Treaty<sup>1</sup> a Directive is binding as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods on how to implement it. Currently, the Merger Directive is addressed to 27 EU Member States. Therefore the measures of the Merger Directive have to be transposed into national laws of 27 Member States.

The Merger Directive was adopted in 1990 and has been amended four times since its adoption. In 1994, 2003 and 2006 the Merger Directive was amended because new Member States joined the EU. In 2005, material provisions of the Merger Directive were changed to expand its scope.

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<sup>1</sup> Treaty concluded in Rome, 25 March 1957, establishing the European Community as amended by the Treaty on the European Union concluded in Maastricht, on 7 February 1992 and entered into force on 1 November 1993. The Treaty was further amended by the Treaty on the European Union concluded in Amsterdam on 2 October 1997 and entered into force on 1 May 1999.

## 1.1 Adoption of the Merger Directive in 1990

In 1990, at the time the Directive was adopted, there were 12 Member States in the European Union: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and United Kingdom. According to Article 12(1) of the Merger Directive, these countries had to bring into force laws, regulations and administrative provisions necessary to comply with the Merger Directive not later than 1 January 1992. An exception applied to Portugal as Article 12(2) of the Merger Directive allowed the country to delay the application of the provisions concerning transfers of assets and exchanges of shares until 1 January 1993.

Each Member State was obliged to inform the Commission on whether the Merger Directive has been implemented.

After the given period the Commission noted that Greece failed to implement the Merger Directive within the set time limits and as a result the Commission brought the matter before the ECJ. The case was decided in 1998 when the ECJ declared that the Hellenic Republic failed to fulfil its obligations under Article 12(1) of the Merger Directive.<sup>2</sup>

The Merger Directive adopted in 1990 applied to mergers, divisions, transfers of assets and exchanges of shares. The basic principles of these transactions are illustrated below (there are of course more complex variants of these transactions, however they will not be discussed here). It is important that a transaction involves a cross-border element to fall within the scope of the Merger Directive.

Broadly, 'merger' means an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities representing the capital of that other company and, in certain circumstances, a cash payment not exceeding certain value. For example, the transfer of all a French company's assets and liabilities to its sister company in Belgium would be a 'merger' within the meaning of the Merger Directive, provided that shareholders of the French company receive securities in the Belgian company in return and the French company ceases to exist and a number of other conditions are met. According to the Merger Directive, a 'merger' would also be a transaction where a French company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital, which in this case could be its parent company incorporated, say, in Germany.

A 'merger' would also be the transfer of assets and liabilities of two or more companies, being dissolved without going into liquidation, to a new company that they both establish in exchange for the issue to their shareholders of securities representing the capital of that new company and, in certain circumstances, certain amount of cash payment in addition to securities. This would be a case where a French company and a Belgian company, on being dissolved without going into liquidation, would transfer all their assets and liabilities to a new company, say, in the Netherlands where their shareholders would receive securities in this Dutch company in return.

Another type of the operation covered by the Merger Directive is 'division'. Broadly, a 'division' is an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more existing or new companies in exchange for the pro rata issue to its shareholders of securities representing the capital of

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<sup>2</sup> C-8/97 'Greece v Commission' [1998] ECR I-823.

the companies receiving the assets and liabilities and, if applicable, a cash payment of certain amount. For example, a 'division' would be an operation where all assets and liabilities of a French company are split in two parts and transferred to its two sister companies in Belgium and Germany.

Also, a 'transfer of assets' falls within the scope of the Merger Directive and is defined as an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer. This would be a case where, for example, a French company transfers a branch of activity to a sister company in Belgium and receives securities representing the capital of that company in return.

Finally, the Merger Directive defines 'exchange of shares' as an operation whereby a company acquires a holding in the capital of another company such that it obtains majority of the voting rights in that company 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 particular amount of cash payment in addition. For example, an 'exchange of shares' would be an operation where a parent company in Belgium transfers shares held in its French subsidiary to a company in Germany in return for shares of that German company.

The overall aim of the Merger Directive is to set out a common tax system ought to avoid the imposition of tax in connection with the outlined types of transactions, while at the same time safeguarding the financial interests of the State of the transferring or acquired company. The Merger Directive sets out a number of conditions that have to be met for these operations to be tax exempt. The most important principle is that the tax deferral is subject to the condition that assets remain connected to a permanent establishment of the transferring company or permanent establishment of the receiving company. Effectively, this means that assets should remain within the jurisdiction of the Member State of the transferring company for the tax deferral to be applicable. The compatibility of this requirement with the latest developments in the ECJ case law is discussed in more detail in chapter IV. The Merger Directive and exit charges.

A number of amendments have been made to the Merger Directive since 1990 - these are explained in more detail further below.

## 1.2 1994 Amendments

In 1994 the Act concerning the conditions of accession of Austria, Finland and Sweden<sup>3</sup> was adopted since it was expected that Austria, Sweden and Finland would join the EU on 1 January 1995. Article 168 of the Act provided that the new joiners were obliged to put into effect the measures of the Merger Directive from the date of their accession. The Act also amended the Merger Directive so that it includes Austrian, Swedish and Finnish companies.<sup>4</sup>

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<sup>3</sup> Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (94/C 241/08), OJ No C 241 29/08/1994 p.21, as amended by 95/1/EC, Euratom, ECSC: Decision of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union, OJ L001, 01/01/1995 p.0001 - 0219.

<sup>4</sup> Amendments can be found in Annex I of the Act. Interestingly, Annex I of the Act initially provided that the Merger Directive should cover Norwegian companies. However, after the majority of Norwegian voters rejected membership of the EU in 1994, Annex I was amended by the Decision of the Council of the European Union (95/1/EC, Euratom, ECSC) to exclude Norwegian companies from the Merger Directive.

### 1.3 2003 Amendments

In 2003 the Act concerning the conditions of accession of ten new Member States<sup>5</sup> was adopted. The Act set out the joining conditions for the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic who became a part of the EU on 1 May 2004. Article 54 of the Act obliged the new Member States to comply with the Merger Directive from the date of their accession. It also supplemented Article 3 of the Merger Directive with types of companies in new Member States which should fall within the scope of the Directive.<sup>6</sup>

### 1.4 2005 Amendments

In 2005 Council Directive 2005/19/EC of 17 February 2005<sup>7</sup> substantially amended the Merger Directive.

#### 1.4.1 Extension to the European Company and the European Cooperative Society

The scope of the Merger Directive was extended to apply to an European Company (SE) and European Cooperative Society (SCE). These types of companies were introduced in the EU in 2001 and 2003, respectively to enhance company cross-border mobility within the EU. One of the advantages of establishing an SE or SCE is the possibility to transfer its registered office between Member States without winding up or the creation of a new legal person<sup>8</sup>. Accordingly, the Merger Directive was amended to ensure that the transfer of the registered office of an SE or SCE, or an event connected with that transfer, does not give rise to some form of taxation in a case where the assets of an SE or SCE remain effectively connected with a permanent establishment situated in the Member State from which the registered office was transferred (Amendments to: Articles 1, 11, Annex; Articles 10b, 10c, 10d inserted).

#### 1.4.2 Extension of Annex I

Annex I of the Merger Directive lists companies that may enjoy the benefits of the Directive. In 2005 the list was extended considerably to cover more types of entities established under national laws of Austria, Belgium, Denmark, Germany, Greece, France, Ireland, Italy, Luxembourg, the Netherlands and Sweden, including several types of entities which are considered as fiscally transparent. The aim of these amendments was to improve the coverage of the Merger Directive. Although the initial proposals aimed at extending the

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<sup>5</sup> Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L236, 23/09/2003, p.33.

<sup>6</sup> Articles 24, 53 and 54 and Annex II, Chapter 9(7) of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L236, 23/09/2003, p.33.

<sup>7</sup> Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L58, 04/03/2005 p.19.

<sup>8</sup> As provided by Article 8 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L294, 10/11/2001 p.1; and Article 7 of Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE), OJ L207, 18/08/2003, p.1.

Merger Directive to all enterprises resident and subject to corporation tax in the Member States, the Commission concluded that it could not be achieved due to asymmetries found in commercial law governing the legal types of entities and the diversity of tax arrangements applicable to them in various Member States (Amendments to: Article 3, Annex).

#### 1.4.3 Extension to cover partial divisions or 'split-offs'

In 2005 the scope of the Merger Directive was extended to cover a partial division or 'split-off'. Broadly, a 'split-off' is defined as 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, the receiving company issues securities representing its capital (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 the securities issued in exchange) and these securities are transferred to the shareholders of the transferring company. The amendments also ensured that a split-off is a tax neutral transaction provided that the assets and liabilities so transferred remain connected with a permanent establishment of the receiving company in the Member State of the transferring company (Amendments to: Article 2 (b) (a) inserted, other articles of the Merger Directive amended accordingly).

#### 1.4.4 Extension to the conversion of a branch into a subsidiary

Before 2005 it was argued by some that no tax can be deferred upon conversion of a branch into a subsidiary of the same foreign entity. Such argument was possible because the Merger Directive required that, in order to apply it, assets should remain connected to a permanent establishment, however, upon the conversion into a local subsidiary company, the assets ceased to be connected to a permanent establishment. The 2005 amendments made it clear that the Merger Directive covers situations where the assets connected to a permanent establishment (and constituting a 'branch of activity') are transferred to a newly set up company - a subsidiary of the same company whose permanent establishment transfers the assets (Amendments to: Article 10 (1), subparagraph 3 inserted).

#### 1.4.5 Amendment of the definition of 'exchange of shares'

The definition of 'exchange of shares' was amended to cover further acquisitions beyond that granting a simple majority of voting rights. The amendment was inserted as it was rather common for company statutes and voting rules to be drafted in such a way that further acquisitions were needed before the acquirer can obtain complete control over the target company. The amendments clarified the applicability of the Merger Directive to such transactions (Amendments to: Article 2 (d)).

#### 1.4.6 Amendment to link the provisions of the Merger Directive with the Parent-Subsidiary Directive

Article 7 of the Merger Directive was amended to link the provisions of the Merger Directive with the provisions of the Parent-Subsidiary Directive.<sup>9</sup> The Article was amended to provide that no tax liability arises to the receiving company when it cancels its holding in the capital of the transferring company, provided that the holding exceeds 15% as of 1 January 2007 and 10% as of 1 January 2009. Similarly, the Parent-Subsidiary Directive allows deriving distributions tax exempt from the transferring company, subject to the same levels of minimum holding percentage. Before the amendments the threshold in the Merger Directive was 25% and thus the tax treatment was more disadvantageous than the one available under the Parent-Subsidiary Directive (Amendments to: Article 7).

#### 1.4.7 Amendment to cover fiscally transparent entities

Articles 4(2), 8(3) and 10a were inserted in the Merger Directive with the aim to provide that Member States may apply tax deferral if they consider non-resident corporate taxpayers or shareholders of companies entering into the transactions within the scope of the Merger Directive as fiscally transparent. In particular, Article 4(2) prevents a Member State to tax its resident taxpayers having an interest in the fiscally transparent company of another Member State at the time of the transactions covered by the Merger Directive. Similarly, Article 8(3) defers taxation on the taxpayers having an interest in fiscally transparent shareholders of companies entering into the transactions included within the scope of the Merger Directive. However, the Council decided to depart from the Commission's proposed rules in Articles 4(2) and 8(3) and inserted Article 10a in the Merger Directive. This Article allows Member States not to apply the regime in Articles 4(2) and 8(3) where transparent entities are involved (Amendments to: Articles 4(2), 8(3) and 10a inserted).

#### 1.4.8 Entry into force

Member States had to implement the 2005 amendments in two stages. The provisions regarding the transfer of the registered office of an SE or of an SCE and the inclusion of the SE and the SCE in the list of companies covered by the Directive had to be transposed into national laws by 1 January 2006. Other changes had to be transposed by 1 January 2007.

It was considered that most countries implemented the amendments within the set time limits. However, on 14 August 2007 the Commission referred Belgium to the ECJ<sup>10</sup> for failing to implement into national law the provisions which were due to be implemented by 1 January 2006. On 8 May 2008 the ECJ decided that Belgium failed to fulfil its obligations under the Merger Directive.<sup>11</sup>

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<sup>9</sup> 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, OJ L225, 20/08/1990, p.6.

<sup>10</sup> C-392/07 Action brought on 14 August 2007 - 'Commission of the European Communities v Kingdom of Belgium', OJ C 235, 6/10/2007, p.10.

<sup>11</sup> C-392/07 'Commission of European Communities v Kingdom of Belgium', OJ 2008/C 158/8.

## 1.5 2006 Amendments

On 20 November 2006 the Council adopted Directive 2006/98/EC<sup>12</sup> which, inter alia, added Bulgarian and Romanian companies to the list of companies who may enjoy the benefits of the Merger Directive. Bulgaria and Rumania were obliged to transpose the amendments into their national laws by 1 January 2007 when they joined 25 EU Member States. The obligation to comply with the provisions of the Merger Directive was set out in the Act concerning the conditions of accession of Bulgaria and Romania.<sup>13</sup> Article 53 of the Act provided that both countries were obliged to put into effect the measures to comply, from the date of their accession, with the provisions of Directives within the meaning of Article 249 of the EC Treaty.

## 1.6 Applicability of the Merger Directive in 27 EU Member States

Member States were obliged to implement the Merger Directive and amendments within a particular timeline, however the application of the Merger Directive was often seen as impracticable by many until December of 2007 as until that point many Member States only provided for mergers (if at all) in a domestic context. Since companies encountered many legislative and administrative difficulties if they wished to merge with a company in another Member State, a number of Community level measures have been designed to assist companies in this regard. The European Company (SE) Statute<sup>14</sup> was adopted in 2001, and this was followed by the European Cooperative Society (SCE) Statute in 2003.<sup>15</sup> Broadly, these regulations created a legislative framework which would allow certain companies incorporated in different Member States to merge or form a SE or SCE while avoiding the legal and practical constraints arising from the existence of different legal systems.

Further, the Directive on cross-border mergers of limited liability companies<sup>16</sup> was adopted in 2005. Member States were obliged to bring into force the laws and administrative provisions necessary to comply with this Directive by 15 December 2007 thus finally putting

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<sup>12</sup> Council Directive of 20 November 2006 adapting certain Directives in the field of taxation, by reason of the accession of Bulgaria and Romania, OJ L363, 20/12/2006, p.129. Note that this time, unlike the procedure followed in 1995 and 2004, the amendments were not embedded in the Act concerning the conditions of accession of the new Member States. Instead, Article 4(3) of the Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union (OJ L157, 21/06/2005 p.11) and Article 56 of the Act concerning the conditions of accession of the republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded (OJ L157, 21/06/2005 p.203) authorized the Council to adopt the necessary provisions.

<sup>13</sup> Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, OJ L157, 21/06/2005 p.203.

<sup>14</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L294, 10/11/2001.

<sup>15</sup> Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE), OJ L207, 18/08/2003.

<sup>16</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L310, 25/11/2005.

into place the necessary legal framework to facilitate the transactions envisaged in the Merger Directive.

## 2. Interpretation of the Merger Directive

Particular provisions of the Merger Directive have been interpreted by the ECJ in three cases: '*Leur-Bloem*', '*Andersen og Jensen*' and '*Kofoed*'. These cases discuss the meaning of 'transfer of assets', 'exchange of shares' and 'branch of activity' as defined by Article 2 of the Merger Directive, as well as the meaning and application of Article 11(1)(a) which, broadly, allows a Member State to refuse to apply or withdraw the benefits of the Merger Directive where it appears that the principal objective or one of the principal objectives of the transaction is tax evasion or tax avoidance.

### 2.1 The ECJ's rights to interpret where only a domestic situation and national laws are involved

Interestingly, two out of the three ECJ cases discussing the provisions of the Merger Directive concerned purely domestic situations and provisions of national laws which applied to such situations. The '*Leur-Bloem*' case considered the situation in the Netherlands, whereas the '*Andersen og Jensen*' case discussed the situation in Denmark. National courts, referring their questions to the ECJ for a preliminary ruling, were concerned whether the ECJ has jurisdiction under Article 177 to interpret the provisions of the Merger Directive where the Directive is not directly applicable to the specific circumstances of the case, although it is the national legislature's intention that those circumstances are to be treated in the same manner as a situation to which the Merger Directive does apply.

Indeed, when delivering his opinion in the '*Leur-Bloem*' case, Advocate General Jacobs concluded that the national legislature has borrowed Community rule and transposed it to a context outside the ECJ's contemplation. However, the ECJ did not follow this opinion and held that it has jurisdiction under Article 177 of the EC Treaty where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a Directive into domestic law has chosen to apply the same treatment to purely internal situations and to those governed by the Directive thus aligning the domestic legislation to Community law.<sup>17</sup> Thus, '*Leur-Bloem*' repeated an important principle set out earlier in other cases: national courts may ask the ECJ for a preliminary ruling where the facts of the cases being considered by the national courts are outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms of contract.<sup>18</sup> The ECJ followed this reasoning in '*Andersen og Jensen*'.

### 2.2 Articles 2(d) and 11(1)(a) of the Merger Directive: the '*Leur-Bloem*' case

#### 2.2.1 Facts of the case

Mrs Leur-Bloem was the sole shareholder and director of two private Dutch companies. She planned to acquire shares in another private holding company in exchange for her shares in

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<sup>17</sup> C-28/95 'A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2' [1997] ECR I-4161, paragraph 34.

<sup>18</sup> C-28/95 'A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2' [1997] ECR I-4161, paragraph 27.



these two companies. After the transaction she would be, no longer directly but only indirectly, the sole shareholder in her two companies.

Mrs Leur-Bloem argued that the transaction was subject to the Netherlands Income Tax Law of 1964 which provided that, in the case of merger by exchange of shares, tax may be deferred on any gain made on the transfer of shares. The Dutch tax authorities disagreed that the transaction could be considered as a merger by exchange of shares. The dispute arose because the parties interpreted differently the definition of company mergers in the Netherlands Income Tax Law which provided that a company merger would be a transaction where:

*'... a company established in the Netherlands acquires, in return for the transfer of a number of its shares together in some cases with an additional payment, possession of a number of shares of another company established in the Netherlands permitting it to exercise more than half the voting rights in the latter company, with a view to combining in a single unit, on a permanent basis from an economic and financial viewpoint, the undertaking of the acquiring company and that of another person.'*

In particular, Dutch tax authorities disagreed that the purpose of Mrs Leur-Bloem's transactions was to combine *'in a single unit, on a permanent basis from an economic and financial viewpoint'*, the acquired company with companies owned indirectly after the transaction was completed. Mrs Leur-Bloem contended that the transaction was designed to achieve closer cooperation between the companies and therefore must be regarded as merger.

The ECJ was asked whether the definition of 'exchange of shares' in the Dutch national law was compatible with the Merger Directive.

### 2.2.2 The ECJ decision

*'Leur-Bloem'* was decided by the ECJ on 17 July 1997. The court pointed out that the disputed condition of *'merging the business of two companies permanently in a single unit from a financial and economic point of view'* is not contained in Article 2 (d) of the Merger Directive but, apparently, was inserted by the Netherlands when transposing the Merger Directive to prevent, pursuant to Article 11 of the Merger Directive, tax advantages where the principal objective of the transaction is tax evasion or tax avoidance. Therefore the ECJ decided to discuss both Article 2 (d) and Article 11 (1) (a) of the Merger Directive.

### 2.2.3 Article 2 (d)

The ECJ ruled that the Merger Directive applies to all mergers, divisions, transfers of assets or exchanges of shares irrespective of the reasons, whether financial, economic or simply fiscal, for those operations. The ECJ held that an operation can still be considered as an 'exchange of shares' within the meaning of Article 2 (d) of the Merger Directive although:

- (a) the acquiring company does not itself carry on a business (e.g. is a holding company);
- (b) the same natural person, who was the sole shareholder and director of the companies acquired, becomes the sole shareholder and director of the acquiring company;
- (c) there is no permanent merger of the business of two companies into a single unit.

The ECJ concluded that the above characteristics of the transaction alone may not exclude Mrs Leur-Bloem's transaction from the definition of 'exchange of shares' within the meaning of Article 2(d) of the Merger Directive. However, the ECJ then considered whether the conditions fell within Article 11(1)(a) of the Merger Directive.

#### 2.2.4 Article 11(1)(a)

Article 11(1)(a) allows Member States to refuse to apply or withdraw the benefit of all or any part of the provisions of the Merger Directive, 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 SCE has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of these operations 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.

The '*Leur-Bloem*' case sets out a number of important concepts in this regard. These concepts are discussed in more detail in chapter III. Anti-avoidance provisions of the Merger Directive.

#### 2.2.5 Implications of the '*Leur-Bloem*' case

First, the '*Leur-Bloem*' case sets out the important principle that the ECJ has rights to give the guidance where purely a national situation and national law are involved, but where the Community provisions have been rendered applicable 'either by national law or merely by virtue of terms of contract'.

Second, the decision prohibits Member States to insert additional criteria other than those provided by the Merger Directive for a transaction to benefit from the regime.

Third, the case also illustrates factors which cannot be 'decisive on their own' when tax avoidance or tax evasion is considered.

Finally, the '*Leur-Bloem*' case identifies a number of important concepts which should be taken into account when interpreting Article 11(1)(a) of the Merger Directive.

### 2.3 Article 2(c) and (i) of the Merger Directive: the '*Andersen og Jensen*' case

#### 2.3.1 Facts of the case

In 1996, shareholders of a Danish limited company Randers Sport A/S ('RS') set up a new company Randers Sport Nyt A/S ('RSN'). Broadly, RSN was set up with a view to pass the business on to the next generation and the intention was to transfer over all RS's assets and liabilities to RSN with the exception of a minor block of shares and the proceeds of a loan taken out by RS. Effectively, the RS's loan reduced the net value of assets and liabilities to be transferred to RSN due to the arrangement that loan proceeds remained in RS. It was also arranged that RSN's cash flow requirements would be covered by a line of credit granted by a financial institution which, by way of security, would seek a lien over all the shares representing the capital of RSN.

RS argued that the planned transaction can be considered as a transfer of assets and thus should be tax exempt. Ligningsråd (highest administrative authority in Denmark competent to settle various issues of taxation law) did not agree that the transaction is a transfer of

assets, because the proceeds of the loan and the corresponding debt were neither transferred entirely to RSN, nor remained with RS. Furthermore, Ligningsråd opined that a transaction cannot be considered as transfer of assets because a security for the benefit of the company receiving the transfer was provided.

The ECJ was asked whether a transaction can be considered as a 'transfer of assets' within the meaning of Article 2(c) and (i) of the Merger Directive, where, first, the proceeds of a loan contracted by the transferring company remain with this company but the obligations arising from the loan are transferred to the receiving company and, second, where a company transfers its entire assets to another company with the exception of a small block of shares. Furthermore, the ECJ had to decide whether there is a 'branch of activity' as defined by Article 2(i) of the Merger Directive where the future cash flow requirements of the company receiving the transfer must be satisfied by a credit facility from a financial institution which insists that the shareholders of the company receiving the transfer provide security in the form of shares representing the capital of that company.

### 2.3.2 The ECJ decision

The ECJ decided the case on 15 January 2002. First, following the '*Leur-Bloem*' case, the judges agreed that the ECJ has jurisdiction to determine whether the tax regime applicable to this situation is in line with the provisions of the Merger Directive, because Denmark had decided to treat purely internal situations in the same way as those governed by the Merger Directive.

Then, the ECJ held that the 'transfer of assets' within the meaning of the Merger Directive must encompass all the assets and liabilities relating to a branch of activity and pointed to Article 2(i) which provides that only an entity capable of functioning by its own means can constitute a branch of activity. The ECJ noted that the assets and liabilities relating to a branch of activity should be transferred in their entirety. If the transferring company retains the proceeds of a large loan contracted by it and transfers the obligations deriving from that loan to the company which receives assets, the two elements are dissociated and this transaction is not the 'transfer of assets' within the meaning of the Merger Directive. However, the ECJ added, the retention of a small number of shares in a third company by the transferring company does not automatically exclude that a branch of activity, unrelated to those shares, has been transferred.

The ECJ further discussed whether there is a 'branch of activity' where the future cash flow requirements of the receiving company must be satisfied by a credit facility from a financial institution which insists, in particular, that the shareholders of the company receiving the transfer provide security in the form of shares representing the capital of that company. The court held that the independent operation of the business must be assessed primarily from a functional point of view - the assets transferred must be able to operate as an independent undertaking without needing to have recourse for that purpose, to additional investments or transfers of assets - and only secondarily from a financial point of view. The fact that a company receiving a transfer takes out a bank loan under normal market conditions cannot in itself mean that the transferred business is not independent, even where the loan is guaranteed by shareholders of the receiving company who provide their shares in that company as security for the loan granted.

The ECJ also noted that the position may, however, be different where the financial situation of the receiving company, as a whole, makes inevitable the conclusion that it will very probably not be able to survive by its own means. An example may be, where the income of the company receiving the transfer does not appear sufficient to cover the

payments of principal and interest due in respect of its debts. The ECJ concluded that the assessment as to whether or not a business is independent must, however, be left to the national court having regard to the particular circumstances of the case.

### 2.3.3 Implications of the '*Andersen og Jensen*' case

'*Andersen og Jensen*' explained further the definition of 'branch of activity' of the Merger Directive. In our opinion, the judgment provides a good example on what circumstances might be taken into account when one has to decide whether a branch of activity is transferred. However, the ECJ's decision was issued taking into account particular circumstances of the case and under different circumstances the result might not be the same.

## 2.4 Articles 2(d), 8(1) and 11(1) (a) of the Merger Directive: the '*Kofoed*' case

### 2.4.1 Facts of the case

Hans Markus Kofoed, a Danish tax resident, originally owned half of the share capital of a Danish company Cosmopolit Holding ApS ('CH'). The other half of the shares in the company were owned by another Danish individual Niels Toft. In 1993 Kofoed and Toft carried out an exchange of shares, involving a newly acquired Irish company and CH, followed by a dividend distribution from CH through the Irish company to Kofoed and Toft. It was anticipated that the exchange of shares would not trigger any Danish taxes, but the local tax authorities and the Danish National Tax Tribunal decided that the exchange of shares was not tax exempt. In their view, the exchange of shares and dividend distribution were elements of a single transaction.

### 2.4.2 The ECJ decision

### 2.4.3 Article 2(d) and 8(1)

The ECJ held that a monetary payment made by an acquiring company cannot be classified as a 'cash payment' made in connection with the exchange of shares for the purposes of Article 2(d) of the Merger Directive merely because of a certain temporal or other type of link to the acquisition, or possible tax avoidance intent. The ECJ supported this interpretation by the purpose behind the Merger Directive, which is to eliminate fiscal barriers to cross-border restructuring of undertakings, by ensuring that any increases in the value of shares are not taxed before they are actually realised and by preventing operations involving high levels of capital gains realised on exchanges of shares from being exempt from income tax simply because they are part of a restructuring operation. The ECJ concluded that nothing in the case-file demonstrates that the dividend in question formed an integral part of the necessary consideration, which is the necessary condition for it to qualify as a 'cash payment'. On the contrary - at no time was there any agreement between Mr Toft and Mr Kofoed, on the one hand, and the Irish company, on the other, by which the latter was bound to distribute that dividend.

### 2.4.4 Article 11(1) (a)

Further the ECJ had to reply whether tax authorities may react to a possible abuse of rights, even though national law has not enacted specific measures to transpose Article 11(1) (a)

of the Merger Directive. This part of the ECJ's decision is discussed in more detail in chapter III. Anti-avoidance provisions of the Merger Directive.

#### 2.4.5 Implications of the 'Kofoed' case

It is apparent from this case that the ECJ does not allow the introduction of further requirements to provisions contained in the Directive - an important factor in determining legal certainty.

The decision also sheds new light on the meaning of exchange of shares within the context of the Merger Directive as it provides additional criteria as to what forms an integral part of the necessary consideration for 'exchange of shares' purposes.

Furthermore, the case provides guidance on the relationship between anti-avoidance rules and national tax rules, particularly in a situation where Article 11(1)(a) has not been transposed into national tax law. This is discussed in more detail in chapter III. Anti-avoidance provisions of the Merger Directive.

Finally, it can be said that the ruling probably has limited effect for Danish taxpayers (other than the parties directly involved) since the respective provisions of Danish legislation have been changed.

### 3. Pending cases

On 14 June 2007 German national court lodged the reference for a preliminary ruling in the case '*Ernst & Young Deutsche Allgemeine Treuhand AG v Finanzamt Stuttgart-Körperschaften*' (the case reference number is C-285/07). The ECJ is asked to interpret Articles 8(1) and (2) of the Merger Directive, in particular, whether these provisions preclude the taxation rules of a Member State under which, on the transfer of shares in one EU company limited by shares to another, the transferring party may maintain the book value of the shares transferred only if the receiving company has itself valued the shares transferred at their book value ('double book carry-over'). If the answer is negative, the court is also asked whether the above rules are contrary to Articles 43 and 56 of the EC Treaty, even though the 'double book value carryover' is required also on a transfer of shares in a company limited by shares to one that is subject to unlimited taxation.

## II. Methodology of the Survey

### 1. Methodology

Officials from the Taxation and Customs Union Directorate General (TAXUD) prepared a detailed questionnaire to analyse the question as to whether the modified Merger Directive, adopted by the European Council on 17 February 2005, as Directive 2005/19/EC had been properly implemented in all 27 Member States as of 1 January 2008. The questions were identified by reference to the articles in the Merger Directive to which they were focused.

The EU champions from the Ernst & Young tax practice in each Member State, who form the Ernst & Young EU Competence Group, commented on 62 questions covering all aspects of the Merger Directive.

Given the volume and complexity of the information that was gathered the results of the survey are visually represented in a Summary of Findings. This Summary of Findings illustrates key tension areas within each Member State through a 'Red/Amber/Green' flagging system, to identify aspects of domestic tax law that are, in our view, possibly non-compliant (Red), doubtfully compliant (Amber), or compliant (Green), respectively.

Each question was evaluated through the flagging system, resulting in 1,675 evaluations.

It is appreciated that this practical approach could be open to criticism from an academic standpoint, but it allows the reader of the Survey to easily identify the problem areas of the implementation of the Merger Directive in the 27 Member States.

### 2. General Conclusions

The evaluation of how the Merger Directive has been implemented in the 27 Member States following this approach leads to the following general conclusions:

#### 2.1 Uncertainty regarding certain terms used in the Merger Directive

The Merger Directive does not define terms such as 'securities' (2.1), 'branch of activities' (2.6), 'real value' and 'value for tax purposes' (4.1), 'provisions and reserves' (5.1), 'head office' (10b.2) and 'comparable circumstances' (10c.1).

The Survey shows that the absence of definitions in the Merger Directive leads to uncertainties regarding the meaning of these terms in most of the Member States. In eight or more of the 27 Member States the local interpretation of terms for six different items used in the Merger Directive was evaluated as doubtfully compliant or even possibly non-compliant with the Merger Directive.

This result underlines the importance of further work to establish a common understanding of definitions in the Merger Directive. If the Merger Directive uses a specific term without giving a definition (and without relevant case law at the European Court of Justice) in case of doubt the legislator and/or the tax administration in almost all Member States tend to follow a local interpretation of the term which may not lead to a common EU understanding.

## 2.2 Loss of taxation rights and exit charges

While the Merger Directive deals with what happens while assets remain taxable in a Member State following a reorganisation, in many transactions following the Merger Directive a Member State will see assets leave its taxing jurisdiction. In this context the question arises as how assets and liabilities will be evaluated for tax purposes in case of exit taxation and whether or not the Member State of origin grants a tax deferral. This issue may come up for example in the context of assets and liabilities not effectively connected with a permanent establishment in the Member State of the transferring company (4.5, 4.7 and 9.3), the transfer of the registered office of a company from one Member State to the other (10b.1) or the treatment of permanent establishments in a third Member State (10.3).

Based on the Survey eight different items associated with the loss of the taxation right were evaluated in eight or more of the 27 Member States as doubtfully compliant or possibly non-compliant with the Merger Directive or with EC Primary Law. As the Merger Directive is silent on exit charges almost all of the Member States assume from this that exit charges are compliant with EC Law. The Ernst & Young EU Competence Group does not share this conclusion and in principle evaluated exit charges as being doubtfully compliant with EC Primary Law.

Given the importance of this matter the Survey contains a respective separate chapter.

## 2.3 Additional requirements

A further outcome of the Survey is that several Member States only grant the benefits of the Merger Directive under more stringent requirements compared to the Merger Directive itself. This applies to the qualifying exchange of shares (2.4), the carry over of balance sheet values (4.9), provisions and reserves (5.4) and losses (6.4), and the tax exempt transfer of assets (9.2).

In at least eight or more Member States four different items were identified as doubtfully compliant or possibly non-compliant with the Merger Directive.

## 2.4 Consideration of ECJ rulings on EC Primary Law

Article 11 of the Merger Directive allows the Member States to refuse or withdraw the benefits of the Merger Directive in case of tax evasion or tax avoidance. The ECJ has published considerable guidance on the parameters for anti-abuse legislation.

For various Member States the position was taken that the legislator did not follow the guidance given by the ECJ (11.3). In case of specific anti-abuse provisions in context with the implementation of the Merger Directive the rules were often evaluated as doubtfully compliant with EC Primary Law.

Given the importance of this matter for the Survey the conclusion is outlined in a separate chapter of the Survey.

## 3. Final remarks

Overall, 37 items were identified in the 27 Member States and evaluated as possibly non-compliant with the Merger Directive and/or EC Primary Law. It is even more important that 476 out of a total of 1,675 evaluations were considered as doubtfully compliant with

the Merger Directive or with EC Primary Law. This allows the conclusion that many of the items raised in the Survey will continue to be subject to controversy discussion between EU tax experts. The uncertainty on these tax issues might underline the practical experience that in planned EU cross border reorganizations companies often do not take advantage of the Merger Directive.

One may ask why that is? One answer is that until very recently the corporate law in many countries was not in place to allow cross border mergers, and the European Company was of little interest. With the introduction of the appropriate corporate law, in the form of Directive 2005/56/EC on cross-border mergers of limited liability companies, it may be that companies will wish to take greater advantage of the Merger Directive in the tax area. The Directive on cross-border mergers of limited liability companies had to be transposed into national law by 15 December 2007.



### III. Anti-avoidance provisions of the Merger Directive

#### 1. Introduction

##### 1.1 The benefits of the Merger Directive may be refused where tax avoidance is present

The preamble of the Merger Directive provides that Member States may refuse to apply the Merger Directive where the objective of the operation is tax avoidance or tax evasion.

Anti-avoidance provisions are embedded in Article 11 (1) (a) of the Merger Directive. This Article permits a Member State to refuse to apply or withdraw the benefit of all or any part of the provisions of the Merger Directive 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 has as its principal objective or as one of its principal objectives tax evasion or tax avoidance. The provision further sets out that tax avoidance or tax evasion is present where the transaction is not carried out for 'valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation'.

##### 1.2 The unclear borderline between 'tax avoidance' and 'valid commercial reasons'

Effectively, Article 11 (1) (a) of the Merger Directive confirms that if there is a 'valid commercial reason' no 'tax avoidance' is present and vice versa. However, the Merger Directive does not mark the borderline between these concepts clearly. Since it is a European Directive that introduces the concept of tax avoidance it would be for national courts to consider the concept of 'tax avoidance' in accordance with the Community law principles.<sup>19</sup> Such principles are articulated by the ECJ in a number of cases.

Many ECJ cases discuss 'tax avoidance' in the light of the EC Treaty freedoms. The meaning of 'tax avoidance' in Article 11 (1) (a) of the Merger Directive is discussed by the ECJ in the '*Leur-Bloem*' case and the '*Kofoed*' case.

#### 2. ECJ cases interpreting Article 11 (1) (a) of the Merger Directive

##### 2.1 The '*Leur-Bloem*' case

A number of important concepts derive from the '*Leur-Bloem*' case.<sup>20</sup>

First, the case suggests that 'tax avoidance' is present where the subjective intention of a taxpayer is to obtain a purely fiscal advantage thus marking the borderline where a transaction ceases to constitute a 'valid commercial reason':

*'It is clear from ... the Directive, that 'valid commercial reasons' is a concept involving more than the attainment of a purely fiscal advantage. A merger by exchange of shares having only such an aim cannot therefore constitute a valid commercial reason ...'*<sup>21</sup>

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<sup>19</sup> See, to that extent, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee 'The application of anti-abuse measures in the area of direct taxation - within the EU and in relation to third countries', COM(2007) 785 final, 10 December 2007.

<sup>20</sup> For details on the facts of the case reference is to be made to I.2.2.1 above.

<sup>21</sup> C-28/95 '*Leur-Bloem*' [1997] ECR I-4161, paragraph 47.

It follows that where a purely fiscal advantage is present, benefits of the Merger Directive may be denied.

Secondly, the '*Leur-Bloem*' case sets out a number of steps and principles which should be taken into account in determining whether the planned operation has as its principal objective or as one of its principal objectives 'tax evasion' or 'tax avoidance'. As a first step, the general examination of the operation in each particular case must be carried out. Such an examination then must be open to judicial review. Finally, national provisions and internal procedures of a Member State must be proportional in achieving the aim of Article 11(1)(a) of the Merger Directive and should not go beyond what is necessary to prevent such tax evasion or tax avoidance.

Thirdly, the '*Leur-Bloem*' case highlights the supremacy principle of the Community law thus reminding that Community measures cannot be made subject to or conditional upon the requirements of the national laws of each Member State.

Finally, one of the ECJ's arguments somewhat disagrees with later ECJ decisions. Namely, the ECJ stated in the decision that a 'purely fiscal advantage' will be present where the operation is carried out to bring about a horizontal setting-off of tax losses between the participating companies. Arguably, this contradicts with later ECJ decisions which suggest that not only the intention to obtain a tax advantage (subjective intention) is important, but also the objective circumstances of the transaction have to be considered when determining 'tax avoidance'.

In addition, the '*Leur-Bloem*' case suggests that several particular factors cannot be decisive on their own when 'tax avoidance' (or a 'valid commercial reason') is assessed. These factors are

- (a) involvement of a newly-created holding company;
- (b) restructuring of companies which already form an entity from the economic and financial point of view; and
- (c) creating a specific structure for a limited period of time and not on a permanent basis.

In our view, this example-based guidance might have assisted the Dutch national court to decide the case, however might not be helpful for other taxpayers because it applies to particular circumstances of the '*Leur-Bloem*' case only. Indeed, the ECJ meant to issue the guidance for the '*Leur-Bloem*' case only as it held in this regard:

*'... national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination'.*

## 2.2 The '*Kofoed*' case

The '*Kofoed*' case<sup>22</sup> discusses the application of Article 11(1)(a) of the Merger Directive in a situation where Article 11(1)(a) is not implemented into national provisions of a Member State. However, this case does not assist in determining the borderline between 'tax avoidance' and 'valid commercial reasons' but rather confirms that

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<sup>22</sup> For details on the facts of the case reference is to be made to I.2.4.1 above.

*'Article 11(1)(a) of [the Merger Directive] reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices that is to say, transactions carried out not in the context of normal commercial operations but solely for the purpose of wrongfully obtaining advantages provided for by Community law'.*

This paragraph of the case links Article 11(1)(a) of the Merger Directive to the general Community law principle that abuse of rights is prohibited. Arguably, it can be implied from the above that tax avoidance in Article 11(1)(a) of the Merger Directive is 'the same' tax avoidance which is contrary to the EC Treaty and 'the same' tax avoidance which is prohibited under the provisions of the 6<sup>th</sup> VAT Directive<sup>23</sup> (now consolidated into Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax). Therefore, it would be necessary to ascertain what constitutes 'tax avoidance' according to the EC Treaty as now it is clear that the same understanding can be applied when tax avoidance under the provisions of the Merger Directive is assessed.

### **3. 'Tax avoidance' concept as developed by the ECJ and the European Commission**

The ECJ has discussed tax avoidance when asked to interpret the EC Treaty. In particular, the court has established that restrictions on the freedom of establishment of the EC Treaty can be justified by imperative reasons in the public interest. One of such reasons is the necessity to reduce the risk of tax avoidance. For the purposes of further analysis (and for the sake of clarity) it has to be made clear that abuse of rights (and in this context - 'tax avoidance') may be present where a 'wholly artificial arrangement' exists. The question is how to identify whether a particular arrangement is 'wholly artificial' or, conversely, carried out for 'valid commercial reasons'?

The European Commission has suggested that the detection of a wholly artificial arrangement *'amounts in effect to a substance-over-form analysis. Application of the relevant tests in the context of EC Treaty freedoms and corporate tax Directives necessitates an evaluation of their objectives and purposes against those underlying the arrangements entered into by their prospective beneficiaries (taxpayers).'*<sup>24</sup>

The guidance of the ECJ in this regard is discussed further below.

#### **3.1 Wholly artificial arrangement = subjective intention + objective circumstances**

The *'Cadbury Schweppes'* case suggests that two criteria have to be present to conclude that a 'wholly artificial arrangement' exists for the purposes of the freedom of establishment of the EC Treaty: in addition to a subjective element consisting of the intention to obtain a tax advantage (discussed in Section 3.1.1) there have to be objective circumstances showing that the objective pursued by the freedom of establishment of the EC Treaty has not been achieved (discussed in Section 3.1.2).<sup>25</sup>

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<sup>23</sup> Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, OJ 1977 L 145, p 1, as amended.

<sup>24</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee 'The application of anti-abuse measures in the area of direct taxation - within the EU and in relation to third countries', COM(2007) 785 final, 10 December 2007, page 4.

<sup>25</sup> C-196/04 *'Cadbury Schweppes and Cadbury Schweppes Overseas'* [2006] ECR I-0000, paragraph 64.

Before further analysis of these two elements is made it has to be noted that a number of ECJ cases suggest using this approach when other EC Treaty provisions or EU Directives and Regulations require to consider the concept of 'wholly artificial arrangements' .

### 3.1.1 Subjective intention

First, the subjective intention to obtain a tax advantage has to be present to conclude that a 'wholly artificial arrangement' exists. Importantly, the subjective intention alone is not sufficient to determine that a 'wholly artificial arrangement' is there. The 'Cadbury Schweppes' case confirms this:

*'...[the fact] that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape tax.'*<sup>26</sup>

In many cases the ECJ has held that a taxpayer is allowed to enjoy the benefits available in other Member States unless the arrangements of the taxpayer are not constructed in a 'wholly artificial' way. For example, in the 'Barbier' case the court said:

*'... a Community national cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided by the rules in force in a Member State other than his state of residence.'*<sup>27</sup>

Similarly, in the 'Eurowings' case<sup>28</sup> the court discussed the freedom to provide services and concluded that availability of a more beneficial regime in another Member State does not deprive a taxpayer from the benefits of the EC Treaty. The 'ICI'<sup>29</sup> case also confirms that the establishment of a company in another Member State does not, of itself, necessarily entail tax avoidance. The ECJ took a similar approach in the Centros case and the Inspire Art case.<sup>30</sup>

Arguably, these cases contradict the view expressed in the 'Leur-Bloem' case where the ECJ held that 'tax avoidance' exists where the operation is aimed at obtaining a 'purely fiscal advantage'. Thus interpretation of Article 11 (1) (a) in the 'Leur-Bloem' case may be misleading and should be considered carefully before applied.

### 3.1.2 Objective circumstances

In addition to the subjective intention, the 'wholly artificial arrangement' concept requires to consider whether a taxpayer conducts activities in line with the objective pursued by the freedom of establishment of the EC Treaty<sup>31</sup> or, as the case may be, in line with European Directives. What is meant by 'objective circumstances' or factors in the light of the freedom of establishment of the EC Treaty has been discussed by the ECJ in a number of cases. The 'Cadbury Schweppes' case is quoted most often in this regard:

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<sup>26</sup> C-196/04 'Cadbury Schweppes and Cadbury Schweppes Overseas' [2006] ECR I-0000, paragraph 63.

<sup>27</sup> C-364/01 'Barbier' [2003] ECR I-15013, paragraph 71.

<sup>28</sup> C-294/97 'Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna' [1999] ECR I-07447.

<sup>29</sup> C-264/96 'Imperial Chemical Industries v Kenneth Hall Colmer' (Her Majesty's Inspector of Taxes) [1998] ECR I-4695.

<sup>30</sup> C-212/97 'Centros' [1999] ECR I-1459; C-167/01 'Inspire Art' [2003] ECR I-10155.

<sup>31</sup> C-196/04 'Cadbury Schweppes and Cadbury Schweppes Overseas' [2006] ECR I-0000, paragraph 52.

*'...that finding must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which [a company] physically exists in terms of premises, staff and equipment. ... If checking those factors leads to the finding that [a company] is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that [company] must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a 'letterbox' or 'front' subsidiary.'*<sup>32</sup>

Overall, the ECJ's approach is well summarized in the 'Part Service' case<sup>33</sup> which discussed the provisions of the 6<sup>th</sup> VAT Directive:

*'As regards the second criterion, the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (...) those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organization or guarantee considerations.'*<sup>34</sup>

### **3.2 An alternative - the escape clause in national law?**

The Advocate General Geelhoed in the 'Thin Cap GLO' case<sup>35</sup> suggested that for the purposes of determining whether a particular transaction represents a 'wholly artificial arrangement', national anti-abuse measures may comprise criteria to target situations in which the probability of abuse is the highest:

*'It is in my view valid, and indeed to be encouraged, for Member States to set out certain reasonable criteria against which they will assess compliance of a transaction (...) and in case of non-compliance with these criteria for them to presume that the transaction is abusive, subject to proof to the contrary (...) The setting out of such criteria is, to my eyes, in the interests of legal certainty for taxpayers, as well as workability for tax authorities.'*<sup>36</sup>

The ECJ followed the Advocate General Geelhoed in this regard and suggested that *'national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices (...)'*

Importantly, both the Advocate General Geelhoed and the ECJ noted that on each occasion where the existence of a 'wholly artificial arrangement' cannot be ruled out, the taxpayer concerned should be given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement. This view is strongly supported by the European Commission:

*'(...) burden of proof should not lie solely on the side of the taxpayer and that account should be taken of the general compliance capacity of the taxpayer and of the type of*

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<sup>32</sup> C-196/04 'Cadbury Schweppes and Cadbury Schweppes Overseas' [2006] ECR I-0000, paragraphs 67 and 68.

<sup>33</sup> C-425/06 'Ministero dell'Economia e delle Finanze v Part Service Srl' [2008] ECR I-0000.

<sup>34</sup> C-425/06 'Part Service' [2008] ECR I-0000, paragraph 62.

<sup>35</sup> Opinion of Advocate General Geelhoed in Case C-524/04 'Test Claimants in the Thin Cap Group Litigation' [2007] ECR I-02107.

<sup>36</sup> Opinion of Advocate General Geelhoed in Case C-524/04 'Test Claimants in the Thin Cap Group Litigation' [2007] ECR I-02107, paragraph 66.

*arrangement in question. It is equally vital in the interest of proportionality that the result of the relevant assessment by the tax authority can be made subject to an independent judicial review. Moreover, the adjustments to the taxable income as a result of the application of the anti-abuse rules should be limited to the extent that is attributable to the purely artificial arrangement. With regard to intra-group transactions that means adherence to the arm's length principle, i.e. the commercial terms as would have been agreed upon between unrelated parties. However, this, in the Commission's view should not prevent Member States from imposing penalties on taxpayers who have made use of abusive schemes to avoid tax'.<sup>37</sup>*

#### **4. 'Tax avoidance' in the Merger Directive = subjective intention + objective circumstances?**

As follows from the analysis above, the ECJ suggests that 'tax avoidance' is present where the arrangement is 'wholly artificial'. Conversely, if the arrangement has some economic substance behind it ('genuine economic activity'), it will not be considered as 'wholly artificial'. As the actual circumstances of the cases may differ, the ECJ strongly suggests considering whether tax avoidance exists on a case-by-case basis.<sup>38</sup> As discussed above, the European Commission supports this view.

According to Article 11(1)(a) of the Merger Directive a Member State may refuse to apply or withdraw the benefits of the Merger Directive where the principal objective or one of the principal objectives of the operation is tax avoidance. ECJ case law suggests that Article 11(1)(a) should be interpreted in line with ECJ decisions discussing the concept of 'wholly artificial arrangements'.

#### **5. Summary**

Article 11(1)(a) of the Merger Directive provides that Member States may refuse to apply or withdraw the benefits of the Merger Directive when the operation aims to avoid tax. Article 11(1)(a) further provides that tax avoidance is present where the transaction is not carried out for valid commercial reasons. It also draws an example that such a reason is rationalisation or restructuring of the activities of the companies participating in the operation.

The Merger Directive does not give any further guidance on how to distinguish between 'tax avoidance' and 'valid commercial reasons', namely, where is the borderline between these concepts. However, some further guidance can be found in the decisions of the ECJ.

The '*Leur Bloem*' case suggests that tax avoidance will be present where a taxpayer intends to obtain a purely fiscal advantage. Other ECJ cases suggest that tax avoidance will be present where, along with the subjective intention to obtain a purely fiscal advantage the objective circumstances of the operation confirm that the arrangement is 'wholly artificial'. It can be concluded from the case law that Member States may refuse to apply the benefits of the Merger Directive where both the subjective intention and objective circumstances confirm that the arrangement does not have any economic purpose.

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<sup>37</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee 'The application of anti-abuse measures in the area of direct taxation - within the EU and in relation to third countries', COM(2007) 785 final, 10 December 2007.

<sup>38</sup> See, for example, C-196/04 'Cadbury Schweppes and Cadbury Schweppes Overseas' [2006] ECR I-0000, paragraph 92.

## IV. The Merger Directive and exit charges

### 1. Introduction

The Merger Directive aims to introduce the regime of deferred taxation on gains accruing to a company of one Member State when this company transfers its assets, liabilities or shares to another company in another Member State (ie when assets, liabilities or shares, theoretically, 'exit' the tax jurisdiction of the first Member State) or when SE or SCE transfers its registered office from one Member State to another 'leaving' its permanent establishment behind. The tax deferral is, however, subject to certain restrictions and conditions.

The provisions of the Merger Directive and the restrictions are explained in more detail below. Before further analysis it has to be noted that, as this Chapter focuses on exit charges, various ways of structuring the operations under the Merger Directive are not analysed here in more detail.

#### 1.1 Transfer of assets: merger, division, partial division, transfer of assets

The Merger Directive provides that a company transferring the assets from one Member State to another is allowed to defer taxation on gains if certain conditions are fulfilled.

First, of course, the transaction has to be covered by the Merger Directive, i.e. it has to be a cross-border merger, division, partial division or transfer of assets as defined by the Merger Directive.

Second, the deferral is granted provided that assets and liabilities remain effectively connected with the receiving company's permanent establishment in the Member State granting the relief. Generally, this means that the deferred tax should be paid as soon as the connection between assets and liabilities and that permanent establishment ceases. For example, this might be at the point when the assets are physically removed from the country of the transferring company or if the cross-border merger results in an unconditional transfer of assets from a company in one Member State to a company in another Member State at a profit. In this chapter tax levied by a Member State under these and similar circumstances will be referred to as 'exit charges'.

In the context of EU tax law the term 'exit charges' (also known as 'exit taxes') is not defined and, commonly, is used to refer to any corporate tax or income tax imposed by a particular Member State when a tax subject (for example, a company) or a tax object (for example, an asset) leaves (or is removed from) that Member State's jurisdiction. Broadly, Member States have been willing to impose 'exit charges' to compensate loss of tax revenue from a particular source in their territory at the point that source moves to another country.

#### 1.2 Transfer of the registered office of a SE or SCE

In 2005 the Merger Directive was amended to cover the transfer of the registered office of a SE or SCE from one Member State to another. Briefly, the Merger Directive now provides that assets and liabilities are not taxed upon the transfer where they remain effectively connected with SE's (or SCE's) permanent establishment 'left behind'. Again, the exit charge would be due where the connection between assets, liabilities and the permanent establishment come to an end. It also means that the tax deferral would not be available if assets were physically removed from the Member State of the permanent establishment.

### 1.3 Transfer of securities: exchange of shares

Broadly, the Merger Directive provides that the transfer of shares held by a company ('A') in one Member State in another company ('B') to a person ('C') in another Member State should not result in the taxation of capital gains. This relief is granted subject to several conditions.<sup>39</sup> As these conditions are not relevant for the analysis of 'exit charges' in this Chapter they will not be discussed in more detail.

The Merger Directive does not require the company benefiting from the relief (i.e. company 'A') to remain within the tax jurisdiction of the Member State granting the relief. It is not entirely clear whether this condition should be implied from the provisions of the Merger Directive.

Neither the Merger Directive makes the share exchange relief conditional upon a minimum holding period after the 'old' shares have been transferred and 'new' shares received in exchange. Member States may raise questions asking whether the tax relief should be conditional upon a minimum holding period of 'new' (or, either 'old') shares. The Merger Directive does not provide a clear answer to that question.

## 2. Exit charges and European Community law

As it can be seen from the above, the Merger Directive suggests that the relief from the 'exit charge' is granted to companies subject to the condition that assets and liabilities maintain nexus with the Member State of the transferring company (or permanent establishment of the SE or SCE 'left behind'). This approach of the Merger Directive may be regarded as encouraging exit charges which are arguably contrary to the provisions of the freedom of establishment of the EC Treaty as interpreted by the ECJ. However, the better view would seem to be that the Merger Directive is simply silent on the question for political reasons. The question of exit charges therefore remains unresolved and we consider the arguments below.

### 2.1 'Exit charges' in the light of the freedom of establishment

The EC Treaty does not contain provisions which provide directly that exit charges are prohibited. Instead, the EC Treaty grants nationals of Member States particular freedoms such as the freedom of establishment (Articles 43 and 48 of the EC Treaty). The freedom of establishment is a wide concept. The borderlines of the freedom have been shaped by the ECJ in many cases. In particular, the ECJ has discussed 'exit charges' in the light of the freedom of establishment in the '*Lasteyrie du Saillant*' case<sup>40</sup>, the '*N*' case<sup>41</sup>, and the '*Sweden v Commission*' case<sup>42</sup>.

According to the EC Treaty the freedom of establishment includes the right to set up and manage undertakings, in particular companies or firms (ie companies constituted under civil or commercial law) under the conditions laid down for its own nationals by the law of the country where such establishment is effected. The freedom of establishment applies to companies and firms formed in accordance with the law of a Member State and having their

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<sup>39</sup> For example, the definition of the 'exchange of shares' (Article 2(d) of the Merger Directive) suggests that after the transaction the acquiring company has to possess the majority of the voting rights in the acquired company.

<sup>40</sup> C-9/02 '*Hughes de Lasteyrie du Saillant*' [2004] ECR I-2409.

<sup>41</sup> C-470/04 '*N v Inspecteur van de Belastingdienst Oost/kantoor Almelo*' [2006] ECR I-7409.

<sup>42</sup> C-104/06 '*Commission v Sweden*' [2007] ECR I-0000.



registered office, central administration or principal place of business within the EU in the same way as natural persons who are nationals of Member States. The EC Treaty provides that restrictions on the freedom of establishment of the EC Treaty are prohibited irrespective of whether these restrictions affect a parent company or a subsidiary within a group.<sup>43</sup> Generally, companies should not be either restricted from setting-up of agencies and branches in other Member States.

Furthermore, the EC Treaty is directed not only at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that state, but also they prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition of Article 48.<sup>44</sup> In a 'classic' exit charge case it is the Member State of origin who imposes restrictions on the freedom of establishment. In particular, a company will be subject to 'exit charge' restrictions if it intends to move its assets, liabilities and shares to another Member State applying the Merger Directive.

It has to be noted that restrictions on the freedom of establishment can be justified under certain circumstances. The ECJ has established that it could be the case where, for example, the restriction aims to prevent tax avoidance or if there is a need to ensure the balance in the allocation of taxing rights between Member States.

## 2.2 Are 'exit charges' compatible with the EC Treaty?

### 2.2.1 'Exit charges' not compatible with the EC Treaty

There is a well supported view that 'exit charges' should be prohibited as an unjustified restriction on the freedom of establishment. This view has been elaborated by the ECJ in several cases and supported by the European Commission. This view suggests that, arguably, 'exit charges' which are not prevented by the Merger Directive are not nevertheless in line with the EC Treaty.

In 2006 the European Commission issued a paper and said in this regard:

*'The 2005 amendments to the Merger Directive ensure that, provided certain conditions are met, the transfer of the registered office of a SE or of a SCE from one Member State to*

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<sup>43</sup> Restrictions on a parent company were considered, for example, in the *'Marks & Spencer'* case (C-446/03 *'Marks & Spencer plc v David Halsey'* (Her Majesty's Inspector of Taxes) [2005] ECR I-10837). In the *'Marks & Spencer'* case a UK parent company wanted to offset losses incurred by its subsidiary established in another Member State. However, under UK legislation a company was only allowed to deduct losses if the losses were incurred by a UK resident subsidiary. Marks & Spencer claimed that this is contrary to Articles 43 and 48 EC Treaty, because it affects the decision of a parent company as to where a subsidiary should be established and the ECJ agreed. Restrictions on a subsidiary have been considered in several other ECJ decisions, for example, in the *'Oy AA'* case (C-231/05, [2007] ECR I-6373). In this case the ECJ discussed whether Finnish rules constitute restriction where a tax deduction for a group contribution by a Finnish resident company to the loss-making UK-resident parent was disallowed. The ECJ held that the Finnish rules constitute a restriction on the freedom of establishment since the regime introduced a difference in treatment between subsidiaries established in Finland depending of where their parent has its corporate seat. Similarly, in the *'Thin Cap GLO'* case (C-524/04 *'Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue'* [2007] ECR I-2107) it was argued that UK national measures on interest deduction are less favorable to a subsidiary where a loan was granted by a parent company established in another Member State.

<sup>44</sup> C-81/87 *'Daily Mail and General Trust plc'* [1988] ECR 5483, paragraph 16; C-264/96 *'Imperial Chemical Industries v Kenneth Hall Colmer'* (Her Majesty's Inspector of Taxes) [1998] ECR I-4695, paragraph 21; C-446/03 *'Marks & Spencer'*, paragraph 31; C-196/04 *'Cadbury Schweppes and Cadbury Schweppes Overseas'* [2006] ECR I-0000, paragraph 42.

*another will not result in immediate taxation of unrealized gains on assets remaining in the Member State from which the office is transferred. The amendments are silent on those assets which do not remain connected to a permanent establishment in the Member State from which the registered office is transferred. However, the Commission considers that the principles of 'de Lasteyrie' apply to such 'transferred' assets ... It follows from 'de Lasteyrie' that taxpayers who exercise their right to freedom of establishment by moving to another Member State may not be subject to an earlier or higher tax charge than taxpayers who remain in one and the same Member State. If a Member State allows tax deferral for transfers of assets between locations of a company resident in that Member State, then any immediate taxation in respect of a transfer of assets to another Member State is likely to be contrary to the EC Treaty freedoms.'*<sup>45</sup>

Several ECJ cases, such as the '*Lasteyrie du Saillant*' case, the '*N*' case, the '*Sweden v Commission*' case support this view. Generally, in these cases the ECJ held that exit charges are unjustified restrictions on the freedom of establishment of the EC Treaty because they prevent nationals (individuals) of Member States from moving and establishing in other Member States. Taxpayers found it being contrary to their EC Treaty freedoms, because their position was more disadvantageous if compared to the position of those taxpayers who did not change their place of residence.

The ECJ and the European Commission appear to be of the view that a Member State is not prevented by EC law from assessing the amount of income on which it wishes to preserve its tax jurisdiction, provided this does not give rise to an immediate charge to tax upon exit of that Member State's jurisdiction and provided there are no further conditions attached to the deferral. A requirement to submit a tax declaration at the time of the transfer for the purposes of assessing the income is considered as a proportionate requirement to ensure allocation powers of taxation between Member States. The respective ECJ decisions are analysed in more detail below.

### 2.2.2 The '*Lasteyrie du Saillant*' case

In '*Lasteyrie du Saillant*' a taxpayer moved its tax residence from France to Belgium and was subject to immediate taxation on the unrealized increase in value of shares which he held in a French company. The ECJ held that a taxpayer wishing to transfer his tax residence outside French territory was subjected to disadvantageous treatment in comparison with a person who maintained his residence in France, because that taxpayer became liable to tax on income which had not yet been realized and which he therefore did not have, whereas, if he had remained in France, increases in value would be taxed when they had been actually realized. The ECJ held that the difference in treatment is likely to discourage a taxpayer from carrying out such transfer and thus, the French provision restricted the exercise of the freedom of establishment.

The ECJ did not accept that in '*Lasteyrie du Saillant*' the restriction can be justified based on the aim of preventing tax avoidance, because a particular provision was not specifically designed to exclude from a tax advantage wholly artificial arrangements aimed at circumventing national law, but was aimed generally at any situation in which a taxpayer 'transfers his tax residence outside France for any reason whatever'. The ECJ further referred to several earlier decisions and held that

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<sup>45</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: 'Exit taxation and the need for co-ordination of Member States' tax policies', COM(2006)825 final, Brussels, 19 December 2006, pages 5 and 6; published at <http://europa.eu>.

*'the transfer of a physical person's tax residence outside the territory of a Member State does not, in itself, imply tax avoidance. Tax evasion or tax fraud cannot be inferred generally from the fact that the tax residence of a physical person has been transferred to another Member State and cannot justify a fiscal measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty'.<sup>46</sup>*

### 2.2.3 The 'N' case

In the 'N' case the ECJ discussed similar restrictions. In this case, Mr N moved his permanent residence from the Netherlands to the UK in 1997. When he emigrated, he declared taxable income and obtained, at his request, a deferment of payment of those amounts, however such deferment was made subject to the provision of security. Following the '*Lasteyrie du Saillant*' case, Mr N claimed that the obligation to provide security, with which he had to comply in order to benefit from a deferment of tax payments, constitutes an obstacle to the rights conferred on him by the EC Treaty.

In this case the ECJ analyzed whether the requirement to provide a security can be considered as compatible with Article 43 of the EC Treaty and held that the obligation to provide guarantees 'goes beyond what is strictly necessary in order to ensure the functioning and effectiveness of such a tax system based on the principle of fiscal territoriality'. The ECJ agreed that restrictions can be justified on grounds of the need to preserve the allocation of the power to tax between Member States, however, it held that the national measure goes beyond what is necessary to attain the objective it pursues. *Inter alia*, the ECJ pointed that a Member State may request the assistance of another Member State in the recovery of debts relating to certain taxes and to ascertain the correct amount of income tax.

### 2.2.4 The '*Commission v Sweden*' case

In the '*Commission v Sweden*' case<sup>47</sup> the ECJ decided that Swedish provisions which make the deferral of taxation on capital gains arising from the sale of a private residential property conditional on the purchase of a new residence being on Swedish territory, infringe the freedoms under the EC Treaty. The ECJ held:

*'... it is clear that a taxable person who decides to sell a residential property that he owns in Sweden in order to transfer his residence to another Member State and to purchase a new property there for the purposes of his accommodation is, in the exercise of the rights conferred by Articles 39 EC and 43 EC, subject to less favorable tax treatment than that enjoyed by a person who maintains his residence in Sweden. That difference in treatment in relation to the deferral of taxation of capital gains realised may affect the assets of a taxable person who wishes to transfer his residence outside Sweden and, as a consequence, is likely to deter him from proceeding with such a transfer.'*

The ECJ did not accept any justifications in this case.

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<sup>46</sup> C-9/02 '*Lasteyrie du Saillant*' [2004] ECR I-2409, paragraph 51.

<sup>47</sup> C-104/06 '*Commission v Sweden*' [2007] ECR I-00671.

### 2.2.5 A possible 'Achilles' heel'

There are several arguments against the view that 'exit charges' are contrary to the EC Treaty.

### 2.2.6 'Exit charge' cases discuss the situation of individuals

First, the 'exit charge' cases above consider the freedom of establishment as applicable to individuals. Although Article 48 of the EC Treaty provides that companies or firms shall be treated in the same way as natural persons who are nationals of Member States, it can be argued that the ECJ may take a different approach, for example, consider justifications, should the case involve companies (there are no ECJ cases on exit charges imposed on companies to the date).

The European Commission is relaxed in its view in this regard as it stated:

*'... the interpretation of the freedom of establishment given by the ECJ in 'de Lasteyrie' in respect of exit tax rules on individuals also has direct implications for Member States' exit tax rules on companies'*<sup>48</sup>.

The Commission referred to the commentators who had observed that, with the exception of one paragraph, the entirety of the *'de Lasteyrie du Saillant'* judgment was written referring to a 'taxpayer', rather than referring merely to an individual. In addition, the Commission also noted that the ECJ itself had cited *de Lasteyrie* in the *'SEVIC Systems AG'* case<sup>49</sup> which concerns cross-border merger of companies.

### 2.2.7 Justification: necessity to safeguard a balanced allocation of taxing rights between Member States

It cannot be excluded that the ECJ might find 'exit charges', such as applied by the Merger Directive, as justified, for example, by the need to preserve the balanced allocation of taxing rights between Member States (fiscal territoriality). This justification has been discussed (and, in some instances, accepted) by the ECJ in several cases concerning cross-border losses for companies, such as the *'Marks & Spencer'* case, the *'Rewe Zentralfinanz'* case<sup>50</sup> and the rather recent *Oy AA*<sup>51</sup> case.

In the *'Marks & Spencer'* case some of Marks & Spencer's EU subsidiaries had incurred losses in other Member States and, despite them being incurred outside the UK, Marks & Spencer claimed these losses against its UK profits. Significantly, the EU subsidiaries were not profitable and were either discontinued by Marks & Spencer, or sold to third parties.

UK tax authorities refused Marks & Spencer's claim as the subsidiaries were not resident in the UK for tax purposes and did not trade in the UK. Marks & Spencer appealed against the decision on the grounds that the UK group relief rules contravened its EC Treaty rights, and were therefore illegal to the extent they disallowed relief for losses derived by its EU

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<sup>48</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: 'Exit taxation and the need for co-ordination of Member States' tax policies', COM(2006)825 final, Brussels, 19 December 2006, published at <http://europa.eu>.

<sup>49</sup> C-411/03 *'SEVIC Systems AG'* [2005] ECR I-10805.

<sup>50</sup> C-347/04 *'Rewe Zentralfinanz eG, as universal legal successor of ITS Reisen GmbH v Finanzamt Köln-Mitte'* [2007] ECR I-2647.

<sup>51</sup> C-231/05 *'Oy AA'* [2007] ECR I-6373.

subsidiaries. The case was referred to the ECJ for a preliminary ruling. Broadly, the ECJ held that Articles 43 and 48 of the EC Treaty do not preclude national legislation, such as the UK's group relief regime to the extent it disallows cross-border loss relief within the EU as a matter of general principle.

When the ECJ considered the justifications of the restrictive rule, it, inter alia, discussed the need to preserve the allocation of the power to impose taxes between the Member States. The ECJ admitted that it is necessary to consider the tax consequences if such a loss relief was unconditionally extended across borders and noted that the option to offset losses in another Member State *'would significantly jeopardize a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred.'*<sup>52</sup> Namely, the need to preserve balanced allocation of taxing rights was accepted as a justification of the restriction in this case.

There is still a question whether the ECJ would follow the same reasoning when it would consider 'exit charges' as applied to companies according to the Merger Directive. The answer is unclear, because the *'Marks & Spencer'* case was based on unique facts. Therefore, the justification might not be accepted in other cases. The *'Rewe Zentralfinanz'* case<sup>53</sup> supports this:

*'... allocation of the power to impose taxes between the Member States ... was accepted [as justification] by the Court in the judgment in 'Marks & Spencer' only in conjunction with two other grounds, based on the taking into account of tax losses twice and on tax avoidance.'*

However, in the more recent *'Oy AA'*<sup>54</sup> and *'Lidl Belgium'*<sup>55</sup> cases the ECJ has shown a greater willingness to respond to Member States' concerns over the allocation of taxing rights and confirmed that allocation of taxing rights may be a valid public policy reason to impose a restriction under the freedom of establishment. This can be considered as a significant development which possibly might impact future ECJ decisions on exit charges. Alternatively, the ECJ may decide in the future that these cases are not relevant to exit charges whatsoever as they discuss particular aspects of national loss relief rules. Nevertheless, we consider that a brief summary of the main concepts developed in these cases at this stage would be helpful to set out emerging patterns of the ECJ's approach to allocation of taxing powers between Member States.

In particular, the question referred to the ECJ in the *'Oy AA'* case was whether Finland should allow a tax deduction for a group contribution which a Finnish limited company intended to make to the loss making UK resident parent of the group. All of the requirements of national provisions were met except for the requirement that the recipient of the contribution is a Finnish company.

The ECJ held that the difference in treatment to which Finnish resident subsidiaries are subjected by reason of the place of corporate seat of their parent company, constitutes a

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<sup>52</sup> C-446/03 *'Marks & Spencer'* [2005] ECR I-10837, paragraph 46.

<sup>53</sup> C-347/04 *'Rewe Zentralfinanz'* [2007] ECR I-2647; this case concerned the German tax law under which the immediate set-off of losses stemming from write-downs to the book value of foreign subsidiaries that pursue passive activities is restricted. In contrast, this restriction does not apply to domestic restrictions. In 1993 and 1994, the German company (*Rewe Zentralfinanz*) - contrary to the respective German provisions - wrote-down the value of its participation in a Dutch holding company because the holding company's second-tier subsidiaries had incurred losses. The tax authorities, however, denied the deduction.

<sup>54</sup> C-231/05 *'Oy AA'* [2007] ECR I-6373.

<sup>55</sup> C-414/06 *'Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn'* [2008] ECR-00000.

restriction on the freedom of establishment. However, the court found that the restriction can be justified as giving companies the right to elect to have their losses taken into account in the Member State in which they are established or in another Member State would undermine the system of the allocation of the power to tax between Member States. The ECJ decided that the national tax legislation at issue could, in principle, be justified on the basis of two of the three *'Marks & Spencer'* justifications, namely, the need to safeguard the allocation of the power to tax and the need to prevent tax avoidance.

In the *'Lidl Belgium'* case a company resident in Germany carried out its business activities via a permanent establishment in Luxembourg. German tax authorities denied the deduction of the losses incurred by the Luxembourg permanent establishment on the basis that the double taxation convention between Germany and Luxembourg provides for the exemption method with regard to income from permanent establishments. Again, the ECJ referred to the *'Marks & Spencer'* decision and discussed whether the restriction can be justified. Consequently, the ECJ held that the preservation of the allocation of the power to impose taxes between Member States and the prevention of the double use of losses justify restrictions imposed on German companies. The ECJ came to the conclusion that losses of a foreign permanent establishment cannot be relieved against profits of the main company in another Member State *'where those losses can be taken into account in the taxation of the income of that permanent establishment in future accounting periods'*.

#### 2.2.8 *'Daily Mail'* and *'Cartesio'*

As a final point of the Achilles' heel argument the ECJ's decision in the *'Daily Mail'* case<sup>56</sup> has to be mentioned. The case was decided in 1988. In this case a company intended to transfer its central place of management from the UK to the Netherlands and was not allowed to do that without receiving the consent from the authorities. The tax authorities refused to grant the permission unless the company agreed to sell at least part of the assets (and thus reduce the risk of later distribution of hidden reserves). The ECJ did not discuss the exit taxation in this case but decided the case against the taxpayer generally being mindful of the differences between company laws of the Member States. This reasoning resulted in the ECJ's conclusion that the EC Treaty *'confers no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State'*.<sup>57</sup>

Almost 20 years after the *'Daily Mail'* case AG Maduro issued his opinion in the *'Cartesio'* case<sup>58</sup> where he suggested that the ECJ's approach to the *'Cartesio'* case should be different from the *'Daily Mail'* case (facts of both cases were similar). The AG found it impossible *'to argue on the basis of the current state of Community law that Member States enjoy an absolute freedom to determine the 'life and death' of companies constituted under*

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<sup>56</sup> C-81/87 *'Daily Mail'* [1988] ECR 5483.

<sup>57</sup> C-81/87 *'Daily Mail'* [1988] ECR 5483, paragraph 29.

<sup>58</sup> C-210/06 *'Cartesio Oktató és Szolgáltató bt'* (published <http://curia.europa.eu/>); the ECJ has not decided the case at the time this Chapter is drafted. Parallels may also be drawn between the *'Cartesio'* case and the *'Überseering'* case (C-208/00 *'Überseering BV and Nordic Construction Company Baumanagement GmbH (NCC)'* [2002] ECR I-9919) which was decided by the ECJ in 2002. Again, that case did not discuss exit charges but rather considered whether a company's capacity to bring legal proceedings before national courts of a Member State ('B') falls within the scope of freedom of establishment of the EC Treaty where that company is registered in another Member State ('A') and is deemed, according to laws of the other Member State ('B'), to have moved its actual center of administration to that Member State ('B'). The ECJ decided that the freedom of establishment applies and that company should be permitted to enjoy its legal capacity to bring legal proceedings before Member State's B national courts for the purposes of enforcing its rights.

*their domestic law, irrespective of the consequences for the freedom of establishment*'.<sup>59</sup> He concluded that a national rule which prohibits transferring company's operational headquarters to another Member State without first winding the company up is contrary to the EC Treaty.

Arguably, it can be asked by analogy whether exit charges on a company leaving a Member State which imposes them do not constitute a restriction on the freedom of establishment of the EC Treaty and, if they do, whether the restrictions can be justified.

When discussing the justifications the AG in the *Cartesio* case suggested that it may be acceptable for a Member State to set certain conditions before *'a company constituted under its own national company law can transfer its operational headquarters abroad'*<sup>60</sup>. This echoes Advocate General Darmon's opinion delivered in the *'Daily Mail'* case in 1988:

*'... Member States are not prevented from requiring a company to settle its fiscal position upon any transfer of its central management, even where winding-up is not required.'*<sup>61</sup>

Interestingly, this view can also be found in the Preamble of the Merger Directive which provides that financial interests of Member States have to be safeguarded<sup>62</sup>.

Only the ECJ's decision on exit charges applied to a company by a Member State would assist to finalize the above discussion.

### 3. Final remarks

As it can be seen from the analysis above, some doubts still exist as to whether 'exit charges' as applied by the Merger Directive can be rebutted by companies as being incompatible with the EC Treaty. On the one hand, ECJ's 'exit charge' cases discussing the situation of individuals suggest so. On the other hand, arguments exist that the ECJ might apply different reasoning if it would have to decide cases involving companies.

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<sup>59</sup> C-210/06 *'Cartesio'* - Opinion of Advocate General Poiares Maduro delivered on 22 May 2008, paragraph 31.

<sup>60</sup> C-210/06 *'Cartesio Oktató és Szolgáltató bt'*, paragraph 33.

<sup>61</sup> AG Darmon in Case C-81/87 *'Daily Mail'*, paragraph 13.

<sup>62</sup> Preamble of the Merger Directive, paragraph 4.





## B. Executive Summaries of the implementation of the Merger Directive in the 27 Member States

### 1. Austria

#### 1.1 General Comments

Austria implemented the Merger Directive (MD) in wide parts prior to the accession to the EU in 1991 when introducing the Reorganization Tax Act (RTA). Thus, only minor amendments were necessary at accession in 1995. RTA has also been amended due to recent changes (cross-border mergers) in the MD on time. Rules concerning change of residence (for SEs and SCEs) are contained in the Individual Income Tax Act (IITA) and the Corporate Income Tax Act (CITA).

Austria's implementation of the MD largely seems to comply with community law requirements. There is hardly any discussion in literature to be found about infringements against the MD. Uncertainty concerning compliance with community law remains especially concerning exit tax and the possibility to use foreign losses in Austria after reorganizations.

In case of exit tax in relation to other EU member states and certain EEA-countries Austria applies the concept of deferred taxation. However, in case of transfer of intangible long-term assets Austria taxes gains at transfer of residence if the assets are capitalized in the new state of residence.

The Austrian tax administration repealed some published opinions that allowed using foreign tax loss carry forwards in Austria after certain reorganizations. In case the tax loss carry forwards are not useable abroad anymore due to the reorganization, this seems to contravene the ECJ decision '*Marks & Spencer*'.

Austrian RTA provides for the possibility of tax-neutral reorganizations in the following cases:

- (a) Merger ('*Verschmelzung*'): Merger of two companies without liquidation;
- (b) Conversion ('*Umwandlung*'): Change of company into partnership (or mere PE of the shareholder if only one shareholder remains);
- (c) Contribution ('*Einbringung*'): Contribution of qualifying assets (branch, branch of activity, share in a partnership, qualifying shares in companies) into a company;
- (d) Formation of partnerships ('*Zusammenschluss*'): Merger of sole proprietors (or partnerships) to form a new partnership;
- (e) Partnership-division ('*Realteilung*'): Division of existing partnerships into partnerships or sole proprietors;
- (f) Division ('*Spaltung*'): Division (or partial division) of companies into companies without liquidation.

## 1.2 Comments relating to specific provisions of the Merger Directive

### Article 1

RTA also covers Austrian consequences of foreign and cross-border mergers and other reorganizations.

RTA is also applicable if companies or shareholders from third states are involved. The tax consequences of the reorganization might especially differ if Austria loses taxing rights in relation to third states and not to EU-member states.

Transfers of seat are covered by IITA and CITA.

### Article 2

RTA is applicable to Austrian and comparable foreign transactions. Normally, compensation payments of up to 10% are allowed. The interpretation of branch of activity for cross-border reorganizations by the tax administration was aligned with the requirements of the MD in 2007. The Austrian RTA is structured differently than the Directive and also includes reorganizations of partnerships.

### Article 3

Austria qualifies foreign entities as companies or partnerships according to a 'Typenvergleich'. Thus, the scope of the respective possible transactions is extended to all entities comparable to Austrian corporations or partnerships. The RTA copies the companies listed in the annex to the MD when referring to the forms of companies covered. Austria has neither introduced a subject-to-tax clause nor shareholder requirements.

### Article 4

Reorganizations (including foreign and cross-border mergers) can be effected without taxation of gains. In case Austria loses taxing rights, accrued reserves (including good will) will be taxed. However, in case Austria loses taxing rights in relation to other EU-member states or certain EEA-countries, tax is deferred (until later alienation or transfer of taxing rights to a third state). According to our view, tax treatment of intangible long-term assets might be an infringement of community law (please refer to section 'General Comments').

Permanent establishments (PE) are defined similar to the OECD-model. Reorganizations have to be notified to the tax administration.

### Article 5

Provisions are normally tax deductible if the costs are connected to the respective period and there is an obligation in relation to third parties.

Provisions and (accrued) reserves will be carried over to the absorbing entity. Please note that in case they are linked to a unit where Austria's taxation right is restricted, Austrian law asks for revaluation at fair market value (subject to tax deferral in relation to EU-member states and certain EEA-countries).

## Article 6

There is no possibility to carry back losses in Austria. Losses from business activities can be carried forward for an unlimited period of time if they were determined by proper book keeping. Losses have to be set-off against the next profits. Please note that losses can only be set up against 75% of ordinary current profits. Thus, normally 25% of the income remains taxable even if the taxpayer has sufficient tax loss carry forwards.

In general Austrian tax loss carry-forwards of the surrendering entity can be carried over to the absorbing entity if certain requirements are fulfilled. According to a published opinion of the tax administration, this is not possible for foreign losses. According to our view this might be an infringement of fundamental freedoms in certain cases (please refer to section 'General Comments').

## Article 7

Article 7 has not been implemented. Gains are not taxed, losses are non-deductible.

## Article 8

Austria applies a system of taxation at company and shareholder level, without credit of underlying tax. The effect of economic double taxation is reduced by the applicable tax rates. This system is also implemented at reorganizations.

## Article 9

Austria allows for tax neutral contribution of qualifying assets (branches ('*Betrieb*'), branch of activity ('*Teilbetrieb*'), shares in partnerships ('*Mitunternehmeranteil*') and qualifying shares in companies ('*qualifizierte Kapitalanteile*') into companies. Due to the system of economic double taxation accrued reserves are taxable at shareholder and company level after contribution.

## Article 10

Austria has not introduced a recapture rule for foreign losses at reorganization. In principle, Austria applies a system of world-wide taxation. However, most tax treaties provide for exemption method for profits of foreign PEs. RTA provides for taxation of (foreign) accrued reserves if Austria loses its taxation right. Please note that due to domestic rules losses can be even deducted if the tax treaty provides the exemption method. In that case domestic law provides for a recapture clause to avoid double dipping of losses. According to the RTGI, this should not be the case at foreign PEs. Thus, accrued reserves linked to PEs in (third) member states should not be taxed at reorganization. Furthermore, in relation to other member states, the concept of deferred taxation would apply.

## Article 10a

Austria has not implemented specific rules for hybrid entities.

### Article 10b

Assets linked to an Austrian PE remain taxable in Austria after the transfer of seat. Assets linked to a foreign PE normally were not taxable in Austria before the transfer of seat. Only if Austria loses taxing rights, it would tax gains at the transfer of seat. In relation to member states, the concept of deferred taxation will be applied.

### Article 10c

Austria does not tax gains at transfer of seat if the assets (PE) remain taxable in Austria. There is no specific rule on the availability of tax loss-carry forwards after transfer of residence. Legal commentators argue that they should be available.

### Article 10d

Assuming the SE transfers its residence for commercial law purposes without liquidation, no liquidation would be deemed for tax purposes. In case Austria loses its taxing right because of a change of residence into an EU-member state (or certain EEA-countries), deferred taxation would apply.

### Article 11

Austria applies a substance over form approach and especially combats tax abuse if an unusual structure is entered into for tax saving purposes only without any business reason.

Nina Doralt

Markus Stefaner

## 2. Belgium

### 2.1 General comments

The aim of this memorandum is to briefly summarize our findings in connection with completing the Belgian part of the 'Survey of the implementation of the Council Directive 90/434/EEC (further: the Directive) as amended by the Directive 2005/19/EEA'. Belgian tax law has deliberately not been fully adapted to the Merger Directive. Belgian Government indeed considered that, since according to Belgian company law, a cross border merger was not yet possible, it was not obliged to adapt the tax law. However, in the meantime Belgian Company law has been adapted to European standards and consequently the above argument is not valid anymore.

A draft bill regarding the implementation of the Merger Directive has been approved by the Belgian Government on June 27, 2008. Amongst other things, the draft bill provides for

- (a) a tax free exchange of shares;
- (b) a set of rules, in compliance with the Directive, which are applicable both to domestic and cross border mergers, divisions and partial divisions;
- (c) specific rules, in compliance with the Directive, regarding the cross border contribution of a division, branch of activities or universality of goods;
- (d) the tax regime applicable to the transfer of the seat of a Belgian resident SE/SCE to another EU Member State and of a foreign SE/SCE to Belgium;
- (e) new anti-abuse provisions in line with the Directive.

This bill has been submitted to Parliament.

Most Belgian commentators agree that the Merger Directive has direct effect in the Belgian legal order. This position has not yet been confirmed by case law, although the Belgian Supreme Court has stated that Belgian domestic regulations that are inspired by the Merger Directive must be interpreted in line with the Merger Directive and in line with the case law given by the ECJ in '*Leur-Bloem*'.

It is clear that under the present Belgian domestic tax law cross border mergers and divisions whereby a Belgian resident company would be merged into a company resident outside Belgium, albeit within the EU, may not be implemented under tax neutrality under the present Belgian tax law.

Belgian tax law is broadly in compliance with the Merger Directive only with respect to the following operations:

- (a) exchange of shares, to the extent that capital gains realized on shares by a company are exempt, insofar the shares qualify for the 'subject to tax' condition under the DRD regime. However, this exemption may even go beyond the Directive, where it is definitive and valid even if the issuing company is not established within the EU and irrespective whether or not the majority is acquired or extended within the acquired company;
- (b) contribution of a Belgian branch of activity by a EU company to a Belgian and EU resident company;

- (c) transfer of a branch of activity situated in Belgium as a consequence of a tax neutral merger, division or contribution operated abroad.

## 2.2 Comments relating to specific provisions of the Merger Directive

### Article 1

We are of the opinion that Belgian legislation complies with Article 1 (a) of the Directive. The tax-free regimes as provided for in Belgian tax law apply irrespectively of the state of residence of the parent companies and also to domestic transactions.

As regards Article 1 (b) no tax-free regime has been provided yet for the transfer of the registered office of an SE or a SCE. This is obviously not compliant with the Directive.

### Article 2

We are of the opinion that Belgian legislation does not fully comply with Article 2 of the Directive:

- (a) the scope of the term 'merger', 'division' and 'partial division' is limited to certain legal entities as listed in the Company Law and this does not include all entities of the Annex to the Directive;
- (b) the application of the tax-free regime for an exchange of shares is not provided for;
- (c) the term 'branch of activity' cannot consist solely of financial fixed assets and share investments as such the real estate needs to be transferred together with the other assets and liabilities, the tax authorities focus on the perspective of the transferring company.

### Article 3

Belgian legislation is not compliant with Article 3 of the Directive (and the principle of Freedom of establishment) since it limits the application of the tax-free regimes to entities listed in the Company Law, which is narrower than the Annex to the Directive.

### Article 4

Belgian legislation is not compliant with the Directive since it does not provide for a tax-free regime at all for cross-border mergers, divisions or partial divisions.

### Article 5

Belgian legislation is not compliant with the Directive since it does not provide for a tax-free regime at all for cross-border mergers, divisions or partial divisions.

In addition, with respect to domestic mergers, divisions or partial divisions, the tax-free regimes are not compliant with the Directive since certain tax-free reserves may become taxable to the extent that the receiving company holds a participation in the transferring company or to the extent that the transaction is effected with a cash payment.

## Article 6

Belgian legislation is not compliant with the Directive since it does not provide for a tax-free regime at all including the partial transfer of losses for cross-border mergers, divisions or partial divisions whereas such regime is provided for domestic transactions.

## Article 7

We are of the opinion that Belgian legislation does not fully comply with Article 7 of the Directive since only 95% of the capital gains realized are tax exempt and in addition the exemption is subject to certain minimum holding requirements which are not provided for in the Directive.

## Article 8

We are of the opinion that Belgian legislation does not fully comply with Article 8 of the Directive since no tax-free rollover regime is provided for share exchange. If the transferred company does not meet the subject to tax test, the capital gains are taxable.

## Article 9

We are of the opinion that Belgian legislation does comply with Article 9 of the Directive.

## Article 10

We are of the opinion that Belgian legislation does not comply with Article 10 of the Directive since no tax-free regime is provided for assets and liabilities effectively connected with a permanent establishment in a third state.

## Article 10a

Belgian legislation does not provide for a special tax restructuring regime for tax transparency. Income derived through the entity that is treated as fiscally transparent is deemed to be received by its partners.

## Article 10b

Belgian legislation does not comply with Article 10b of the Directive since no tax-free regime is provided for the transfer of the registered office of an SE or SCE.

## Article 10c

Belgian legislation does not comply with Article 10b of the Directive since no tax-free regime is provided for the transfer of the registered office of an SE or SCE.

### Article 10d

Belgian legislation does not comply with Article 10b of the Directive since no tax-free regime is provided for the transfer of the registered office of an SE or SCE.

### Article 11

We are of the opinion that Belgian legislation does not fully comply with Article 11 of the Directive, since merging companies which are not able to demonstrate that the merger has a positive economic/financial effect on their businesses become taxable also when tax evasion or tax avoidance is not the principal or one of the principal objectives of the merger.

Steven Claes

Marc De Muynck

Anne Van de Vijver



### **3. Bulgaria**

#### **3.1 General comments**

The Merger Directive has been implemented by the new Corporate Income Tax Act (CITA) of December 2006, (promulgated in the State Gazette No 105, dated 22 December 2006), which entered into force on 1 January 2007. Further amendments to the provisions of CITA governing the implementation of Directive 90/434/EEC (Merger Directive) were introduced at the end of 2007 (promulgated in State Gazette No 110, dated 21 December 2007), which entered into force on 1 January 2008. CITA fully implemented the Merger Directive clauses regarding all types of mergers, namely: merger (fusion), merger by the formation of a new company, division, partial division, transfer of assets and exchange of shares or interests, and applying both to resident companies, as well as in which companies from two or more EU Member States are involved.

The SE Regulation (No 2157/2001) has been implemented with the CITA of December 2006. The SCE Regulation (No 1435/2003) has been implemented with the CITA of December 2006.

As of today, the Bulgarian National Revenue Agency has not issued any guidelines for the interpretation and application of the CITA provisions implementing the Merger Directive.

#### **3.2 Comments relating to specific provisions of the Merger Directive**

In general, the provisions of the Bulgarian tax legislation are compliant with the EU Merger Directive. However, some provisions of the Bulgarian CITA may be considered as being incompatible with the Merger Directive's provisions.

Please find below an article-by-article summary of the Bulgarian compliance status:

##### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive. However, the Bulgarian CITA does not apply if one of the merging companies is from a third (non EU member) state.

##### Article 2

No incompatibility problems have been found with the implementation of Article 2 of the Merger Directive. No cash payments are allowed for minority shareholders buy-out.

##### Article 3

No incompatibility problems have been found with the implementation of Article 3 of the Merger Directive.

#### Article 4

No incompatibility problems have been found with the implementation of Article 4 of the Merger Directive.

It should be noted that Article 4(2) of the Merger Directive is not implemented in the Bulgarian CITA because there are no tax transparent entities under Bulgarian tax legislation.

The option provided under Article 4(4) is not taken into consideration and Bulgarian tax law envisages all transforming companies to apply capital gain deferral.

#### Article 5

No incompatibility problems have been found with the implementation of Article 5 of the Merger Directive.

#### Article 6

No incompatibility problems have been found with the implementation of Article 6 of the Merger Directive.

#### Article 7

No incompatibility problems have been found with the implementation of Article 7 of the Merger Directive.

#### Article 8

The additional requirements set forth by Bulgarian tax law in order to benefit from the relief in case of an exchange of share transactions may be found to be incompatible with the Merger Directive.

#### Article 9

The additional requirements on the grounds of anti-abuse considerations set forth by Bulgarian tax law in order to benefit from the relief in case of a transfer of assets transactions may be found to be incompatible with the Merger Directive.

#### Article 10

No incompatibility problems have been found with the implementation of Article 10 of the Merger Directive. Bulgaria does not apply the option provided under Article 10(2) of the Merger Directive.

#### Article 10a

This provision is not relevant for Bulgaria as it treats all entities as corporate tax liable persons.

Article 10b

No incompatibility problems have been found with the implementation of Article 10b of the Merger Directive.

Article 10c

No incompatibility problems have been found with the implementation of Article 10c of the Merger Directive.

Article 10d

Bulgarian tax legislation does not contain any provisions in this matter.

Article 11

No incompatibility problems have been found with the implementation of Article 11 of the Merger Directive.

Alexandros Karakitis

Julian Mihov

Atanas Mihaylov

## 4. Cyprus

### 4.1 General comments

Cyprus joined the European Union ('EU') on May 1, 2004. Before accession, Cyprus thoroughly revised its tax regime to make the Cypriot tax legislation compatible with EU requirements by changing the laws of taxation of income and gains. Consequently, there were no specific tax acts or amending laws to implement the Merger Directive in the existing Cypriot (Corporate) Income Tax legislation. The Income Tax Law ('ITL') came into force on January 1, 2003 and specifically states that it is issued among others for the purpose of harmonization with the Merger Directive. The ITL includes a section regarding company reorganizations which is aimed at implementing the Merger Directive.

The principal Stamp Law was amended twice in 2002 in the EU law harmonization process. These law amendments came into force on January 1, 2003 and brought about (among others) the introduction of exemptions from stamp duty in case of company reorganizations, in order to comply with the Merger Directive.

The Capital Gains Tax Law excludes transfer of property in case of reorganization from the definition of 'disposal of property'.

Cyprus levies capital duty in the form of registration fees at a rate of 0.6% upon establishment of a Cypriot company and upon increase of the registered authorized share capital. No exemption was introduced in this respect so registration fees are also payable in case of qualifying company reorganizations.

Cyprus applies a broad company reorganization relief regime. Relief can be claimed for qualifying reorganizations between companies, without any geographical restrictions,<sup>63</sup> without additional conditions or limitations and without any specific anti-abuse rules. Most provisions of the company reorganization relief rules were copied literally from the Merger Directive but various restricting or complicating provisions of the Merger Directive were left out. As such the Cypriot direct tax law should overall be considered to comply with the Merger Directive. However, some provisions of the Cypriot law may generate the possibility of being non-compliant with the Merger Directive.

### 4.2 Comments relating to specific provisions of the Merger Directive

Please find below an article-by-article summary of the Cypriot compliance status:

#### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive. The definition of a company reorganization qualifying for relief does not include a jurisdictional restriction to 'two or more Member States'. Therefore tax deferral also applies where there are companies and/or shareholders from third States.

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<sup>63</sup> Other than in case of a transfer of registered office whereby an SE or an SCE must transfer its registered office from one Member State to another Member State.

## Article 2

The company reorganization relief rules apply to transactions defined in the ITL. The ITL refers to the same transactions as the Merger Directive but it refers to shares and not to securities (except for the definition of the partial division which was added at a later stage). This may be found to limit the implementation of the Merger Directive. The ITL does not apply tax relief to other transactions not mentioned in the Merger Directive.

## Article 3

The company reorganization relief rules apply to 'companies' whereby the term companies has the meaning assigned to this term by the Companies Law and includes any body with or without legal personality, or public corporate body, as well as every company, fraternity or society of persons, with or without legal personality, including any comparable company incorporated or registered outside Cyprus and a company listed in the First Schedule, but it does not include a partnership. The definition does not contain any tax residency or subject-to-tax clauses and is formulated broader than the Merger Directive (which states that a company must take one of the forms listed in the annex). However, on the other hand some small differences exist between the Annex to the Merger Directive and the First Schedule, most importantly that one type of Hungarian company and the companies registered in the new EU Member States Bulgaria and Romania are not included (yet) in the First Schedule enclosed to the ITL. A disparity may occur if there are cases where such Hungarian body corporate or Bulgarian or Romanian body corporates is included in the annex to the Merger Directive but is not considered to be a 'company' which is 'incorporated or registered' based on domestic rules. If such cases indeed exist, this may be found to be a limitation to the implementation of the Merger Directive.

## Article 4

No incompatibility problems have been found with the implementation of Article 4 of the Merger Directive. The ITL states that assets and liabilities, including provisions and reserves, which are transferred under a reorganization, shall not give rise to profits liable to tax for the transferring company. The concept of 'permanent establishment' has been defined in the ITL as a fixed place of business through which the business of an enterprise is wholly or partly carried on. This definition is in practice used as a starting point taking into account specific provisions under the double tax treaties concluded by Cyprus with other countries and taking into account the commentary to the OECD Model Tax Convention. There are no specific laws or guidelines in Cyprus on the concept of 'effectively connected' but in principle a functional approach is taken.

## Article 5

No incompatibility problems have been found with the implementation of Article 5 of the Merger Directive. As mentioned above a transfer of provisions and reserves as part of a reorganization shall not give rise to profits liable to tax for the transferring company. The Cypriot tax legislation does not distinguish between provisions and reserves derived from permanent establishments abroad and other provisions and reserves. There are no specific rules or guidelines for the allocation of provisions and reserves and there are no further conditions for carry over of provisions and reserves.

## Article 6

The definition and interpretation in practice of concepts or terms used in the Merger Directive and in the company reorganization relief rules may differ. However, this is still unclear since no specific rules or guidelines have been issued in practice. Based on the text of the law, no incompatibility problems have been found with the implementation of Article 6 of the Merger Directive. As a general rule, tax losses may be carried forward indefinitely. No carry back of tax losses is allowed. Group loss relief is available between group companies under certain conditions. In case of a company reorganization, accumulated losses of the transferring company which is resident in Cyprus or has a PE in Cyprus shall be transferred to the receiving company in Cyprus or having a PE in Cyprus. The provisions applying for set-off or carry forward of losses in domestic situations apply accordingly to losses carried over under the company reorganization relief rules. It may be relevant to note that no carry over of (foreign) losses is allowed for losses incurred by a non resident disappearing entity not having a permanent establishment in Cyprus in the situation of a cross border merger where the Cypriot company is the surviving entity.

## Article 7

No incompatibility problems have been found with the implementation of Article 7 of the Merger Directive. Capital gains or losses realized by a Cypriot tax resident upon a sale of shares are exempt or not tax deductible in Cyprus. Capital gains or losses realized by a non Cypriot tax resident upon a sale of shares are not subject to tax in Cyprus. Moreover, the ITL states specifically in case of reorganizations that any profits accruing to the receiving company on the cancellation of the holding shall not be liable to tax (without conditions or thresholds).

## Article 8

The definition and interpretation in practice of concepts or terms used in the Merger Directive and in the company reorganization relief rules may differ. However, this is still unclear since no specific rules or guidelines have been issued in practice. Based on the text of the law, no incompatibility problems have been found with the implementation of Article 8 of the Merger Directive. The ITL states that the allotment of shares representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for shares representing the capital of the latter company shall not, of itself, give rise to any profits or benefits liable to tax in respect of that shareholder. The ITL states furthermore that the shares received shall have the same value for tax purposes as the shares exchanged had immediately before the reorganization.

## Article 9

The definition and interpretation in practice of concepts or terms used in the Merger Directive and in the company reorganization relief rules may differ. However, this is still unclear since no specific rules or guidelines have been issued in practice. Based on the text of the law, no incompatibility problems have been found with the implementation of Article 9 of the Merger Directive. As mentioned above, the ITL states that assets and liabilities, including provisions and reserves, which are transferred under a reorganization, shall not give rise to profits liable to tax for the transferring company. Since reorganization is defined as merger, division, partial division, transfer of assets, exchange of shares, and transfer of the registered office involving companies resident in Cyprus, no separate Article such as

Article 9 is required to apply this provision to transfer of assets. No specific rules are provided for valuing the shares received by the transferring company in the receiving company for tax purposes.

#### Article 10

The definition and interpretation in practice of concepts or terms used in the Merger Directive and in the company reorganization relief rules may differ. However, this is still unclear since no specific rules or guidelines have been issued in practice. Based on the text of the law, no incompatibility problems have been found with the implementation of Article 10 of the Merger Directive. Cyprus applies an exemption for profits from a permanent establishment situated outside Cyprus provided that certain conditions are met. Cypriot tax legislation provides for loss recapture with respect to permanent establishments situated outside Cyprus if such permanent establishment starts to generate taxable profits. Such profits derived from a permanent establishment situated outside Cyprus are not exempt from tax and must be included in the taxable income if and in as far as deductions for losses were allowed in previous years. However, there is no explicit provision regarding recapture of losses in case a permanent establishment is transferred under a company reorganization in a situation as envisaged in Article 10 of the Merger Directive (Cypriot company being the transferring company).

#### Article 10a

There are no specific rules or guidelines implementing Article 10a of the Merger Directive. It may be relevant to note that the only corporate bodies that are considered fiscally transparent from a Cypriot tax perspective are partnerships and trusts.

#### Article 10b

As to Article 10b of the Merger Directive, Cyprus generally does not have exit taxation provisions (except for revaluation of trading stock - not including securities) but a transfer of registered office is considered to be a qualifying reorganization.

#### Article 10c

Cypriot legislation appears to be compliant with this Article.

#### Article 10d

Cypriot legislation appears to be compliant with this Article.

#### Article 11

No incompatibility problems have been found with the implementation of Article 11 of the Merger Directive.

Additional remark

Although outside of the scope of this survey, it is relevant to note the following. Transactional taxes (registration fees) are considered to be the most relevant 'bottlenecks' in practice upon dealing in Cyprus with Merger Directive situations. More in particular, if the registered nominal/authorized share capital of a Cypriot company is increased in the process of a reorganization, registration fees are payable without cap and without an exemption applying for qualifying company reorganizations. The absence of a provision in this respect may be found to violate the obligation under Article 12 of the Merger Directive to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.

Maarten Koper

Susanne Verloove



## 5. Czech Republic

### 5.1 General comments

The aim of this memorandum is to briefly summarize our findings in connection with completing the Czech part of the 'Survey of the implementation of the Council Directive 90/434/EEC (Merger Directive) as amended by the Directive 2005/19/EEA'.

The Czech Republic has not implemented the Merger Directive in one single act. Instead, several amendments to the Czech Income Taxes Act (ITA) have been gradually made, introducing the provisions of the Directive into the Czech legal system. However, the Directive has not been fully implemented, in particular:

- (a) certain provisions of the Directive have not been directly implemented at all (e.g. the application to tax transparent entities);
- (b) the Czech Commercial Code (CoC) provided only for mergers and divisions where the companies involved had a registered office in the Czech Republic, with the cross-border mergers and divisions, thus having been not legally allowed. However, this has been remedied by the Czech Transformation Act, which took its legal force as of 1 July 2008;
- (c) finally, certain provisions of the Directive have been implemented in the version stipulated in the 1990 Directive, but have not been updated in connection with the amendments to the Directive (e.g. qualifying exchange of shares).

Furthermore, please note that the implementation of the Directive has generally stayed out of the focus of both the taxpayers and the tax authorities, as (a) the mergers and transfers of assets generally represent tax neutral transactions anyway and (b) most cross-border reorganizations were not legally possible. The implementation of the Directive is generally not clear and may be open to different interpretations in the future.

### 5.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

We are of the opinion that Article 1 of the Directive was generally implemented correctly into the ITA. However, the Czech Republic extends the benefits of the Directive also to restructuring where only Czech companies are involved.

#### Article 2

Most of the definitions included in Article 2 of the Directive have been implemented directly or indirectly into ITA or the respective clarification may be found in CoC. However, ITA fails to reflect the amended version of the Directive insofar as it does not provide for the qualifying exchange of shares.

### Article 3

The Czech Republic has transposed the list of companies indicated in the Annex to the 1990 Directive into the Czech legal system in the form of the Announcement of the Ministry of Finance of the Czech Republic, with all companies being principally covered.

### Article 4

Tax neutrality of a merger, division or partial division stipulated in Article 4 of the Merger Directive has been implemented in ITA (including carry over of tax basis of assets).

The terms real value and value for tax purposes have not been directly transposed into ITA. However, certain guidance insofar as the real value is concerned may be derived from the Czech Accounting Act.

The Czech Republic has not issued any specific guidance regarding reorganizations of transparent entities.

### Article 5

With the effectiveness as of 1 July 2008, reserves and provisions created on the basis of respective foreign law may be carried over (up to the maximum amount laid down by the Czech Act on Reserves).

No specific allocation method of provisions and reserves has been implemented into Czech law.

### Article 6

According to ITA, the receiving company may take over the losses of the transferring company provided specific conditions are met.

### Article 7

Article 7 of the Merger Directive has not been implemented into the Czech tax law.

### Article 8

In our view Article 8 of the Merger Directive has generally been implemented correctly into the Czech tax law.

### Article 9

In our view Article 9 of the Merger Directive has generally been implemented correctly into the Czech tax law.

## Article 10

The Czech Republic has not directly implemented this provision.

## Article 10a

Article 10a of the Merger Directive has not been implemented into the Czech tax law.

## Article 10b

The interpretation of the implementation of Article 10b of the Merger Directive into the Czech tax law is not clear.

## Article 10c

The interpretation of the implementation of Article 10c of the Merger Directive into the Czech tax law is not clear.

## Article 10d

The interpretation of the implementation of Article 10d of the Merger Directive into the Czech tax law is not clear.

## Article 11

In our view Article 11 of the Merger Directive has been implemented generally correctly into the ITA. Moreover, please note that general 'substance over form' provision is also present in the Czech tax law.

Jiri Prokop

## 6. Denmark

### 6.1 General comments

The original 1990 Merger Directive was implemented in Denmark by Act No. 219 of 3 April 1992. The 1992 Act provided for the implementation of a tax regime applicable to intra-community corporate mergers, as the tax regime applicable to corporate domestic mergers was already in place at that time. Furthermore, the Act provided for the implementation of other intra-community and domestic restructurings such as division and transfer of assets.

In 2002 Denmark abolished the limitation on the cash payment in connection with a merger, division and exchange of shares.

The 2006 European Commission amendments to the Directive were implemented as Act No. 343 of 6 June 2007. The amendments were retroactively applicable to all intra-community and domestic reorganisations which had taken place ('merger date', etc.) from 1 January 2007.

SEs and SCEs are also included in the tax regime applicable to intra-community reorganisations without any specific amendment as they were already subject to the same tax provisions applicable to Danish companies.

### 6.2 Comments relating to specific provisions of the Merger Directive

Danish tax law is mostly compliant with the Merger Directive. However, some provisions of the Danish Merger Tax Act may be considered being non-compliant with the Merger Directive.

Below is an article-by-article summary of the Danish compliance status:

#### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive.

#### Article 2

This Article does not seem to have been properly implemented in Danish tax legislation.

According to Danish tax legislation it is therefore a requirement for all shares to be exchanged within a period of 6 months after the first share has been exchanged. Furthermore, according to tax practice it is generally a requirement for the exchange of shares to be carried out within 6 months after approval has been obtained. These 6-months requirements do not follow from the Merger Directive or the intentions of the Merger Directive.

Also, in its tax practice the Danish tax authorities have consistently been applying a condition that any ownership changes within a period of three years after the restructuring will be reported to the tax authorities.

A minor difference can also be found in the implementation of the term securities, as convertible bonds may not be exchanged according to the rules on the exchange of shares.

Also, Danish tax authorities have – in relation to transfer of assets – in tax practice considered subsequent dividend distributions cash payments. It is uncertain whether this will be changed after the 'Kofoed' case.

### Article 3

No incompatibility problems have been found following the implementation of Article 3 of the Merger Directive except that Denmark has restricted certain types of entities from benefiting from the Directive. Also it may be argued whether the disqualification of cooperatives complies with the Merger Directive.

### Article 4

Generally, no incompatibility problems have been found with the implementation of Article 4 of the Merger Directive. However, the requirement that the tax payer should notify the tax authorities of any subsequent changes in the group structure during a period of three years may be argued as incompatible with the Merger Directive.

### Article 5

No incompatibility problems have been found with the implementation of Article 5 of the Merger Directive.

### Article 6

No incompatibility problems have been found with the implementation of Article 6 of the Merger Directive. However, it is difficult to tell how the rule will be interpreted in tax practice.

### Article 7

No incompatibility problems have been found with the implementation of Article 7 of the Merger Directive.

### Article 8

No incompatibility problems have been found with the implementation of Article 8 of the Merger Directive.

### Article 9

There is a risk of economic double taxation, which does not seem in line with the objectives of the Merger Directive.

## Article 10

No incompatibility problems have been found with the implementation of Article 10 of the Merger Directive.

## Article 10a

No incompatibility problems have been found with the implementation of Article 10a of the Merger Directive. However, the Danish tax treatment of transparent entities is unclear.

## Article 10b

No incompatibility problems have been found with the implementation of Article 10b of the Merger Directive. However, it is not clear whether the Danish exit taxes are compatible with EU law.

## Article 10c

No incompatibility problems have been found with the implementation of Article 10c of the Merger Directive.

## Article 10d

No incompatibility problems have been found with the implementation of Article 10d of the Merger Directive.

## Article 11

The anti-abuse provision in Article 11 of the Merger Directive has not been transposed into Danish tax legislation but is applied by the tax authorities when determining whether a restructuring is based on valid business reasons.

Denmark has taken no steps as to include the principles in ECJ practice under Danish tax law, and the 'Cadbury' judgment has not resulted in new national

Michael Kirkegaard Nielsen

Morten von Jesse

## 7. Estonia

### 7.1 General comments

The Merger Directive has been implemented into the Estonian tax law through the general provisions to be found in the Income Tax Act (ITA). It is a general principle that mergers, divisions, and reorganizations are tax neutral and the movement of fiscal reserves among the transferred assets is not taxable in line with the general principles of the Estonian tax system.

No individual income tax will be levied on the capital gain realized on the substituted shares or on the allotment of shares, nor on the unrealized capital gain on the shares in a SE or SCE transferring its registered office, as long as the substituting shares in the acquiring/receiving, split off or migrating company are not sold by the shareholder. For legal entities, this requirement is fulfilled by the general concept that accrued but undistributed profits are not taxed.

Another requirement of the Merger Directive that is met due to the Estonian unique tax system is the carry over of tax-free provisions and reserves as companies in Estonia are obliged to pay corporate income tax only on distributed profits, such provisions and reserves do not exist, i.e. there is nothing to carry over.

Although not all of the situations covered by the Merger Directive are explicitly regulated by the ITA, tax neutrality should be achieved through the interpretation of general clauses.

In conclusion, we find that the Merger Directive has been fully and correctly implemented into the Estonian tax law.

Nevertheless, certain violation with the EC Primary Law could result from the fact that when no permanent establishment remains in Estonia, tax consequences follow to non-resident shareholders but not for resident shareholders (see sections 10b.1 and 10d.1 from the Questionnaire).

### 7.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive. However, certain operations can not be effected due to lack of legal framework provided by the Company Law Merger Directive (e.g. cross-border merger involving a cooperative society).

#### Article 2

Provisions safeguarding the tax neutrality of share exchange transactions are incomplete which could lead to taxation of private individuals and non-residents.

### Article 3

No incompatibility problems have been found with the implementation of Article 3 of the Merger Directive.

### Article 4

No incompatibility problems have been found with the implementation of Article 4 of the Merger Directive.

### Article 5

No incompatibility problems have been found with the implementation of Article 5 of the Merger Directive.

### Article 6

No incompatibility problems have been found with the implementation of Article 6 of the Merger Directive.

### Article 7

No incompatibility problems have been found with the implementation of Article 7 of the Merger Directive.

### Article 8

No incompatibility problems have been found with the implementation of Article 8 of the Merger Directive.

### Article 9

No incompatibility problems have been found with the implementation of Article 9 of the Merger Directive.

### From Article 10 to Article 10d

No incompatibility problems have been found with the implementation of Article 10, Article 10a, Article 10b, Article 10c and Article 10d of the Merger Directive.

### Article 11

No incompatibility problems have been found with the implementation of Article 11 of the Merger Directive.

Ranno Tingas

Tönis Jakob



## 8. Finland

### 8.1 General comments

The requirements of the Merger Directive are implemented in Sections 52-52h of the Finnish Business Income Tax Act.

The rules implementing the Merger Directive entered into force on 1 January 1996 but the rules applied retroactively to cross-border transactions entered into on or after 1 January 1995 if the taxpayer so requested. The amendments to the Merger Directive were implemented as of 1. January 2006 with respect to those related to the SE and SCE, and as of 1 January 2007 with respect to other amendments as required by the Directive 2005/19/EC amending the Merger Directive.

The same Finnish domestic law provisions apply to both pure domestic arrangements and to arrangements involving a company of another EU Member State. Furthermore, the case law has extended the application of the principles (particularly the deferral of capital gains taxation) of the domestic law provisions implementing the Merger Directive to cover even transactions which are not covered by the Merger Directive. The case law has extended the application to e.g. SICAVs, single member state transactions within the EU and even in Canada as well as transactions involving companies from EEA- and EFTA-states.

In terms of compliance with the Merger Directive, there are only a few points to mention. Finnish legislation may be regarded as compliant with the Merger Directive for the most part. However, Finnish legislation may be regarded as incompliant with the Directive, or its compliancy may be considered as doubtful, on some specific issues such as:

- (a) The Finnish implementing law requires that new shares be issued to the shareholders of the transferring company. As a result, 'old' shares bought back by the company cannot be used as a means of compensating the shareholders of the transferring company. However, we note that it is our understanding that a draft government bill is pending which would abolish the requirement of shares being 'new' as of 1. January 2009;
- (b) The amendments related to the treatment of transparent entities have not been expressly implemented into Finnish legislation (apart from that they are included in the list of eligible entities). Although it is possible that none of the entities are qualified as transparent for Finnish tax law purposes, it remains unclear what are the consequences if such qualification would be made.

In terms of compliancy with primary EU law, the main concerns relate to exit taxation. In this respect, no account has been taken of the relevant ECJ case law. Therefore deferral of exit taxes is not possible even if the comparable event would not realise taxation in a purely domestic context. This is likely to be in conflict with EU law. The main events causing exit taxation are:

- (a) the assets do not remain or they cease to be effectively connected to a permanent establishment in Finland;
- (b) the Finnish taxing right to a permanent establishment of a Finnish company ends due to company reorganization;

- (c) a natural person who receives new shares in exchange of shares transaction becomes resident abroad either according to Finnish domestic tax law or to an applicable tax treaty within 3 years from the end of the year in which the exchange took place.

Another point of concern may be the interpretation and application of the specific anti-abuse rule to company reorganizations the impact of the ECJ case law on anti-abuse provisions has not been expressly taken into account in tax law, but it could affect the interpretation of such provision. However, this issue can only be resolved on a case by case basis.

## **8.2 Comments relating to specific provisions of the Merger Directive**

### Article 1

In our opinion the Finnish legislation complies with Article 1 of the Merger Directive.

Tax deferral applies also where there is involvement from third states and court and administrative guidance exists on the matter (e.g. The Supreme Administrative Court cases KHO 1997/2531 and KHO 2004:112 and Central Tax Board's advance ruling 2007/38).

### Article 2

In our opinion the Finnish legislation in force does not necessarily fully comply with Article 2 of the Merger Directive.

Finnish legislation refers to 'new shares' being issued to the shareholders of the transferring company and clearly differs from the Directive in this respect and may not fully comply with the Merger Directive. However, we note that it is our understanding that a draft government bill is pending which would abolish the requirement of shares being 'new' as of 1 January 2009.

Extensive case law exists e.g. on the definition 'branch of activity'.

### Article 3

In our opinion the Finnish legislation complies with Article 3 of the Merger Directive.

The interpretation is even broader than in the Merger Directive and there is also case law on the matter. Pursuant to the freedom of establishment under the EC and EEA Treaty the benefits of the Merger Directive are also granted e.g. to reorganizations which involve comparable companies established in EEA states (Central Tax Board's advance ruling 2007/38).

There are no specific rules in Finnish legislation governing the residence of companies. In practice, companies are considered to be residents of Finland if they are established in accordance with Finnish law and registered in the Trade Register in Finland (criterion of incorporation). Foreign companies are not deemed to be residents of Finland even if they are effectively managed from Finland.

Under most double tax treaties (DTT) concluded by Finland a company is considered to be a resident of the state where the place of its effective management is located. Therefore a Finnish company may become resident in another state due to the application of the DTT (KHO 2003:33 and KHO 2003:34). However, under its domestic law Finland does not

deem foreign companies to be residents of Finland even if they are effectively managed from Finland.

The implementing law mentions that only companies subject to tax are covered by the implementing legislation. No administrative guidance has been issued.

#### Article 4

In our opinion the Finnish legislation complies with Article 4 of the Merger Directive.

Finnish legislation requires that the assets are effectively connected to its permanent establishment situated in Finland. If the receiving company does not have a permanent establishment in Finland, or if the assets thus transferred cease to be effectively connected to the permanent establishment, the difference between the fair market value and the tax book value of the items will be treated as taxable income in Finland in connection with the tax assessment.

#### Article 5

In our opinion the Finnish legislation complies with Article 5 of the Merger Directive.

#### Article 6

In our opinion the Finnish legislation complies with Article 6 of the Merger Directive.

Generally speaking, if the business operations of a company yield a net loss, this tax loss may be carried forward for tax purposes and set off against future business profits. The loss can be carried forward for up to 10 tax years. There are some restrictions regarding the use of losses e.g. in the case of ownership change. Permanent establishments are generally treated in the same way as companies for the purposes of allocating losses.

#### Article 7

In our opinion the Finnish legislation complies with Article 7 of the Merger Directive.

#### Article 8

In our opinion the Finnish legislation does not fully comply with Article 8 of the Merger Directive.

If a natural person who receives new shares in exchange of shares becomes resident abroad either according to Finnish domestic tax law or to an applicable DTC, within 3 years from the end of the year in which the exchange took place, the amount which escapes taxation through the application of Finnish legislation, is treated as income in the year in which the person becomes resident abroad.

This is likely to be incompliant with ECJ case law because the taxation is not realized at the moment of the actual disposal of shares, which is also the event which would trigger the capital gains taxation in a domestic context.

## Article 9

In our opinion the Finnish legislation complies with Article 9 of the Merger Directive.

No avoidance of economic double taxation is provided. Pursuant to Finnish legislation the acquisition costs for received shares is the difference between the cost base for tax purposes of the transferred assets less the amount of transferred debts and reserves.

However, under the general participation exemption rules, the subsequent disposal of shares may be exempted from tax in which case no double economic taxation arises. The conditions for a tax exempt sale of shares are: the seller is not a venture capital company, shares belong to the seller's fixed assets, and the seller owned at least 10% of the share capital in the company directly and continuously for at least 1 year. The shares in real estate companies do not qualify for the tax exemption.

## Article 10

In our opinion the Finnish legislation complies with Article 10 of the Merger Directive.

Finnish legislation expressly states that if the transferred assets and liabilities are effectively connected with a permanent establishment of a Finnish company situated in another Member State, the difference between the fair market value and the book value of the assets, as well as reserves deducted from the permanent establishment's income, are treated as income in the hands of the transferring company.

With respect to the Finnish tax due on this income, relief is granted for the amount of tax that, but for the provisions of the Directive, would have been charged on the relevant income in the state in which the permanent establishment is located.

## Article 10a

In our opinion the Finnish legislation complies with Article 10a of the Merger Directive.

The 'option right' has not been implemented in Finnish tax law. Based on the entity classification, it is unlikely that any of the entities covered by the Merger Directive would be treated as transparent for Finnish tax purposes.

## Article 10b

In our opinion the Finnish legislation complies with Article 10b of the Merger Directive.

## Article 10c

In our opinion the Finnish legislation complies with Article 10c of the Merger Directive.

## Article 10d

In our opinion the Finnish legislation complies with Article 10d of the Merger Directive.

## Article 11

In our opinion the Finnish legislation complies with Article 11 of the Merger Directive.

Finnish legislation states that the relevant paragraphs do not apply if it is evident that the sole or one of the principal objectives of the transaction is tax avoidance or tax evasion.

At least theoretically there could be some incompliance in the interpretation and application of the specific anti-abuse rule to company reorganizations by case to case basis.

Hannele Liede

Tom Viitala

## 9. France

### 9.1 General comments

The aim of this memorandum is to briefly summarize our findings in connection with completing the French part of the 'Survey of the implementation of the Council Directive 90/434/EEC as amended by the Directive 2005/19/EEA'.

The Directive has been implemented by amending existing French tax regulations.

However, even if the same rules apply to both domestic and cross-border operations, French courts have always refused to apply the '*Leur-Bloem*' ECJ decision to domestic operations and have thus not developed an extensive case-law which would have balanced the practice of the French tax authorities.

Indeed, from a global viewpoint, French legislation may be regarded as compliant with the Merger Directive. For instance, the non implementation of some provisions of the Directive may be explained by French legislation specificities (e.g., the territoriality principle, the non recognition of the tax transparency concept, the possibility for operations accounted at real value to benefit from the favourable tax merger regime, the non recognition by French company law of partial division). Furthermore, on other issues, the French legislation may be regarded as more favourable than the regime set out in the Directive (i.e., types of entities, the 'subject-to-tax' requirement).

However, French legislation may be regarded as incompliant with the Directive, or its compliancy may be considered as doubtful, on some specific issues such as:

- (a) the determination of a branch of activity to be transferred, for which a prior validation by the French tax authorities is almost always required in practice in order to secure the favourable tax treatment of the operation;
- (b) holding commitments, which are still required even if the financial consequences of a non-respect of those commitments have decreased since the reform of the taxation of capital gains deriving from long term investments and recent case-law;
- (c) the double taxation of capital gains in case of transfer of assets and exchange of shares, which are assimilated to transfer of assets under French tax rules;
- (d) the requirement of ensuring the future taxation in France of the latent capital gains, which, in some cases such as the incorporation of a French branch, leads to specific and more complex structuring of the operations and to subordinated double commitments.

Finally, the French legislation relating to the favourable tax merger regime is characterized by the extensive use of rulings or validations from the French tax authorities, which are required either by the law or for securing the tax treatment of the contemplated operations. In this respect, it should be noted that, if an extensive experience now exists regarding the conditions to be fulfilled for obtaining such ruling or the practice of the French authorities in charge of those rulings in case of a transfer of assets to a foreign entity, the determination of a branch of activity or the incorporation of a French branch, such experience is more limited in respect of more recent issues such as the transfer of a registered office.

## 9.2 Comments relating to specific provisions of the Merger Directive

### Article 1

We are of the opinion that French legislation complies with Article 1 of the Merger Directive since the French favourable tax merger regime may apply to operations realized by French companies, operations realized by companies from one or several Member States and, under certain conditions, operations realized by companies located in third companies.

### Article 2

We are of the opinion that French legislation does not fully comply with Article 2 of the Merger Directive:

- (a) a branch of activity is appreciated at both the level of the receiving company and the level of the transferring company and at both the date of realization and the date of effectiveness of the operation;
- (b) the application of the favourable merger regime to an exchange of shares aiming at consolidate an existing majority is subject to a ruling;
- (c) a partial division may only be realized by way of a two-steps operation: transfer of assets; followed by a distribution to its shareholders of the shares received in exchange of the assets.

### Article 3

We are of the opinion that French legislation complies with Article 3 of the Merger Directive.

### Article 4

We are of the opinion that French legislation complies with Article 4 of the Merger Directive except for:

- (a) in case of divisions or transfer of assets, the requirement that the transferor or the shareholders of the transferring company commit themselves to hold the shares received for 3 years;
- (b) in case of transfer of shares, the requirements that the transferring company commits itself to hold the shares received for 3 years and that the receiving company commits itself to hold the received shares as long as being detained by the transferring company;
- (c) in case of operations realized at real value, the immediate taxation of capital gains resulting from the transfer of current assets of the transferring company.

### Article 5

We are of the opinion that French legislation complies with Article 5 of the Merger Directive except for the requirement in case of divisions or transfer of assets that the transferring company or the shareholders of the transferring company commit themselves to hold the shares received for 3 years.

## Article 6

We are of the opinion that French legislation complies with Article 6 of the Merger Directive except for the requirement that the transferred activity, which generated the losses, is maintained for at least 3 years.

Furthermore, in practice, French tax authorities tend to consider that this requirement may not be fulfilled by holding or real estate companies, which are deemed to not perform any activity.

## Article 7

We are of the opinion that French legislation complies with Article 7 of the Merger Directive.

## Article 8

We are of the opinion that French legislation does not comply with Article 8 of the Merger Directive in regards of:

- (a) the anti-abuse provision applicable to exchange of shares recently issued by way of a capital increase;
- (b) in case of a partial division realized by way of a two-steps operation, the requirement that the shareholders commit themselves to hold the shares for 3 years.

Furthermore, French legislation only provides for a tax deferral at the level of the shareholders and does not provide for the avoidance of economic double taxation.

## Article 9

We are of the opinion that French legislation does not comply with Article 9 of the Merger Directive in regards of:

- (a) the appreciation of the branch of activity;
- (b) in case of a transfer of assets, the requirement that the transferring company commits itself to hold the shares for 3 years;
- (c) in case of a transfer of shares, the requirements that the transferring company commits itself to hold the shares for 3 years and that the receiving company commits itself to hold the shares as long as being detained by the transferring company;
- (d) the requirement from a practical viewpoint to request a prior ruling.

Furthermore, French legislation does not provide for the avoidance of economic double taxation at the level of the transferring company.



## Article 10

We are of the opinion that French legislation does not comply with Article 10 of the Merger Directive since, in case of a transfer of a branch of activity to a company in exchange for shares of this company, the French tax authorities tend to request a double transfer of the assets and liabilities and related commitments from the French companies to hold the shares received in exchange of those transfers.

## Article 10a

French legislation does not recognize the concept of tax transparency.

## Article 10b

We are of the opinion that French legislation complies with Article 10b of the Merger Directive.

## Article 10c

Since France does not apply a worldwide taxation system, French legislation does not include any rule for the offset or the recapture of foreign permanent establishment losses.

## Article 10d

We are of the opinion that French legislation complies with Article 10d of the Merger Directive.

## Article 11

We are of the opinion that French legislation does not comply with Article 11 of the Merger Directive.

First, the specific anti-abuse provision set out in French legislation may be regarded as not compliant with Article 11 of the Directive. Indeed, the requirement set out in this provision that the operational modalities of the operation ensure the future taxation of the latent capital gains has led to additional requirements from the tax authorities.

Second, the application of the favourable tax merger regime is subject to several requirements (e.g., holding requirements, realization of two-steps operations, etc.) depending on the case at hand.

Anne Colmet Daage

## 10. Germany

### 10.1 General comments

The Merger Directive was implemented by the Tax Amendment Act 1992, dated 25 February 1992, and the so-called SETI Act, dated 7 December 2006. The Tax Amendment Act 1992 transposed only the requirements of the EU cross border transfer of assets and exchange of shares into German law, but not the requirements of EU cross border merger and division/partial division. The Tax Amendment Act 1992 came into effect on 1 January 1995. The SETI Act came into effect on 13 December 2006 and is applicable for transactions occurring after 1 January 2007. It implemented the Merger Directive in Sec. 1 ff. RTA and Sec. 12 CITA.

As outlined in the explanatory memorandum to the SETI Act it is the position of the German legislator that German tax law is compliant with the Merger Directive as a result of the implementation of the Merger Directive by the SETI Act.

The company law Directive 2005/56/EC on cross-border mergers of limited liability companies was implemented in Sec. 122a seq. RA effective as from 25 April 2007. Prior to the implementation a EU cross-border merger was not laid down by German company law with the exception of the SE- and SCE-Regulations. The SE-Regulation (No. 2157/2001) was supplemented with the SEImpl. Act dated 22 December 2004. The SCE-Regulation (No. 1435/2003) was supplemented with the SCEImpl. Act, dated 14 August 2006, adjusted by Article 12 (11) of the Law dated 10 November 2006 and the so-called ECSI Act, dated 14 August 2006. Cross-border divisions/partial divisions are still not laid down by German company law. Because the RTA refers to reorganizations under the RA, the implementation of the Merger Directive in German tax law could not cover German cross-border divisions/partial divisions. Insofar as such reorganizations must be allowed from a legal point of view under reference to EC Primary law, the provisions of the RTA must be read in a way covering such reorganizations.

### 10.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

Article 1 of the Merger Directive was implemented correctly.

Please note that the SETI Act does not only cover EU/EEA reorganizations but also domestic reorganizations and to a limited extent reorganizations involving companies and shareholders from third States.

#### Article 2

The RTA follows the terminology of the RA and ITA, respectively, and not the one of the Merger Directive. As a result, the interpretation of legal terms might be different.

For example, it is controversially discussed whether *jouissance* rights ('*Genussrechte*') are 'securities'.

With respect to the 'exchange of shares' and 'transfer of assets' the German legislator added a further requirement into the RTA by providing that securities granted in exchange

of the shares or for the assets must be new shares. This requirement is in our view non-compliant with the Merger Directive.

Furthermore it is questionable whether the term 'branch of activity' corresponds to what in German tax law is meant by 'Teilbetrieb'.

### Article 3

The provisions implementing the Merger Directive apply to all companies established in accordance with the legislation of a Member State or any EEA State within the meaning of Art. 48 EC and Art. 34 EEA Agreement provided that their registered office and place of management are located within the territory of any of these States. This definition includes companies listed in the Annex of the Merger Directive.

Because the subject-to-tax clause of Art. 3(c) of the Merger Directive was not transferred into the RTA, the RTA applies in principle also to a merger including corporations which are (partially) exempt from corporate income tax but listed in Article 3(c) of the Merger Directive.

### Article 4

The Merger Directive does not define what is meant by real value of an asset. Under German tax law real value could have two different meanings, i.e., the market value for the single asset with or without taking into account the going concern of the business. With the SETI Act the German legislator decided to follow the single asset approach. As the Merger Directive is silent and a specific valuation cannot clearly be deduced from EC Primary law this approach might be treated as being compliant with EC law. However, in our view and taking into consideration the purpose of the Merger Directive the going concern valuation should be the appropriate method.

To be taxable in Germany the assets of a foreign company must be allocated to a permanent establishment of the receiving company in Germany following German domestic tax rules as well as the applicable German DTT, if any. Germany applies the functional approach and interprets it in a way that assets serving the company as a whole must be allocated to the head office. This principal approach is in our view doubtful compliant with the Merger Directive.

The RTA provides for a recapture provision in case of shares in the receiving company owned by the transferring company. Even if a profit would be tax exempt, 5 per cent of it would be treated as non deductible expenses increasing the taxable profit. We consider this as doubtful compliant with Article 4 of the Merger Directive.

If and insofar as a merger results in a situation where Germany would lose the right to tax the gain on the disposal of the transferred assets with the receiving company or such right would be limited, the respective transferred assets, including any intangible assets not acquired for a consideration or self-developed, must be valued at fair market value in the closing balance sheet of the transferring company and will be taxed. There are good arguments existing that the immediate exit charge could be seen as being incompatible with the freedom of establishment.

The RTA provides that the share of the merger profit equal to the holding of the receiving company in the transferring company would follow the rules applicable for the taxation of capital gains from the disposal of shares. Because this would result in an increase of the

taxable income of 5 percent we consider this rule as being incompliant with Article 4 of the Merger Directive.

#### Article 5

The terms 'provision' and 'reserves' follow German GAAP. For tax purposes provisions and reserves will only be recognized if they meet the requirements under the ITA and as supplemented by administrative guidelines.

With respect to provisions for pensions the RTA provides an exception from the rule that the valuation follows the real value concept. The valuation is based on very specific requirements outlined in the ITA and additional administrative guidelines, principally resulting in a value significantly below the fair market value. Therefore, these hidden charges are not taken into consideration by reorganizations under the RTA.

Disregarding hidden charges might be treated as a violation of the principle of tax neutrality of reorganizations under the Merger Directive.

#### Article 6

Under the actual tax regime any remaining losses/loss carry forwards of the transferring company cannot be taken over by the receiving company. As a result of this no carry over loss rule exists for a domestic merger or division/partial division under the RTA which must be extended to cross border mergers or foreign mergers under the Merger Directive.

Due to tax loss utilization strategies and the German Organschaft concept which is disallowed for cross-border structures it could be argued that the German concept is in practice discriminating non-German investors. However, in light of the ECJ decisions in the 'Marks & Spencer' case (C-446/03) and 'Oy AA' case (C-231/05), respectively, the arguments should not be strong enough to evaluate the German concept as being doubtful compliant with EC Primary law.

#### Article 7

Under German tax law capital gains from the disposal of shares are for corporate shareholders tax exempt. This principle is also applicable for capital gains accruing to the receiving company on the cancellation of its holding in the transferring company as a result of a merger.

However, German tax law also provides that 5 per cent of any such capital gains will be treated as non deductible expenses, i.e. they increase the taxable income.

Article 7 of the Merger Directive does not provide for such a charge. Because the gains are caused by the merger itself and not by a disposal of shares of the transferring company we consider this provision as being incompliant with the Merger Directive.

#### Article 8

On a merger, division or exchange of shares the shares received by the shareholder of the transferring or acquired company in exchange for securities will be valued with the book value of the securities at the level of the receiving or acquiring company.

The economic double taxation is mitigated rather than avoided by the tax treatment of capital gains at the level of the shareholder. For corporate shareholders capital gains are tax exempt (but 5 per cent thereof will be treated as non deductible expenses).

As the 5 per cent rule must be seen in context with the tax deductibility of expenses connected with the disposal of the shares the associated economic double taxation is in our view not sufficient enough to evaluate the German concept as being doubtful compliant with EC Primary law.

#### Article 9

In case of a transfer of assets the value assessed on the receiving company for the transferred assets shall be deemed to be the purchase price for the shares received by the transferring company.

The economic double taxation will be mitigated under the same rule as mentioned above (see under Article 8).

#### Article 10

Germany follows the concept of worldwide taxation. Under German DTT, income from foreign permanent establishments is principally exempt from taxation in Germany. In case of tax exemption of the income of a permanent establishment, losses from a permanent establishment are disregarded for German tax purposes. If the income is not tax exempt, Germany credits foreign taxes. The credit is limited by the per country limitation, and no carry forward of a tax credit is allowed.

As far as the income from a permanent establishment in another Member State is not tax exempt under the applicable DTT and is - in the case of a merger of a company - subject to unlimited tax liability in Germany the corporate income tax levied on the transfer gain is to be reduced by the amount of foreign tax which would have been charged pursuant to the legislation of another Member State if the transferred assets had been disposed of at fair market value. Losses that qualify for tax deduction under Sec. 2a(1), (2) ITA are deductible at the level of the resident company.

Article 10 of the Merger Directive was implemented into German tax law. With respect to exit charges see our comments under Article 4.

#### Article 10a

Only the minimum required content of Art. 10a of the Merger Directive was implemented.

Germany applies the RTA generally only to those companies which are regarded as non-transparent under the so-called 'Typenvergleich'. This is a test which compares the legal characteristics of the foreign corporation in question with the ones of a German corporation which is subject to unlimited taxation under Sec. 1 (1) CITA.

In case a non-resident transferring or acquired company in the meaning of Art. 3 of the Merger Directive is to be considered fiscally transparent, Germany would grant a tax credit on a per-country limitation basis. Following German tax principles an excess tax credit cannot be carried forward and would be lost.

We consider the per-country limitation and the disallowance to carry forward tax credits as doubtfully compliant with EC Primary law.

### Article 10b

The transfer of a registered office of a SE would give rise to exit taxation as follows.

In the event that the German taxing right for gains on the disposal or use of an asset is excluded or limited, this shall be deemed a disposal or transfer for use of that asset at fair market value. This rule is based on the assumption that the transfer of the registered office to another Member State does not lead to a liquidation from a legal point of view, i.e. the legal entity remains in existence. This concept applies only for the SE/SCE. For other German company forms the transfer of the registered office to another Member State would currently result in a liquidation of that entity. However, according to a recently released proposal of the Federal Ministry of Finance Germany should introduce the Foundation Doctrine for companies by the end of 2008.

For the exit taxation no tax deferral is granted. We consider this is as being doubtful compliant with Art. 43 and 48 EC.

### Article 10c

German tax law follows the principles outlined in Article 10c.

### Article 10d

If the SE or SCE transfers its registered office to another EC Member State a future disposal of shares in the SE/SCE would remain subject to German taxation in the same way as prior to the transfer. As a consequence, non-residents who are subject to taxation with their shares in a SE/SCE resident in Germany remain subject to German taxation even if the SE/SCE transfers its registered seat to another EC Member State. This means that hidden reserves in such shares generated after the transfer remain subject to taxation in Germany.

As far as non-resident shareholders are concerned it is in our view doubtful whether the taxation right for hidden reserves generated after the transfer of the registered seat of a SE/SCE is in line with Article 10d and/or the freedom of free movement of capital.

### Article 11

The RTA does not contain a general provision for the prevention of tax abuse. There are specific anti abuse provisions in the RTA which are at least doubtful compliant with the principles as outlined by ECJ cases like Leur-Bloem (C-28/95), Kofoed (C-321/05) and Cadbury Schweppes (C-196/04). This relates especially to the provisions in the RTA which provide for certain holding periods in connection with divisions/partial divisions and the transfer of assets/exchange of shares. In addition, these provisions do not provide for the opportunity to produce evidence that in the concrete situation the transaction is no tax abuse.

The anti abuse provisions are in our view not compliant with European Community principles as articulated by the ECJ in a number of cases.

Tim Hackemann

Dr. Klaus von Brocke

Ferdinand Ochs

## 11. Greece

### 11.1 General comments

The 90/434 Directive has been implemented into the Greek legislation by virtue of Law 2578/1998, which was issued on 17 February 1998 (Volume A´ 30/17-2-1998 of Government's Gazette). By virtue of such law, the content of the above Directive was transposed literally into Greek legislation, i.e. the wording used in the Greek law is almost identical to the one found in the Directive. In addition, on 21 December 2006 the Greek parliament passed Law 3517/2006 (Volume A´ 271/21-12-2006 of Government Gazette), which transposed into Greek law Directive 2005/19 that amended the 1990 Directive and introduced a number of amendments to Law 2578/1998.

However, given that the Greek Corporate Law (Law 2190/1920) does not provide for any regulatory framework for cross-border mergers, divisions, and partial divisions, transfers of assets and exchanges of shares, the practical implementation of the Merger Directive remains pending. In particular, the current corporate legal framework regulates such transactions effected only between Greek corporations. As a result, the tax provisions of Law 2578/1998 remain in practice inactive and are currently of theoretical interest only. Nevertheless, Greek case law has acknowledged in isolated cases (Ruling 58/2002 of Legal State Council) that Law 2578/1998 has introduced the legal framework permitting cross-border mergers. Furthermore, it is also interesting to note that the Greek administration and Greek tax authorities have not dealt with Directives 90/434 and 2005/19 and have not issued any relevant administrative guidelines/rulings in connection thereto.

The findings of our analysis have shown that Greece is, to a large extent, compliant to the provisions of the Directive. Having said that it is also evident that Greece proceeded to a literal transposition mainly of the Directive in the domestic tax legislation. The outcome of this approach has resulted in many unclear areas, the extent and importance of which would emerge, whenever the practical implementation of the Directive in the Greek reality occurs. This is especially true, given that no administrative guidelines, as regards the interpretation or application of the Directive have been issued and we do not expect to be issued at least in the foreseeable future.

Apart from the above, our analysis has shown that the ECJ case law has not been taken into account as well, which however was no surprise, since it is the practice of the Greek administration not to take notice of the ECJ cases, which initially, do not have any connection with Greece.

### 11.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

The term 'company' includes only Greek 'societe anonyms' companies (AE) and limited liability stock companies (EPE). Parent companies are excluded. Currently, it does not seem possible under Greek law to apply the benefits of the Merger Directive if the merging companies were from a single (foreign) Member State or from a third (non-EU) State or States.

## Article 2

Tax law adopts the definitions introduced by domestic corporate law. Securities are defined as 'shares in the share capital of a stock company'. The term 'stock company' for the purposes of the Directive includes two types of stock company:

- (a) the 'societe anonyme' (AE); and
- (b) the limited liability stock company ('ΕΠΕ').

There are no administrative guidelines with respect to the terms 'cash payments' (but it can be argued that it applies on a per shareholder basis) and 'branch of activity'. As per the definition adopted by Greek case law, the term 'branch of activity' (or business sector) includes the total of tangibles and intangibles, such as movables and real estate, receivables, liabilities, clientele, goodwill, trademarks, etc, organized as an independent unit. In contrast with the transfer of assets on an itemized basis, the transfer of business sector is considered as the transfer of an economic entity which retains its identity and is taken as the total of organized resources for the exercise of economic activity (principal or secondary).

## Article 3

Greek tax law basically adopts the legal seat criterion of a legal person in order to assess its tax residence. Having said this, according to Greek Civil Law, a company shall be deemed to have its real seat in Greece if Greece is the place of its effective management. However, evidence that a prima facie foreign company is effectively managed in Greece would attribute Greek company and Greek tax residency status to the foreign company at hand.

## Article 4

In principle, the law transposing the Directive adopts the wording and terminology of the Directive. There are no specific implementation or interpretative guidelines for concepts 'effectively connected' and 'permanent establishment' and 'transparent entities'. Assets and liabilities are allocated to a permanent establishment, as long as they are depicted by means of relevant entries in its accounting books. As a result, assets and liabilities not effectively connected with a permanent establishment in case of a merger would be subject to the local capital gains taxation (i.e. 25% tax), unless relief could be invoked under a relevant double taxation treaty. No account of the ECJ case law has been taken. Additionally please note that the Greek law introduces further conditions for the tax relief from real estate transfer tax.

## Article 5

There is no specific definition of the term 'provisions and reserves' in the said laws transporting both Directives. Therefore, for the purpose of specifying such term within the framework of the Directive's implementation, it may be argued that one could find recourse to Greek tax incentive laws providing for Greek tax provisions and reserves. There is no specific rule excluding the provisions and reserves deriving from permanent establishments abroad since such provisions and reserves may not be utilized under the Greek tax law by Greek head offices.



## Article 6

The carry over of losses is applicable to the extent that the domestic law grants such possibility to mergers of Greek companies effected under the provisions of Articles 1 - 5 of Greek law 2166/1993 or Article 16 para 5 of Law 2515/1997. It should be mentioned that currently, carry over of losses is not possible for mergers of Greek companies effected in accordance with Law 2166/1993 or Article 16 para 5 of Law 2515/1997.

Please note that losses attributed to a permanent establishment located abroad can be offset against income derived abroad and not against income arising in Greece.

## Article 7

The holding threshold of 15% has been implemented into Greek law. The treatment of losses has not been dealt in the Greek legislation.

## Article 8

The Greek law has adopted to a great extent the wording of the Merger Directive and it has not made any specific reference to any provisions for the avoidance of the double taxation.

## Article 9

The Greek law has not made any specific reference to any provisions for the avoidance of the double taxation.

## Article 10

Greek legislation does not consider loss recapture as stated in Article 10(1) of the Merger Directive as it applies the derogation available in provision of Article 10 (2) of the Merger Directive. As per the transposing Greek law provisions, the capital gain of the permanent establishment of a Greek merging company is subject to income tax. From the abovementioned income tax is deducted the total tax that would have been imposed in the Member State in which the permanent establishment is situated.

## Article 10a

The tax transparency of a foreign entity is determined by reference to the legal characteristics that the foreign corporate law regulating the incorporation of the foreign entity attributes to such entity. In particular, a foreign company is considered as tax transparent if its profits are taxed in the hands of its shareholders or partners. In this case, the profits or capital gains would be taxable in the hands of Greek resident members of the transparent entity. From the abovementioned tax is deducted the total tax that would have burdened the foreign entity in case the provisions of the Greek transporting law did not apply.

The tax basis for the notional tax credit is the positive difference between the fair market value of the transferred assets and liabilities and their net book value.

The notional tax credit is determined as amount of tax that would have been imposed against the foreign transparent entity if Law 2578/1998, as amended, had not been applicable.

Greece has opted not to apply the merger Directive when the non resident receiving or acquiring company is a deemed fiscally transparent one.

#### Article 10b

There are no specific administrative guidelines with regard to the implementation of the respective provisions of Law 2578/1998, which simply transpose the wording of the Directive.

#### Article 10c

No administrative guidelines exist thereon. Under general Greek tax rules, losses attributable to a permanent establishment in a third member state may not be utilized in Greece.

#### Article 10d

The transfer of registered office of an SE should not give rise to a deemed liquidation from a tax perspective unless no permanent establishment remains in Greece.

#### Article 11

The exact wording of Article 11 (1) of the Merger Directive was transposed into Greek law. There are no further administrative guidelines.

Stephanos Mitsios

Vassilis Vlachos

Evgenia Kousathana.

## 12. Hungary

### 12.1 Overall state of implementation

The requirements of the Merger Directive are implemented in the Act LXXXI of 1996 on Corporate Income Tax and Dividend Tax ('Act on CIT').

In Hungary, the rules implementing the Merger Directive were introduced in 2003 (i.e. before Hungary joined the EU in 2004) but first the preferential treatment set in the Merger Directive could only be applied by Hungarian companies. Further amendments in 2004, 2006 and 2007 extended the benefits of the Merger Directive to cross-border transactions and followed the provisions of the Directive 2005/19/EC amending the Merger Directive. The same Hungarian domestic law provisions apply to both pure domestic arrangements and to arrangements involving a company of another EU Member State.

The Hungarian legislation distinguishes preferential transactions and general transactions. Preferential transactions can enjoy the benefits of the Merger Directive but companies involved into preferential transactions also have to meet certain criteria.

### 12.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

Hungarian legislation should be in compliance with Article 1 of the Merger Directive. Hungarian legislation does not extend the benefits of preferential transformations, transfer of assets and exchange of shares to the foreign parent companies but any income of the parent companies realized through these transactions is not taxable in Hungary anyway. However, the benefit is extended to the resident shareholder even if the other entities involved are from a Member State.

#### Article 2

Hungarian legislation should be compliant with Article 2 of the Merger Directive.

However, the interpretation of certain terms remains unclear:

- (a) Hungarian legislation does not include a definition of the term 'securities';
- (b) The definition of 'branch of activity' included in the Hungarian legislation follows the wording of the Merger Directive. Nevertheless, its interpretation for Hungarian tax purposes is unclear.

#### Article 3

Hungarian legislation should be in compliance with Article 3 of the Merger Directive.

#### Article 4

Hungarian legislation appears to be in compliance with Article 4 of the Merger Directive, except for the issue regarding exit taxation. In this respect, no account has been taken of the relevant ECJ case law (C-470/04 'N') and the Hungarian legislation prescribes some tax base increasing items which result in corporate income tax being imposed on the company migrating abroad.

There are certain points of concern regarding the interpretation and application of certain definitions that are not determined in the Hungarian legislation or they do not follow the definitions prescribed in the Directive:

- (a) No guidance has been issued for divisions and partial divisions. The Hungarian legislation determines 'preferential transformation' that includes mergers and divisions as well.
- (b) Hungarian legislation remains silent regarding the concept of 'effectively connected' and it does not specify in detail which assets and liabilities are deemed to be effectively connected to a permanent establishment.

Finally, the law is unclear as regards the treatment of transparent entities. The amendments related to the treatment of transparent entities have not been expressly implemented into the Hungarian legislation. Hungarian law does not recognize the concept of fiscally transparent entities; therefore, it is unclear how Hungarian law would treat such entities established under foreign law.

#### Article 5

In principle, Hungarian legislation seems to be in compliance with Article 5 of the Merger Directive. Nevertheless, the interpretation of the Hungarian legislation implementing Article 5 of the Merger Directive, i.e. regulating the carry over of provisions and reserves, is not clear cut due to the vagueness of its wording. Moreover, the Hungarian Tax Authority has not issued any guidance on the interpretation of this piece of legislation. Therefore, even if its wording seems to imply that it is in compliance with Article 5 of the Merger Directive, it is not conclusive.

Hungarian legislation only determines 'provisions' for accounting purposes and it remains silent regarding provisions and reserves attributable to a foreign permanent establishment or business division. Moreover, it is unclear whether further conditions need to be applied to carry over provisions and reserves.

#### Article 6

Hungarian legislation appears to be compliant with Article 6 of the Merger Directive.

One point which remains unclear is whether losses can be carried forward in cross border situations as well.

#### Article 7

Hungarian legislation should be in compliance with Article 7 of the Merger Directive.

#### Article 8

The Hungarian legislation seems to be in line with Article 8 of the Merger Directive except for the transfer pricing rules if they are applicable.

If the shareholder of the acquired company and the acquiring company are considered as related parties for transfer pricing purposes, the transfer pricing rules are applicable for the exchange of shares. Pursuant to Section 18, (6) of the Act on CIT, if the shares are not

transferred at market value, the difference between the market value and the value of transfer is taxable. The difference between the value of transfer and the book value can be differed for tax purposes in line with the Hungarian legislation implementing the Merger Directive.

Thus, the Hungarian transfer pricing rules are unlikely to be fully coherent with the Directive.

#### Article 9

Hungarian legislation appears to be compliant with Article 9 of the Merger Directive, except for the matter regarding exit taxation (see Article 4).

#### From Article 10 to Article 10d

With regard to the implementation of Article 10, Article 10a, Article 10b, Article 10c and Article 10d of the Merger Directive, there are certain points of concern concerning the Hungarian legislation:

- (a) Hungarian legislation is silent with respect to loss recapture for permanent establishments, however, it is reasonable to assume that there is no loss recapture in such situation.
- (b) Hungarian law does not recognize the concept of fiscally transparent entities; therefore, it is unclear how Hungarian law would treat such entities established under foreign law (see Article 4).

In addition, as set out above (see Article 4) the Hungarian legislation prescribes some tax base increasing items which result in corporate income tax being imposed on the company migrating abroad. However, in the case of SEs and SCEs, these provisions are not applicable, (i.e. the transfer of the registered office of an SE or SCE would not give rise to exit taxation under Hungarian legislation) for the business that the SE or SCE continues in Hungary through its Hungarian permanent establishment.

Please note that a Hungarian case (C-210/06 *'Cartesio'*) is still pending before the ECJ. The case concerns the corporate law issues of the migration of the head office of the plaintiff to other member state. This case may have impact on the Hungarian tax legislation in the future. However, to date, the Advocate General's opinion, supporting *'Cartesio'*'s claim, is only available.

#### Article 11

Hungarian legislation should be in compliance with Article 11 of the Merger Directive.

Sara Hermann Herrero

Zsombor Baki

Agnes Claus

## 13. Ireland

### 13.1 General comments

The original 1990 Merger Directive (the 'Directive') was implemented in Ireland with effect from 1 January 1992. The measures were limited to transfers of assets and in particular:

- (a) the transfer of an Irish trade, or part thereof, between two companies;
- (b) the transfer of an asset used for the purpose of an Irish trade to a company which holds all of the securities representing its capital; and
- (c) the transfer of the whole or part of a trade carried on through a non-Irish branch in return for securities in the receiving company (credit for tax).

The rationale for limiting the implementation of the Directive to these situations was that the Irish Revenue did not consider that mergers, divisions and (more recently) partial divisions were possible under Irish company law. However, a statutory power is available to Revenue to extend relief, 'on a just and reasonable basis' to any other transactions 'of a type specified in the Directive' upon application in writing to the Revenue. Due to its discretionary nature this would seem to be a less than satisfactory means of facilitating transactions covered by the Directive, but there is no reason to suspect that Revenue would deny relief for bona fide commercial transactions.

In practice many mergers, divisions and partial divisions are carried out by way of a 'reconstruction' and/or a share for share exchange. Legislation already existed to facilitate 'reconstructions' and 'amalgamations' and share for share exchanges. No further reference to these provisions was made in 1992 when implementing the Directive. In considering the response to this survey it is necessary to note that the language of the Directive is employed only in connection with transfers of assets.

All of the above legislation is contained in the Taxes Consolidation Act 1997 (TCA97).

In response to Regulation 2157/01 introducing the Societas Europaea (SE) and the amendments in Directive 2005/19/EC of 17 February 2005, the 2006 Finance Act contained provisions facilitating the creation of an SE or SCE by merger and the transfer of a registered office of an SE. The 2006 legislation did not amend the earlier provisions in connection with general mergers, divisions or partial divisions. On 27 May 2008, Ireland transposed into Irish law Directive 2005/56/EC on cross-border mergers (10<sup>th</sup> Company Law Directive).

### 13.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

Ireland would seem to be in compliance with Article 1 of the Merger Directive as the 'transfers of assets', share for share, and 'reconstruction' provisions are not confined to particular types of companies of Member States. The transfer of a registered office of an SE or European Cooperative Society (SCE) is also facilitated.

## Article 2

The definitions used in Article 2 of the Merger Directive are transposed into Irish law in connection with the provisions applying to transfers of assets. The definitions for 'transferring company' and 'receiving company' are more narrowly defined in Irish law in that they refer to transfers of the whole or part of an Irish 'trade' rather than a 'branch of activity'. The reason for this is that a non-resident company is only liable to corporation tax if it carries on a trade in Ireland through a branch or agency.

Mergers, divisions, partial divisions and exchanges of shares have not been defined as the Directive's provisions for these transactions have not been transposed into Irish law. Because of the requirement to fit these types of transactions within the 'reconstruction' provisions it is not clear if a cash payment could preclude relief for transactions falling within the Directive. Presumably in these instances the discretionary relief referred to above could be applied for.

The definition of 'securities' is applied inconsistently. Following an anti-avoidance amendment introduced in 2002, the share for share exchange provisions generally do not apply to debentures or loan stock. Nevertheless, the reference to shares would appear to be adequate.

## Article 3

The legislation implementing the Directive's provisions on transfers of assets refer directly to Article 3 of the Merger Directive.

The Irish Revenue has not yet produced a list of foreign entities which it regards as transparent. It has issued opinions to taxpayers in response to specific requests for clarification on the application of particular elements of Irish tax law to specific foreign entities.

No specific 'subject to tax' rules have been introduced for examining entitlements to the benefits of the Directive. For transfers of assets the Directive's definition of 'company from a Member State' has been used. No subject to tax requirement exists for share for share exchanges but a practical 'subject to tax' test exists where 'reconstruction' relief is to be claimed as any assets transferred to a receiving company must remain within the charge to Irish corporation tax to obtain the tax deferral.

## Article 4

Ireland has not implemented specific provisions to deal with mergers, divisions or partial divisions with the exception of those facilitating the formation of an SE or SCE by merger. These transactions (in particular partial divisions) may be accommodated by the tax deferral for reconstructions. Where this provision applies, the transfer of assets from the transferring company to the receiving company is deemed to take place at a value that would result in neither a gain nor a loss (i.e. effectively at cost). It is a precondition for this relief that the assets transferred will be used for the purposes of a trade carried on by the non-resident company through a branch or agency in Ireland.

Ireland has taken advantage of the derogation in Article 10(2) (permanent establishment in a third Member State) and Article 10a of the Merger Directive (transparent entities).

Where the merger, division or partial division cannot be accommodated by the tax deferral available for reconstructions, and discretionary relief is sought from the Revenue, it is unclear what conditions, if any, might be imposed.

#### Article 5

Irish tax law does not allow for the creation of tax exempt provisions or reserves so no specific reference to the transfer of such provisions or reserves is required.

#### Article 6

An overview of the Irish loss relief provisions is contained in 6.1 and 6.2 of the Irish questionnaire. In a domestic context, losses are not transferable to a receiving company that inherits a trade or part of a trade from another company except where the transferring company owns 75% of the ordinary share capital of the receiving company or where the same shareholder owns 75% of the shares of both the transferring and receiving companies, either directly or indirectly at some point in the two years after the transfer.

Ireland does not discriminate between wholly domestic transactions and cross-border transactions as the same rules apply equally to both situations.

#### Article 7

No specific provision is made for share cancellations that arise out of a merger, division or partial division. The tax effect of the cancellation would need to be reviewed based on the facts of each case to see if discretionary relief was required. In view of the transposition into Irish law of the 10<sup>th</sup> Company Law Directive specific provisions may be preferable.

#### Article 8

While the Irish tax code does not specifically refer to mergers, divisions, or partial divisions there are measures providing for a tax deferral on exchanges of shares that would seem to facilitate the types of transactions envisaged by the Directive.

Economic double taxation on share for share exchanges does not always arise on the basis that, either the acquiring company will be deemed to have purchased the shares in the acquired company at their market value, or because the disposal of the shares by the acquiring company would qualify for the exemption from capital gains available on the disposal of certain trading companies (see example 8.1.1).

Where a 'reconstruction' is used to effect a merger, division or partial division, economic double taxation may be avoided if the (corporate) shareholders in the transferring company qualify for the relief from capital gains on the disposal of certain trading companies. However, no new economic double taxation would appear to be created by a 'reconstruction'.

#### Article 9

The provisions concerning transfers of assets are closely aligned with the wording of the Directive. In practice these provisions are seldom used because the tax deferral available for intra-group transfers of assets is available to residents of other EU Member States if the assets remain chargeable assets, i.e. by virtue of their usage by a branch or agency carrying on a trade in Ireland.



It would appear that economic double taxation at the level of the transferring company could be avoided on the assumption that shares issued by the receiving company are deemed to be received by the transferring company at the market value of the assets exchanged. Alternatively, any disposal of the shares may be covered by the exemption for disposals of shares in certain trading companies.

If it is accepted that the concept of a trade is narrower than a business or branch of activity then there would appear to be a discrepancy between the implementing measures and the Directive. A non-resident company is only liable to Irish corporation tax if it carries on a trade in Ireland through a branch or agency. However, a non-resident company, not carrying on a trade in Ireland through a branch or agency, could be liable to Irish income tax or capital gains tax on certain Irish source income or gains, subject to the application of a relevant double taxation agreement. In this instance, an application might need to be made to the Revenue seeking discretionary relief if the transaction is of a type that should be covered by the Directive, for example a bona fide reconstruction or transfer of assets to another company in consideration for shares.

While there is no reason to suggest that the Revenue would refuse to grant relief in cases clearly covered by the Directive, the discretionary nature of the relief is a less than ideal way of implementing the Directive.

A disposal by the transferring company of the shares in the receiving company within 6 years of the date of the transfer may result in the deferred gain being deducted from the allowable base cost used to compute any gain on the disposal of the shares by the transferring company. Whether this has any practical impact will depend on the facts of the case and in particular the availability of the exemption referred to above. This 6 year clawback period is not provided for in the Directive.

#### Article 10

Ireland taxes resident companies on their worldwide profits and has availed of the derogation contained in Article 10(2) of the Merger Directive. Provisions for loss recaptures are not required.

The derogation has been implemented into Irish law where:

- (a) a company resident in Ireland transfers the whole or part of a trade which immediately before the transfer was carried on in a Member State (other than Ireland) through a branch or agency to a company not resident in Ireland;
- (b) the transfer included the whole of the assets (excluding cash) of the transferor used for the purposes of the trade or the part of the trade; and
- (c) the consideration for the transfer consists wholly or partly of the issue to the transferring company of securities in the receiving company; or
- (d) where there is a formation of an SE or SCE by merger and the SE or SCE carried on a trade through an overseas branch.

Where the provision applies Ireland will take account of any tax that would have been imposed by the Member State in which the branch is situated were it not for the operation of that Member State's domestic law or the application of the Directive. In order to benefit from a credit for this notional tax it is necessary to obtain a certificate from the tax

authorities of the Member State in which the branch is located certifying the tax that would otherwise have been paid.

#### Article 10a

Ireland has availed of the derogation contained in Article 10a (1) of the Merger Directive although no list of recognised transparent entities has been produced. This was achieved by adapting in 2006 the tax credit provisions of S.634 TCA97 as they apply to transfers of assets as follows:

- (a) where a non-resident company transfers the whole or part of a trade to another company and the consideration consists solely of the issue to the transferring company of securities in the receiving company, and
- (b) for the purpose of computing the income or gains of any person who is chargeable to Irish tax, income or gains of the transferring company are treated as being income or chargeable gains of that person and not of the transferring company,
- (c) an appropriate part of the tax specified in a certificate given by the tax authorities of the Member State in which the trade was carried is to be credited against any Irish tax due.

In line with Ireland's approach to the Directive no specific provision is made for mergers, divisions, partial divisions or exchanges of shares involving transparent entities. No reference is made to fiscally transparent 'acquired', 'receiving' or 'acquiring' companies or to the treatment of shareholders in what the Revenue might regard to be fiscally transparent companies.

#### Article 10b

The transfer of the registered office of an SE from Ireland to another Member State should not of itself give rise to a change in the residence status of the company. If the SE carries on a trade in Ireland through a branch or agency no exit charge should arise on the migration of the company's residence to another Member State anyway.

Assets unconnected with a remaining branch or agency may be subject to an immediate exit charge although it is worth noting that there are a number of general exemptions from the exit charge that might apply.

#### Article 10c

The transfer of the registered office of an SE or SCE from one Member State to another will not restrict the use of losses provided the SE or SCE is regarded as succeeding to the same trade and is within the charge to corporation tax.

No provision is made for the recapture of losses attributable to permanent establishments in third Member States (or indeed non-EU states). If these losses can be regarded as having arisen from a single worldwide trade carried on by the SE prior to the transfer of its registered office, the losses would appear to be available for carry forward against future income of that same trade.

### Article 10d

Irish legislation appears to be compliant with this Article.

### Article 11

The share for share exchange, transfers of assets and formation of SE/SCE provisions are subject to a 'bona fide commercial reasons' test. The transaction must also not form part of any arrangement or scheme, one of the main purposes of which is the avoidance of tax.

Joe Bollard

David Fennell

## 14. Italy

### 14.1 General comments

The original 1990 Merger Directive was implemented in Italy through the Legislative Decree No. 544 of 30 December 1992. Such Legislative Decree was implemented by the Italian Government on the basis of Article 34 of Law No. 142 of 19 February 1992. The Delegation Law provided for the implementation of a tax regime applicable to intra-community corporate reorganizations since the domestic tax regime applicable to corporate reorganizations was already in place at that time. Subsequently, the 1995 Budget Law has modified such domestic tax regime by harmonizing the latter with the tax regime applicable to intra-community corporate reorganizations.

With the 2004 income tax reform, the above mentioned tax rules were inserted in the Income Tax Code (ITC) through the Legislative Decree No. 344 of 12 December 2003. The new Articles introduced in the ITC were substantially similar to the original Decree: only minor wording changes were made.

The 2006 European Commission amendments to the Directive were introduced in the ITC through the Legislative Decree No. 199 of 6 November 2007. The amendments were retroactively applicable to all intra-community reorganizations which had taken place from January 1, 2007. Please note that the Italian intra-community reorganization rules are applicable also to SEs and SCEs without any specific amendment been made since the Technical Explanation to the Decree No. 199 stated that 'SEs were already included in the tax regime applicable to intra-community reorganizations since they were already subject to the same tax provisions applicable to Italian companies'.

The Merger Directive has not had a vast application in Italy, but for the share for share exchange, due to a lack of a legal background for international mergers and divisions.

Please note that effective January 1, 2008, companies resulting from mergers, divisions and contribution of assets can align the tax values of the transferred assets (including goodwill) to their book value by paying a substitute tax ranging between 12% and 16%. From a transferor perspective, the reorganization shall remain tax neutral. Such election can be made also with respect to the differences between book and tax values as at December 31, 2007 related to prior years reorganizations.

### 14.2 Comments relating to specific provisions of the Merger Directive

Italian Tax Law is mostly compliant with the Merger Directive. However, some provisions of the Italian Merger Directive may generate the possibility of being non-compliant with the Merger Directive.

Please find below an article-by-article summary of the Italian compliance status:

#### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive. Please refer to the paragraph on Article 2 of the Merger Directive for the limitation to foreign shareholders in the case of exchange of shares.

## Article 2

As a general rule, domestic tax definitions follow domestic commercial law ones. However, in Italy until 3 March 2008, domestic commercial law was lacking of some definitions and specific procedures, which 'de facto' prevented certain transactions covered by the Merger Directive from being implemented.

Italian tax Law may violate the purpose and the spirit of the Merger Directive in respect to the exchange of shares.

As a matter of fact, based on the literal interpretation of the tax law, the exchange of shares under the provision of the Italian Merger Directive is applicable only if at least one of the shareholders involved is resident in Italy or the exchanged shares are held by a qualifying EU company through an Italian permanent establishment.

No other transactions not included in the Merger Directive are covered by domestic tax law.

## Article 3

A minor difference can be found in the implementation of Article 3(c) of the Merger Directive which has been introduced in the ITC by making reference to fulfillment of the subject to tax (Annex B) clause without the possibility of benefiting of an optional tax regime; no reference is made to the possibility of being exempt.

However, such provision does not seem to be contrary to the scope of the Merger Directive.

Italian Tax Law does not extend the relief to non-resident companies not included in the Annex of the Directive. However, the above relief is extended to some resident companies not listed in the Annex.

## Article 4

The Italian domestic definition is quite similar to OECD Commentary. According to the domestic definition a PE is represented by a fixed base through which a non resident enterprise carries on its business (or art of its business) in the State.

There are specifically defined cases of PE:

- (a) managing office;
- (b) branch;
- (c) office;
- (d) shop (workshop);
- (e) laboratory;
- (f) mine, oilfield, seam and similar,;
- (g) installation or construction plants (including supervisory activities) with over 3 months of duration.

A fixed base not considered a permanent establishment if:

- (a) it is used as deposit / showroom / delivery office of the goods of the enterprise;
- (b) goods are stored in a warehouse for the sole purpose of storage, exposition and delivery, or for the manufacturing by third parties;
- (c) it is used only to purchase goods and / or to collect information;
- (d) it is used to perform preparatory / auxiliary activities, or a combination of the above activities, if the combination has a preparatory/auxiliary character.

In addition, servers for collection and transmission of information for the purpose of the sale of goods and services do not represent a PE

The Italian definition contains the same clauses with respect to independent and dependent agents (exceptions are provided for maritime agents) as the OECD Model definition, and the controlling/controlled company definition.

Upon realization of intra-community reorganization assets and liabilities not effectively connected with the permanent establishment in Italy are considered as realized; consequently, the difference between their fair market value and tax value is considered capital gain subject to tax according to ITC.

In case of a division, the Merger Directive requires the transfer of all of the assets and liabilities of the transferring company to two or more existing or new companies. Under the ITC it is required for a division that the assets transferred must each be branches of activities (*'ramo d'azienda'*). Moreover, there is a discrepancy between the rules governing the domestic divisions and intra-community divisions whereby the domestic provisions do not require that the assets transferred must each be branches of activities.

However, such provisions do not seem to be contrary to the scope of the Merger Directive.

#### Article 5

No incompatibility problems have been found with the implementation of Article 5 of the Merger Directive.

As a general rule, risk provisions and reserves cannot be deductible until effectively incurred/realized.

#### Article 6

No incompatibility problems have been found with the implementation of Article 6 of the Merger Directive.

Italian Tax Law provides for the carry forward of losses for five years for corporate income tax purposes. Losses incurred in the first three years of activities can be unlimitedly carried forward. No carry back is provided by Italian Tax Law.

#### Article 7

No incompatibility problems have been found with the implementation of Article 7 of the Merger Directive.

## Article 8

The additional requirements set forth by Italian Tax Law in order to benefit from the relief in case of an exchange of share transactions may be found to be incompatible with the Merger Directive.

## Article 9

No incompatibility problems have been found with the implementation of Article 9 of the Merger Directive.

## From Article 10 to Article 10d

In principle, Italian Tax Law follows the same approach of the Merger Directive by providing a deferred 'exit charge' as soon as the connection with the permanent establishment ceases to exist. Only in such a case, according to Italian Tax Law corporate income tax is levied on the capital gain.

Please note that no incompatibility problems with the Merger Directive may be raised in the above case. However, the 'exit tax' provision may be found to be contrary to the freedom of establishment set forth in the EC Treaty. It is worth mentioning that ECJ has already ruled against 'exit charges' imposed by Member States on individuals. Nevertheless, it is difficult to predict whether the same approach would be followed in cases of 'exit taxes' imposed on companies. As a consequence, Italian Tax Law should not be considered to be incompatible with the EC Treaty although some doubts may be raised in this regard.

Italian Tax Law provides for a credit method for the income attributable to a PE of a resident company.

In principle, foreign entities are always considered as non-transparent. However, some exemptions apply.

## Article 11

No incompatibility problems have been found with the implementation of Article 11 of the Merger Directive.

Guido Lenzi

Barbara Romanazzi

Daniele Ascoli

## 15. Latvia

### 15.1 General comments

The Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (the Merger Directive) as amended has been implemented through new provisions included in the Latvian Corporate Income Tax Act (the CITA). Generally, the provisions of the CITA are in accordance with the wording of the Merger Directive. However, some of the implemented provisions have come into contradiction with the already existent provisions of the CITA, for example, the provisions in respect of carry forward of losses in case of merger (see Article 6).

There is no administrative guidance issued on the application of the provisions of the CITA implementing the Merger Directive. There are terms and provisions that are directly transposed from the Merger Directive into the CITA without further explanations for their practical application. As a result, the practical application of the implemented provisions could lead to the different interpretations. There has not been very much praxis in the application of the tax provisions regarding the cross-border reorganisations. However, after the implementation of the Directive 2005/56/EC in the Latvian Commercial Law providing the legal procedure for the cross-border mergers, the cross-border reorganisations could become more frequent and the practical uncertainties regarding the practical application of the implemented rules could arise.

### 15.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

The provisions of the CITA comply with Article 1 of the Merger Directive.

#### Article 2

The definitions provided in Article 2 of the Merger Directive have been directly transposed in Section 1 of the CITA; accordingly the definitions are in conformity with the provisions of the Merger Directive.

#### Article 3

The definition of 'company from a Member State' as stated in Article 3 of the Merger Directive have been directly transposed in Section 1 of the CITA; accordingly the definitions are in conformity with the provisions of the Merger Directive.

#### Article 4

Article 4 and Article 9 of the Merger Directive have been implemented by adding Section 6(2) to the CITA that provides general provisions for carry over of balance sheet values of assets and liabilities. Section 6(2) of the CITA provides that in case of merger, division or transfer of assets the revaluation results shall not be taken into account for tax purposes, if the assets are effectively connected with the permanent establishment of the receiving company in Latvia. However, there is no clear guidance provided in the Latvian tax



laws regarding the valuation of assets and liabilities not effectively connected with the permanent establishment in Latvia.

The CITA provides general provisions for a recapture of depreciation in case of alienation of new production technology equipment within a period of five taxation periods from the acquisition or establishment of such fixed asset. Since the CITA does not provide further explanations regarding the application of the above-mentioned provisions, the State Revenue Service of the Republic of Latvia treats the mentioned provisions as also applicable to the transfer of assets during the reorganisation process. As result, the application of the depreciation recapture for new production technology equipment in case of reorganisation is incompliant with Article 4 of the Merger Directive.

#### Article 5

The CITA provides tax relief only for reserves made for the costs of passenger transport on domestic regular bus service routes (Section 8(1) of the CITA). The provisions of Article 5 of the Merger Directive have been implemented in Section 8(1) of the CITA and the mentioned reserves with the same tax exemption may be carried over by the permanent establishment of the receiving company which is situated in Latvia. However, no general rules have been implemented in the CITA and no administrative guidance has been issued regarding the allocation and the carry-over of the provisions and reserves in case of merger, division or partial division. Therefore, the application of these provisions under the Latvian legislation is unclear.

#### Article 6

Article 6 of the Merger Directive has been implemented in Section 14 of the CITA by adding paragraph 111. The provisions of Section 14, paragraph 111, comply with the concept of carry over the losses as provided in Article 6 of the Merger Directive. However, Section 14, paragraph 11 of the CITA provides that in case of merger the receiving company is entitled to carry over tax losses only if the receiving company and the transferring company before the merger and the receiving company after the merger are controlled by one and the same person or group of persons. In our view the above mentioned provisions are in contradiction, because Section 14, paragraph 111 of the CITA allows to carry over the losses irrespective of the control of the companies, however, Section 14, paragraph 11 of the CITA adopted before the implementation of the Merger Directive provides that in case of the merger the transferring company is entitled to carry over the losses only if the control requirement is complied with. According to the latest explanations of the above provisions of the CITA provided by the tax authorities, in case of the merger it is allowed to carry over the losses only if the control requirement is complied with. However, the control is not required to carry over the losses in case of the transfer of assets. Accordingly, more favourable tax regime is provided for the transfer of assets in comparison with the merger.

#### Article 7

The holding threshold mentioned in Article 7 of the Merger Directive has not been implemented in the Latvian legislation. Nevertheless, the current legislation complies with the provisions of Article 7 of the Merger Directive.

## Article 8

The provisions relating to tax relief for shareholders provided in Article 8 of the Merger Directive have been implemented by adding Section 6(3) to the CITA. The tax relief is granted to the shareholders that are residents of Latvia or non-residents that have a permanent establishment in Latvia that is the holder of the transferred shares and the shares received in the result of exchange of shares. The provisions of Section 6(3) of the CITA are in compliance with the Merger Directive.

## Article 9

See Article 4.

## Article 10

The special rules relating to transfer of a permanent establishment in third Member State (Article 10 of the Merger Directive) and the special rules for transparent entities (Article 10a of the Merger Directive) have not been implemented in the CITA. However, the Latvian legislation is not in contradiction with the provisions stated in the mentioned Articles.

The rules applicable to the transfer of the registered office of an SE or an SCE according to Article 10 b and Article 10 c of the Merger Directive have been implemented by adding new paragraphs to Section 6, Section 13 and Section 14 of the CITA. Article 10 c of the Merger Directive has not been implemented in the CITA. However, the Latvian legislation does not give rise to taxation of income, profits or capital gains of the shareholders resulting from the transfer of the registered office of an SE or an SCE. Accordingly, the provisions of the CITA relating to the transfer of the registered office of an SE or an SCE are in compliance with the provisions of the Merger Directive.

## Article 10a

The special rules for transparent entities have not been implemented in the CITA. However, the Latvian legislation is not in contradiction with the provisions stated in the mentioned Articles (see Article 10).

## Article 10b

See Article 10.

## Article 10c

See Article 10.

## Article 10d

See Article 10.

## Article 11

The special anti-abuse provisions stated in Article 11 (1) (a) of the Merger Directive have been implemented in the Latvian legislation only regarding the transfer of registered office of an SE or an SCE. However, the tax administration may apply also the general anti-abuse provisions defined in the Latvian Taxes and Duties Act. The anti-abuse provisions comply with the provisions of the Merger Directive.

Ilona Butane

## 16. Lithuania

### 16.1 General comments

The Merger Directive has been implemented in the Law on Corporate Income Tax (CIT) as of December 29, 2001 (Official Journal 2001, No. 110-3992), which came into force on 1 January 2002.

Amendments of the Merger Directive as of February 17, 2005 were followed by the amendments of the Law on CIT as of December 25, 2005, which came into force on January 1, 2006. The latter law implemented the amendments of the Merger Directive as well as made corrections to the previous implementation.

An official commentary of the Law on CIT implementing the Merger Directive is prepared by the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania. Although the commentary is not legally binding, it expresses an opinion of a competent state authority regarding the application of the Law on CIT.

A taxpayer also has a right to seek for an individual consultation of the tax authorities.

### 16.2 Comments relating to specific provisions of the Merger Directive

In most cases the implementing Lithuanian legislation follows the exact wording of the Merger Directive and shall be considered as compliant.

Please find below an article-by-article summary of the Lithuanian compliance status:

#### Article 1

It is not explicitly stated in the Law on CIT if the fact that the parent companies were from two different Member States suffice to bring the merger within the scope of the national legislation.

Following the amendments of the law of CIT, national legislation is applicable even if the transfer of assets, rights and obligations takes place between foreign entities which take on one of the forms of business organization listed in the Annex to the Merger Directive and are resident in a Member State for tax purposes.

#### Article 2

The possibility to allow up to 10% cash payment for reorganization at book value is implemented in the Law on CIT, however, the Law does not refer to the calculation basis of cash payments allowed. It may be assumed that the cash buy-out of minority shareholders is not allowed.

An additional method of partial division, allowing a partial transfer of assets, rights, and obligations not constituting a branch of activity as well as separation of the shareholders is introduced in Lithuanian legislation.

The term 'majority' was implemented in national law as meaning the holding of shares conferring 2/3 or more of the voting rights - not the majority but the control of a company, which in our opinion is incompliant with the provisions of the Merger Directive.

In addition to the aforementioned the tax authorities argue that a 'branch of activity' needs to include all possible elements of assets, obligations and rights without due regard to their

relevance to the business activity in question. In practice this often leads to the exclusion of certain activities, for example, lease or securities trading from the application of the benefits of the Merger Directive.

### Article 3

There is no concept of transparent entities in Lithuanian tax legislation.

### Article 4

The Law on CIT does not directly refer to the concept of real values, however it is stated that any increase in the value of assets in case of the mergers, divisions, partial divisions, transfers of assets, exchanges of shares or transfers of registered office shall not be included in the taxable income of the acquiring entity.

The term 'effectively connected' has not been transposed into the Lithuanian tax legislation. A merger is granted a relief only if a foreign acquiring entity continues to carry on its activities through a permanent establishment in the territory of Lithuania on the basis of the assets, rights and obligations acquired.

According to the Law on CIT, division, partial division, transfer of assets, and exchange of shares is subject to tax relief only if an entity or its members do not sell or otherwise transfer the ownership of securities (including the merger) received by the means of an exchange for a period of 3 years, except for the subsequent cases of division, partial division, transfer of assets and exchange of shares.

### Article 5

This Article of the Merger Directive has not been directly implemented in Lithuanian legislation, however, in practice provisions or reserves are carried over without any restrictions.

### Article 6

Following the provisions of the Law on CIT the receiving company is allowed to take over the tax losses of the transferring company which had not yet been exhausted for tax purposes (excluding losses from transfer of securities and derivative financial instruments). However the receiving company is only allowed to take over the losses related to the branch of activity transferred provided that it continues such activity for a period not shorter than 3 years.

### Article 7

There is no specific implementation of Article 7 of the Merger Directive in the Lithuanian laws.

### Article 8

The Law on CIT does not eliminate economic double taxation in most cases of merger, division or partial division.

However this may not result in double taxation since many disposals of shares by companies are exempt under substantial shareholding exemption; however this exemption is not

applicable to individuals. If the substantial shareholding exemption is applicable no tax would be due on the subsequent disposal of shares in the transferee company but the subsequent disposal of the underlying assets would be subject to tax.

According to the official commentaries on the Law on CIT, economic double taxation is eliminated in the case of exchange of shares as it is explained that the acquisition price of the shares (interests, member shares) received by the acquiring entity is the price of issue of the shares.

#### Article 9

The Law on CIT does not eliminate economic double taxation in most cases of merger, division or partial division.

#### Article 10

Renouncement of the right to tax a permanent establishment in cases where assets, rights and obligations transferred include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company is not expressly stated in the Lithuanian legislation, so the practical application and compliance remain uncertain.

#### From Article 10a to Article 10d

The Lithuanian legislation appears to be compliant with these Articles.

#### Article 11

Article 11 of the Merger Directive has not been transposed into the Law on CIT; the mergers, divisions, partial divisions, transfers of assets, exchanges of shares and transfers of registered office shall be subject to general anti - avoidance provisions.

Kestutis Lisauskas

Agne Petkeviciute

## 17. Luxembourg

### 17.1 General comments

The Merger Directive, as modified, has been implemented in Luxembourg tax legislation by the following laws:

- (a) Law of 20 December 1991;
- (b) Law of 21 December 2001; and
- (c) Law of 21 December 2007.

The law of 21 December 2007 became effective as from the fiscal year 2007. As a consequence, the implementation deadline of 31 January, 2008 has been met by Luxembourg.

The scope of the Luxembourg law implementing the Merger Directive is broader than the Directive itself since it applies not only to resident companies in the EU but also to resident companies of a Member State of the European Economic Area.

Luxembourg legislation can be said to be in compliance with the Directive and in some cases is broader than the Directive.

### 17.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

The Directive has been implemented to the extent it covers the merging companies themselves, irrespective of who their parent companies/shareholders are.

In some specific cases, Luxembourg law considers that although merging companies are located in one single foreign country, the merger or division can be done at book value (transfer of a Luxembourg permanent establishment of a non resident entity to another non resident entity).

An exchange of shares is also covered by the Luxembourg national law, which is not limited to European Community matters (Article 22bis LIR, 'Loi relative à l'impôt sur le revenu / Income Tax Act).

#### Article 2

All types of mergers and divisions have been implemented under Luxembourg law.

The definition of a merger and a division under the Directive corresponds more or less to the definitions under Luxembourg company law. With the law dated 23 March 2007 some amendments have been introduced to Luxembourg company law pursuant to the implementation of the European Company in order to simplify the rules and conditions on mergers and divisions. The transposition of the EU Directive 2005/56/CE into Luxembourg company law is planned for 2008.

The allowance for a 10% cash payment in addition to shares has been implemented. The wording of the Luxembourg law corresponds to the wording of the Directive.

As far as partial divisions and transfers of assets are concerned, instead of using the term 'branch of activity', Luxembourg law has implemented the Directive by using the term 'business' or 'independent part of business'. 'Independent part of business' is interpreted by reference to the transferring company, i.e. it means that the transferring company keeps at least another independent part of business, which is in line with the definition of 'partial division' given by the Merger Directive. However, Luxembourg administrative guidance indicates that an 'independent part of business' does not necessarily mean that it can survive on its own. This would mean that the term 'independent part of business' is broader than 'branch of activity' as interpreted by the ECJ in C-43/00 *'Andersen og Jensen'*.

### Article 3

Companies that are covered by the Luxembourg law are the companies listed in the Annex since Luxembourg law directly refers to Article 3 of the Merger Directive, and collective entities resident in a Member State of the EEA other than the EU that are fully subject to a tax corresponding to the Luxembourg Corporate Income Tax (CIT). As far as it concerns an exchange of shares, Luxembourg law covers, in addition to companies covered by the Merger Directive, any capital companies subject to tax.

No interpretation of the subject-to-tax clause of Article 3(c) of the Merger Directive can be found in the Luxembourg national legislation.

Any entity referred to in Article 3 of the Merger Directive would not be considered tax transparent for tax purposes.

### Article 4

The profit that should not be taxed under Article 4 of the Merger Directive corresponds under Luxembourg law to the difference between the value that the transferred assets had for the purposes of calculating the CIT of the preceding year, which corresponds to the 'value for tax purposes' mentioned in the Merger Directive, and the remuneration received in exchange for the transferred assets, which would be the fair market value of the assets in case of a remuneration that is not arm's length.

Luxembourg law requires that the assets and liabilities whose transfer could be tax neutral should remain subject to tax in Luxembourg. It does not explicitly require that they are connected to a permanent establishment. In case of the transfer of connected assets together with assets that are not connected, it is uncertain whether such a transfer jeopardizes the whole neutrality or simply implies that profits on the transfer of those assets which are not connected are taxed.

### Article 5

As a general rule, under Luxembourg law, tax deferrals obtained by the transferring company before the merger or the division are transferred to the receiving company if the latter registers the transferred assets at book value. However, in respect of provisions and reserves, Luxembourg law does not contain any specific rules, but provides for certain examples.

### Article 6

Article 6 of the Merger Directive has not been implemented under Luxembourg law given that the latter does not allow the receiving company to take over the losses of the



transferring company which have not yet been exhausted for tax purposes if the operations were effected between Luxembourg companies.

#### Article 7

Luxembourg took advantage of the option provided for by Article 7 of the Merger Directive, which states that where a receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall be liable to taxation, except where the receiving company has a holding of more than 10% in the transferring company. This threshold applies as from 1 January 2007, whereas the Merger Directive required such threshold to apply only as from 1 January 2009. If the conditions of the Luxembourg participation exemption apply, a gain may also be exempt in case of a holding lower than 10%.

#### Article 8

Article 8 of the Merger Directive has been correctly implemented under Luxembourg law, including the possibility to receive a 10% cash payment in addition to shares. This cash payment reduces the acquisition price of the shares received by the shareholders of the acquired company.

Double economic taxation at the level of the shareholder and at the level of the receiving/acquiring company has been avoided since the receiving/acquiring company does not have to book the shares received at their accounting value for the operation to be tax neutral.

#### Article 9

Situations covered under Luxembourg law are the following:

- (a) A Luxembourg resident entity transfers a business or part of a business to a Luxembourg permanent establishment of a company resident in a Member State other than Luxembourg;
- (b) A Luxembourg resident entity transfer a permanent establishment located in another Member State to a company resident in a Member State other than Luxembourg; and
- (c) A company resident in a Member State other than Luxembourg transfer business of part of a business constituting a permanent establishment located in a Member State other than Luxembourg to a Luxembourg resident entity; and
- (d) A company resident in a Member State transfers a permanent establishment located in Luxembourg to a company resident in a Member State.

It may be possible under Luxembourg law that double economic taxation occurs at the level of the transferring company and at the level of the acquiring company when the transfer is done at book value since both the transferring and the receiving companies should book the transferred assets / the shares received in exchange at book value for the operation to be tax neutral. However, under the Luxembourg participation exemption the capital gain realized on the disposal of the shares can be tax exempt provided that the conditions of the exemption are met.

## Article 10

Article 10(1) of the Merger Directive has been correctly transposed under Luxembourg law and, as a principle, where a Luxembourg resident entity transfers a permanent establishment located in another Member State, this transfer does not give rise to any taxation. Luxembourg tax law, however, provides for loss recapture, but only in the case of a transferred permanent establishment located in a Member State with which Luxembourg has not concluded any double tax treaty (DTT). This recapture rule applies in connection with the derogation of Article 10(2) of the Merger Directive.

Indeed, as Luxembourg applies a system of taxing worldwide profits, it took the option to transpose Article 10(2) of the Merger Directive, but only in the case of a Luxembourg resident entity transferring a permanent establishment located in a Member State with which Luxembourg has not concluded a DTT. In case the transferred permanent establishment has incurred losses prior to its transfer, up to the amount of the recaptured losses no tax relief (no notional tax credit) is given. Whereas, concerning the tax on the profits resulting from the transfer of the permanent establishment a notional tax credit is granted for the tax that, but for the provisions of the MD, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated.

In case of a permanent establishment located in a Member State with which Luxembourg has a DTT, based on Luxembourg's DTTs, the right to tax profits attributable to the permanent establishment would be allocated to the other Contracting State and Luxembourg would grant an exemption.

## Article 10a

Luxembourg law did not need to transpose Article 10a of the Merger Directive since, when implementing the Directive, it provided that any entity referred to in Article 3 of the Merger Directive would not be considered as tax transparent for Luxembourg tax purposes.

## Article 10b

When implementing the Merger Directive, Luxembourg law did not differentiate between SEs/SCEs and the other types of company listed in the Annex. SEs and SCEs are treated in the same way as these other entities.

According to Luxembourg law, a company is considered tax resident in Luxembourg if it has either its registered office or its central administration (head office for SE or SCE) in Luxembourg. The term central administration has recently replaced the term principal establishment in order for Luxembourg tax law to comply with Luxembourg corporate law. The latter has implemented the regulation of 2001 about the SEs and the SCEs.

If one of the companies referred to in Article 3 of the Merger Directive transfers its registered office and its central administration outside Luxembourg, this transfer is considered, in principle, as a deemed liquidation, thereby entailing taxation of the liquidation profit of the company, unless the assets of the company stay connected to a Luxembourg permanent establishment. There is uncertainty in case of the transfer of connected assets together with assets that are not connected, as to whether this jeopardizes the whole tax neutrality or whether it simply implies that the profit realized upon the transfer of the assets that are not connected is taxable.

### Article 10c

Article 10c of the Merger Directive has not been implemented in Luxembourg law.

### Article 10d

Luxembourg law is in line with Article 10d of the Merger Directive. In the case of an SE/SCE that transfers both its registered and head-office (central administration) outside of Luxembourg and where the transferred assets do not stay connected to a Luxembourg permanent establishment, this transfer gives rise to a deemed liquidation profit and, at the level of the shareholder, to a deemed liquidation distribution. Should the shareholder be a non resident shareholder who has held a participation of at least 10% in the SE/SCE for less than six months, the liquidation distribution might be taxed in Luxembourg unless an applicable tax treaty provides otherwise.

### Article 11

Article 11 of the Merger Directive has not been transposed as such in Luxembourg law since the Article 11 of the Merger Directive provides for general anti-abuse provisions according to which the tax authorities can challenge simulated operations under the abuse of law doctrine if the sole purpose is the reduction of taxation.

Anja Taferner

## 18. Malta

### 18.1 General comments

The original 1990 Merger Directive was transposed into Maltese law by Legal Notice 238 of 2003. The Act of transposition did not refer to any derogation but merely stated that the Directive 'shall have effect in relation to the Income Tax Acts.'

In that same year, a new Article, Article 27A, was added to the Income Tax Act by Act II of 2003 (via Article 13 of Act II). Article 27A grants the Minister of Finance the power to make rules relating to the tax treatment of mergers and divisions of companies. More importantly, it incorporates certain definitions drawn from the Directive.

Legal Notice 238 of 2003 which transposed the Directive was amended in 2006 by Legal Notice 59 of 2006. The amendment implemented the amendments to the Directive made in 2005.

There have not been any judicial or quasi-judicial pronouncements on the Directive and no ad hoc rules were passed. The latter is probably due to the fact that subsidiary legislation containing rules relating to cross-border merger was passed very recently by legal notice 415 of 2007 - the Cross-Border Mergers of Limited Liability Companies Regulations, 2007 (passed on 14 December 2007).

### 18.2 Comments relating to specific provisions of the Merger Directive

Maltese Tax Law is mostly compliant with the Merger Directive since it has been implemented without any derogation or explanatory notes.

Please find below a summary of the Maltese compliance status:

#### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive.

#### Article 2

Marginal differences were noticed between the text of the Merger Directive and Article 27A of the Income Tax Act. Article 27A refers to cash payments without specifying any percentage, while the Directive specifies a cash payment not exceeding 10 % of the nominal value. Moreover, the definition of 'transfer of the registered office' has not been included in Article 27A of the Income Tax Act.

#### Articles 3-11

Articles 3 to 11 of the Directive were implemented via Article 3 of Legal Notice 59 of 2006 which reads as follows:

'The Directive of 23 July, 1990 adopted by the Council of the European Communities on a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (90/434/EEC) as amended by 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 shall have effect in relation to the Income Tax Acts.'

#### Additional remarks

#### Article 4

Regarding Article 4 of the Merger Directive please note that the concepts of 'effectively connected' and 'permanent establishment' have neither been the object of any administrative guidelines nor interpretations. The allocation of assets either from the head office to a branch or from the branch to the head office is not considered to amount to a transfer because, from a Maltese legal and tax point of view, there is no passage of title. Consequently there will not be any tax liability. The allocation is effected by an accounting entry. Therefore one cannot really speak of a transfer of assets from one company to another if there will be a cross-border merger in respect of which the MD will apply. There will merely be a transfer of assets into the amalgamated entity. Consequently we would not expect immediate taxation and one cannot speak of an infringement but the matter should be clarified by the Maltese authorities.

The in the questionnaire used term 'amalgamation' refers to the merging companies as one entity following the merger.

#### Article 8

There used to be an exemption in respect of capital gains arising upon an exchange of shares upon a restructuring of holdings but it was abrogated in 2004. Consequently in an exchange of shares there are two deemed transfers both of which are taxable. However please note that the intra-group exemption was retained and there is an exemption from tax which applies in respect of transfers of shares between companies which are owned and controlled by the same persons (more than 50%).

Robert Attard

Christopher Naudi

## 19. Netherlands

### 19.1 General comments

The Merger Directive has been implemented by Law of 10 September 1992 (Law Gazette 1992, 491), with retroactive effect to 1 January 1992. This law covered the requirements of exchange of shares, legal mergers and transfer of assets. By Law of 18 December 2003 (Law Gazette 2003, 527) and by Law of 15 December 2005 (Law Gazette 2005, 683), effective as of 8 October 2004 and 18 August 2006 respectively, the SE and SCE are treated on the same footing as a Netherlands NV. Accordingly, both the SE and SCE are eligible under Netherlands implementing legislation to comply with the requirements of all types of transactions covered by the Merger Directive under the same conditions as a Netherlands NV. According to the Netherlands legislator in an official Circular dated 31 May 2006, no. DB2006/290, the Netherlands has complied with the requirements following from Directive 2005/19/EC and which entered into force on 1 January, 2006. In addition, according to the Netherlands legislator in the aforesaid Circular, the Netherlands already complied with all other requirements following from the Merger Directive and which entered into force on 1 January 2007. Accordingly, no further legislative action was considered necessary. The European Commission has been notified in this regard.

### 19.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

The expression 'companies involved' has been interpreted as comprising only the companies directly involved in the transaction and not the parent companies. The fact that the parent companies were from two different Member States would not, as such, suffice to bring the merger within the scope of the national implementing legislation. Nevertheless, the Netherlands would apply the benefits of the Merger Directive if the merging companies were from a single (foreign) Member State. Tax deferral may apply, depending on the case at hand, where there are companies/shareholders from third states.

#### Article 2

Dutch tax law follows the definitions under domestic commercial law with respect to the legal merger and division. In case of an exchange of shares, a cash payment may not exceed 10% of the par-value of the issued securities in order to qualify under the Merger Directive. In other cases, this depends on the applicable civil law since the Netherlands implementing legislation is applicable to all legal mergers and divisions which are allowed under the civil law of the Netherlands or an EU-Member State.

The Netherlands implementation legislation covers not only an exchange of shares leading to the obtaining of a majority of the voting rights, but also any further exchange that may consolidate that majority. It also applies to some transactions not mentioned in the Directive.

#### Article 3

Except for the case of transfer of assets, the Netherlands implementing legislation only applies to the types of entities mentioned in the Merger Directive. Whether or not any of the listed entities are regarded as tax transparent should be determined on the basis of the

relevant criteria under national tax law. The Netherlands implementing legislation does not limit the benefits of the Directive to companies owned or controlled by EU or EEA nationals or residents. A subject to tax clause applies.

#### Article 4

The concept of 'real value' is therefore interpreted as the fair market value of the assets at the time of the transaction. The concept of 'value for tax purposes' is interpreted as the tax book value of the assets in the books of the transferring company at the time of the transaction.

Following the administrative guidelines issued by the Netherlands State Secretary of Finance, the term 'branch of activity' should be interpreted substantively as meaning a permanent organization of capital and labour. Nevertheless, from both Netherlands legislative history and the objective and purpose of the Merger Directive one may infer that the term 'branch of activity' should be interpreted more broadly as to also include types of investment activities, conducted by an investment fund, for instance. Whether or not an asset can be allocated to a permanent establishment should be determined based on the nature of the asset at hand. It should, in addition, be assessed whether or not the permanent establishment personnel controls the relevant asset and who manages and supervises its exploitation. The Netherlands Supreme Court thus seems to follow an economic or functional rather than a legal approach in this respect. Transfer of assets and liabilities not effectively connected with a permanent establishment constitutes a taxable event. No account has been taken in these situations of the case law of the ECJ in the context of exit-charges, for instance Case C-470/04 (N).

#### Article 5

No specific implementation legislation has been enacted in this respect. The general Netherlands rules apply.

#### Article 6

The concept of 'losses' is not specifically defined for the purposes of implementing Article 6 of the Merger Directive. Therefore, the general Netherlands principles apply. Only under circumstances, losses can be transferred upon the transaction.

#### Article 7

Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding are exempt provided that the participation exemption is applicable. The participation exemption applies where a company has a shareholding of at least 5% in a subsidiary. However, if the assets of such subsidiary consist for 50% or more of passive, lowly taxed assets, a credit method instead of the exemption method applies. In case the participation exemption does not apply, deferral may apply only upon request. In case the participation exemption applies, liquidation losses can be deducted, provided that certain requirements are met. All other capital losses are exempt and thus not deductible. If the participation exemption does not apply, capital losses are deductible.

## Article 8

Based on the Netherlands concept of total profit, the shares received by the acquiring company should be valued at their fair market value upon issuance. Accordingly, double taxation of the rolled-over claim is avoided.

## Article 9

Based on the Netherlands concept of total profit, the shares received by the acquiring company should be valued at their fair market value upon issuance. Accordingly, double taxation of the rolled-over claim is avoided.

Where no Netherlands permanent establishment remains after the transaction, which for instance may occur where the transfer of intellectual property is involved, no relief is granted and immediate taxation takes place, without any deferral. No account has been taken in these situations of the case law of the ECJ in the context of exit-charges, for instance Case C-470/04 (*N*).

## Article 10

As a general rule, carry over losses should be recaptured to the amount of the (deemed) gain arising upon merger from the permanent establishment in the third Member State. To the extent no deemed gain arises, no recapture generally applies. Special rules apply in case of re-emigration within 8 years.

Nevertheless, to the extent a Netherlands taxpayer in fact transfers its foreign permanent establishment in a foreign subsidiary to which the Netherlands participation exemption becomes applicable, a further recapture applies to carry over losses not yet recovered. In such case, the Netherlands participation exemption is not applicable on profits derived from the foreign subsidiary to the amount of the carry over losses not yet recovered upon the merger. Under circumstances, such may be in conflict with EC law.

## Article 10a

No specific implementation legislation has been enacted in this respect. The general Netherlands criteria to determine whether an entity is tax transparent or not, apply.

## Article 10b

With respect to assets not connected to a permanent establishment in the Netherlands, an immediate exit charge applies upon transfer of seat. The relevant ECJ case law, such as ECJ 11 March 2004, Case C-09/02 (*'Lasteyrie du Saillant'*) has been considered by the Netherlands legislator in this respect. However, based on ECJ 27 September 1988, Case C-81/87 (*'Daily Mail'*) the Netherlands legislator is of the opinion that immediate taxation upon transfer of seat of a company does not constitute a breach of the EC Treaty freedoms. In Netherlands literature, this view is, however, strongly opposed. It is then argued that *'Daily Mail'* is not the appropriate case in this respect. Consequently, it is highly questionable whether immediate taxation constitutes in all circumstances a proportionate means to safeguard the balanced allocation of taxation powers and/or fiscal coherence respectively.



### Article 10c

The Dutch legislation appears to be compliant with this Article.

### Article 10d

The Dutch legislation appears to be compliant with this Article.

### Article 11

With respect to the legal merger, legal division, exchange of shares and transfer of assets, Netherlands tax law stipulates that no relief is granted where the relevant transaction is dominantly directed to the avoidance or postponement of taxation. A case is currently pending before the Netherlands Supreme Court where the question is whether the avoidance of Netherlands transfer tax, being no corporate income tax, is also covered. Moreover, the question is whether the criterion of 'postponement of taxation' can be considered a correct implementation of Article 11(1)(a) of the Merger Directive and if so, under which circumstances. It could be held that in cases where the transactions reflect economic reality, applying this criterion would be in breach with the Merger Directive. In cases where, by contrast, the sole aim of a transaction is to postpone taxation, applying this criterion may be allowed under the Merger Directive.

The concepts of 'valid commercial reasons', 'restructuring' and 'rationalization' are not further explained in Netherlands tax law. From parliamentary history one can infer that the contribution of shares by a Netherlands substantial shareholder in a Netherlands holding against issuance of shares, followed by an immediate sale of shares by the holding to a third party, which sale is exempt under the Netherlands participation exemption, would not qualify since in such case, deferral is an aim in itself. In addition, according to the State Secretary, shareholders motives do not qualify as valid commercial reasons. However, from Netherlands case law one may draw the opposite conclusion.

In addition, from a Circular of the Netherlands State Secretary of Finance, it follows that the following motives are considered to be valid commercial reasons by the State Secretary of Finance:

- (a) scale-advantages;
- (b) increase of efficiency by streamlining organization;
- (c) use of one another's sale channels; and
- (d) advantages as a result of complementary product assortments.

In practice, for instance the following situations were considered to be business motivated by the Netherlands tax authorities:

- (a) partial division of real estate companies outside the group as a result of the introduction of an employee stock-options plan;
- (b) partial division of part of a particular business unit since this division had developed separately from other business units;

- (c) partial division of head quarter activities and subsidiaries in connection with the promotion of competition between two shareholders; and
- (d) partial division with the aim of cleaning the corporate structure.

In Netherlands case law, a share to share merger between investment companies in order to consolidate the portfolio investments, to increase yields and to deduce costs was considered business motivated. Similarly, the limitation of civil liability was considered to be business motivated. The contribution of pension liabilities and investments in separate entities, by contrast, was not considered to be based on valid commercial reasons. It was, however, to be considered to be dominantly driven by the avoidance of postponement of taxation neither.

Ben Kiekebeld

Daniel Smit

## 20. Poland

### 20.1 General comments

The aim of this memorandum is to briefly summarize our findings in connection with completing the Polish part of the 'Survey of the implementation of the Council Directive 90/434/EEC (Merger Directive) as amended by the Directive 2005/19/EEA'.

Poland has not implemented the Merger Directive in one single act. Instead, several novels to the Corporate Income Tax Act (CITA) and the Companies Commercial Code (CCC) have been gradually passed, introducing the provisions of the Directive into the Polish legal system. However, the Directive has not been fully implemented, in particular:

- (a) certain provisions of the Directive have not been implemented at all (i.e. the provisions regarding the allocation of provisions and reserves to foreign permanent establishments, the provisions regarding the transfer of the registered seat of a Societas Europea);
- (b) other provisions have not been implemented directly, but can be interpreted from general rules stipulated in the CITA or the Tax Code;
- (c) finally, certain provisions of the Directive have been implemented in the version stipulated in the 1990 Directive, but have not been updated in connection with the amendments to the Directive (i.e. the list of companies referred to in Article 3a of the Directive).

### 20.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

We are of the opinion that Article 1 (a) of the Merger Directive has been implemented correctly into the Polish CITA . Additionally, the application of certain provisions implementing the Directive is not limited to restructuring transactions involving companies from EU/EEA Member States but includes also restructuring transactions with third country entities.

Poland has not implemented any provisions ensuring the tax neutrality of the transfer of a registered seat of a SE, SCE.

#### Article 2

Most of the definitions included in Article 2 of the Directive have been implemented directly into the CITA or the CCC.

Certain doubts arise with regard to the implementation of the term 'branch of activity'. The Polish legislator implemented and defined this term as 'organized part of an enterprise' (OPE). We believe that the term OPE could potentially have narrower scope than the term 'branch of activity' as used in the Directive and therefore leading to a limitation of the Directive.

### Article 3

Poland has transposed the list of companies indicated in the Annex to the 1990 Directive into the Polish legal system in the form of an Annex to the CITA . However, the Polish Annex has not been updated. Consequently, certain company types included in the current version of the Annex to the Directive have not been transposed into the Annex to the CITA.

### Article 4

Tax neutrality of a merger, division or partial division stipulated in Art. 4 of the Directive was implemented in the CIT Act (including carry over of fixed assets and intangibles depreciation).

The terms real value and value for tax purposes have not been directly transposed into the CITA. However, Article 14 of the CITA contains a general definition of the term 'market value' which as we believe corresponds with the term 'real value'. The CITA does not use the concept of 'assets effectively connected with a PE'. Poland has not implemented any specific provisions regarding mergers of transparent entities.

### Article 5

Poland has not implemented this provision directly. The CITA does not define the terms 'provisions and reserves'. The terms are defined in the Accounting law, but are binding for tax purposes only in case of direct reference. Nevertheless - as the Tax Code contains a general rule according to which the receiving company steps into all rights and obligations of the transferring company - we believe the Polish provisions to be generally compliant with the Merger Directive in this respect. Poland has not implemented any provision of the Directive with respect to the treatment of PEs. However, we believe that potential inconsistencies with the Directive could be resolved by the application of the general rules (i.e. the succession rule) and the direct application of the provisions of the Directive.

### Article 6

According to the CITA , the receiving company may not take over the losses of the transferring company. Notwithstanding the above, Poland has not implemented any provision of the Directive with respect to the treatment of PEs.

### Article 7

The respective provisions of the CITA are compliant with the Directive. Poland has used the option stipulated under Article 7(2) of the Merger Directive and followed the thresholds and periods provided therein.

### Article 8

The CITA provides for the avoidance of double taxation at the level of the shareholders. Additionally, certain provisions with respect to the taxation of shareholders are not limited to restructuring transactions with EU/EEA entities but are applicable also to restructuring transactions with third country entities.

Provisions regarding fiscally transparent shareholders were not directly implemented.

## Article 9

The CITA ensures the avoidance of double taxation in case of 'transfer of assets'. Please refer also to the comments to Article 6.

## Article 10

Poland has not implemented Article 10 of the Merger Directive directly.

Accordingly, the tax consequences of transactions covered by Article 10 of the Directive (i.e. mergers / divisions / partial divisions, where the transferred assets include a foreign PE of a Polish company) should be determined in accordance with the general rules resulting from the double taxation treaties signed by Poland.

We believe that the Polish CITA is compliant with the Directive as far as the foreign PE is located in a EU Member State with which Poland has signed a double taxation treaty providing for the tax credit method. However, in case of PE's located in EU Member states with which Poland has signed a double taxation treaty providing for the exemption method, the Polish CITA might be considered as incompliant with the Directive.

Please note however, that there is no administrative guidance and very little practice with respect to the analyzed transactions - each case should be analyzed separately.

## Article 10a

Poland has not implemented Article 10a of the Merger Directive. The CITA does not include any provisions with respect to restructuring transactions with fiscally transparent entities.

Accordingly, the tax consequences on shareholder level should be determined in accordance with the general rules. Under the CITA transformations with participation of fiscally transparent entities should not benefit from the exemption regime. At the same time, the CITA does not provide for a relief for tax as stipulated in Article 10(2) of the Merger Directive. In the light of the above we believe, the Polish provisions could be in violation of the Directive.

## Article 10b

Poland has implemented the provisions of Council Regulation 2157/2001 into the SE Act. We believe the provisions of the SE Act to be compliant with the relevant EU legislation.

However, no provisions ensuring tax neutrality of transfer of the registered office of the SE have been implemented into the CITA . As a consequence, should the transfer of the registered seat result in the liquidation of the SE/SCE, under current wording of CIT Law this would lead to taxation or exemption of the liquidation proceeds based on general rules.

## Article 10c

Poland has not implemented this provision.

## Article 10d

Poland has not implemented this provision.

## Article 11

Poland has implemented Article 11 of the Merger Directive with respect to mergers, divisions and partial divisions. Accordingly, the anti-abuse provisions do not apply for the exchange of shares. Also, please note that there has been almost no practice in the use of the anti-abuse provisions by the Polish tax authorities. Additionally, please note that general 'substance over' form provisions are present in the Tax Code.

Łukasz Ziótek

Tomasz Napierała

Maciej Trzebny

## 21. Portugal

### 21.1 General comments

Portugal has transposed the Merger Directive and its amendments to domestic tax law. However, since Portuguese tax law does not state provisions to treat certain foreign entities as tax transparent, the provisions of the Merger Directive addressing tax transparent entities have not been transposed to domestic tax law.

Although not stated in the wording of the EU Merger Directive, nor in the Portuguese tax law, the recognition at fair market value concerning the shares in the acquired company by the acquiring company, in an exchange of shares transaction, should be valid and accepted by the tax authorities. Notwithstanding, introducing such rule in the Merger Directive would enable to overcome any possible doubts.

Portuguese tax law states some provisions which compatibility with the Merger Directive may be challenged. One example is the requirement, under an exchange of shares transaction whereby the shareholders in the acquired company are not resident of Portugal, for the acquiring company to be resident in Portugal. Such condition is not applicable to Portuguese resident shareholders, whom can be attributed shares in an acquiring company resident in other EU Member State. Another example is the rule applicable to individual shareholders who become taxable - as a result of tax deferral termination - when transferring tax residency abroad, including to another EU Member State. These rules simply aim at avoiding/stopping tax deferral whenever Portugal could be prevented from levying taxation due to, for instance, tax treaty protection granted to non residents.

Moreover, Portuguese tax law states a requirement that is not explicit in the EU Merger Directive, i.e., in addition to the carry over of the value for tax purposes from the transferring company to the receiving company - under a merger, division, partial division or transfer of assets - it is also required that assets and liabilities transferred from the former are registered by the same book values at the level of the latter. This condition results, in some situations, in the non compliance with accounting rules (which can require a FMV recognition). For your information, Portuguese tax law states a 'tax neutral' provision for sale-and-leaseback transactions, under which there is no taxable event although there can be a step-up for accounting purposes.

Accordingly, we believe that Portuguese tax law should be amended to enable the application of the tax neutrality regime even if book value is not maintained, provided the value for tax purposes remains the same.

Finally, Portuguese tax authorities have been challenging the tax neutrality of some transactions based on the argument that only transactions that literally fall within the definitions of merger and division can be eligible for taxation deferral. We state herein some examples, as follows.

- (a) Downstream mergers, whereby the sole shareholder is merged in its wholly owned subsidiary.

The argument presented by the tax authorities is that a merger between the sole shareholder and the wholly owned subsidiary is only foreseen for upstream mergers and they are of the opinion that the downstream merger cannot fall under the first two definitions of merger.

- (b) Splitting-mergers, whereby a company is partially divided and the branch of activity being carve-out is immediately merged into the sole shareholder.

The tax authorities believe that none of the definitions of mergers or divisions literally applies to this transaction hence they understand that a two-step restructuring would be required: partial division and merger, which seem against the objectives of the Merger Directive that should facilitate reorganization transactions without tax impacts.

Merger when the transferring company states a negative equity. The tax authorities understand that if equity is negative, there are no positive effects resulting from the merger hence the transfer of tax losses from the transferring company to the receiving company is denied. However, there have been cases where the transferring company owned valuable intangibles with a nil book value. Since book value must be maintained upon merger, although net assets could have a significant positive FMV, equity is negative because it does not reflect the proper economic value.

- (c) Merger without an exchange ratio when the same entity is the sole shareholder of both the transferring and the receiving companies.

The main argument of the tax authorities is that if the shareholder is not attributed which additional shares in the receiving company, future taxation of capital gains could be depreciated, which can indeed be the case.

## 21.2 Comments relating to specific provisions of the Merger Directive

Please find below an article-by-article summary of the Portugal compliance status:

### Article 1

No incompatibility has been found with the implementation of Article 1 of the Merger Directive, except for the fact of not being applicable to third countries but only to Portuguese and EU Member States entities.

### Article 2

No incompatibility has been found with the implementation of Article 2 of the Merger Directive.

Domestic definitions of merger and division generally follow domestic commercial law. As referred above, the Portuguese tax authorities have been challenging certain transactions not literally falling within the tax definitions of merger and division, but which are executed under commercial law.

No definition in the commercial law for transfers of assets and exchange of shares, which follow the rules stated for sharecapital increase in kind (not in cash).

As to the definition of 'branch of activity', the Portuguese tax authorities have already recognized that it can include a transfer of shareholdings together with other resources.



### Article 3

Portugal may be incompliant with regard to the following aspects of implementation of this Article:

- (a) Tax neutrality does not apply to transactions (mergers, divisions, partial divisions and transfers of assets) performed by entities that are exempt from CIT or which taxable profits are determined under the simplified regime of taxation;
- (b) In case of an exchange of shares, the tax neutrality regime only applies to EU or third countries shareholders of the acquired company should they receive shares in a Portuguese resident acquiring company.

### Article 4

No incompatibility has been found with the implementation of Article 4 of the Merger Directive.

The Portuguese PE definition follows the OECD Model Tax Convention, except building site rule that refers to a minimum 6-month period.

Transfer of assets connected with a PE should be exempt from taxation in Portugal, provided the transaction fall within the scope of operations stated in the domestic law (and the Merger Directive). Otherwise, namely, the transfer of assets not effectively connected to the PE should be taxed herein. The gain or loss must be determined separately for each of the items included in such transfer.

No administrative formality or notification is required.

### Article 5

No incompatibility has been found with the implementation of Article 5 of the Merger Directive.

Only the provisions stated in the domestic tax law are deductible.

### Article 6

As a rule, tax losses brought forward by the transferring company can be used by the Portuguese PE of the EU Member State receiving company, provided all assets and liabilities of the transferring company are allocated to the PE of the receiving company and are considered for the computation of taxable profits at the level of the PE.

Carry forward of tax losses is allowed for 6 years. No carry back is possible.

Portugal may be incompliant with regard to the following aspects of implementation of this Article:

In case of partial division, tax losses cannot be transferred with the respective branch of activity and they may be cancelled because the transferring company is likely to change its business purpose or activity carried out.

The transfer of tax losses is dependent from a tax administration decision, which imposes an annual cap based on the increase of taxable profits and the equity values.

## Article 7

No incompatibility has been found with the implementation of Article 7 of the Merger Directive.

No taxation of capital gains/losses realized with the cancellation of holding derived from the incorporation of a subsidiary.

## Article 8

Portugal may be non-compliant with regard to the following aspects of implementation of this Article:

- (a) Under an exchange of shares, tax rollover for foreign shareholders in a Portuguese resident acquired company is only available should the acquiring company also be Portuguese resident.
- (b) Tax rollover on capital gains for individual shareholders as a result of tax neutral transactions ceases to apply should the individual change his/her tax residency abroad.

## Article 9

No incompatibility has been found with the implementation of Article 9 of the Merger Directive.

## Article 10

No incompatibility has been found with the implementation of Article 10 of the Merger Directive.

A credit method is applicable. Accordingly, the Portuguese resident company will be able to deduct the tax that would have been applicable in the country where the PE being transferred is located if the Merger Directive was not applicable therein.

## Article 10a

No transposition.

Non-resident entities are not considered as tax transparent.

## Article 10b

No incompatibility has been found with the implementation of Article 10b of the Merger Directive.

No taxation in case of transfer of registered office, unless there is also a transfer of the place of effective management. In such case, taxation can still be avoided in relation to the assets and liabilities that remain allocated to a PE in Portugal.

In any case, shareholders are subject to tax (although, for resident corporate shareholders an exemption may apply).

### Article 10c

No incompatibility has been found with the implementation of Article 10c of the Merger Directive.

### Article 10d

Portugal may be incompliant with regard to the following aspect of implementation of this Article:

Should there be a transfer of the legal seat and place of effective management abroad, tax rollover may still be available for the company that maintains a PE, but taxation is triggered for the shareholders. Whilst resident shareholders may benefit from a full (with a WHT exemption) or partial participation exemption on the deemed liquidation proceeds, the same should not be available to foreign shareholders, including those resident in the EU.

### Article 11

No incompatibility has been found with the implementation of Article 11 of the Merger Directive. Notwithstanding, in some case, we have seen the tax administration challenging the valid commercial reasons of mergers whenever the transferring companies had negative equity. Such challenge was used to deny the transfer of tax losses but not to trigger the taxation of gains.

António Neves

Vera Figueiredo

## 22. Romania

### 22.1 General comments

Starting 1 January 2007 (i.e. date of EU accession), Romania transposed into its legislation the 1990 Directive as amended by Directive 2005/19/EC. Thus, the Directive has become part of the Romanian Fiscal Code (Law 571/2003 as amended), as a specific chapter of the Profits Tax Section. However, some paragraphs and even Articles of the Directive have not been taken over (i.e. Article 2 Para. (j), Article 4 Para. 1 let. (a), Article 4 Para. 2, Article 8 Para. 3, 8 and 9, Article 10, Article 10a, Article 10b, Article 10c, Article 10d).

There are no clarifications or guidance issued in the applications of the Directive so far.

### 22.2 Comments relating to specific provisions of the Merger Directive

Please find below an article-by-article summary of the Romanian compliance status:

#### Article 1

The implemented Directive in the Romanian legislation does not cover transfers of the registered office of an SE or SCE. In terms of practical implementation, we note that there are no clarifications or guidance of any kind in application of the Article.

#### Article 2

The definition of exchange of shares seems to cover only the exchange leading to the obtaining of a majority of the voting rights (or shares). No clarification is provided as to whether the 10% cash payment applies on a 'per shareholder' basis or on an overall basis. No implementation of the Case C-43/00 '*Andersen og Jensen*' as regards the term 'branch of activity'.

The application of Article 2 of the Merger Directive was not clarified by any guidance.

#### Article 3

The Article seems to be compliant with the Directive's provisions. However, there is no clarification or guidance in its application.

#### Article 4

The Article 4(2) of the Merger Directive was not taken over in the Romanian legislation. Additional please note, that there are no techniques provided by the Romanian legislation on how to allocate the assets to a permanent establishment. Given the lack of clarifications and/or additional legislation in this respect, the logical interpretation would be that transfer of assets not connected to a permanent establishment should be taxable. However, there is no provision on how the taxation should take place, as for instance regarding the taxable base or the taxable moment.

#### Article 5

The Article seems to be compliant with the Directive's provisions. However, there is no clarification or guidance in its application.

#### Article 6

No incompatibility problems have been found with the implementation of Article 6 of the Merger Directive.

#### Article 7

No incompatibility problems have been found with the implementation of Article 7 of the Merger Directive.

#### Article 8

Paragraphs 3, 8 and 9 have not been taken over by the Romanian legislation. Apart from this, the Article seems to be compliant with the Directive's provisions. However, there is no clarification or guidance in its application.

#### Article 9

No incompatibility problems have been found with the implementation of Article 9 of the Merger Directive, apart from the fact that there was no account taken of the relevant case laws of the ECJ.

#### From Article 10 to Article 10d

Article 10, Article 10a, Article 10b, Article 10c and Article 10d of the Merger Directive were not taken over by the Romanian legislation.

#### Article 11

The Article seems to be compliant with the Directive's provisions. However, there is no clarification or guidance in its application.

Venkatesh Srinivasan

Marius Ionescu

## 23. Slovakia

### 23.1 General comments

In Slovakia, the Merger Directive is applicable as from 1 May 2004, i.e. the date when Slovakia joined the European Union.

The Merger Directive has not been implemented into the Slovak legislation in one piece of law. Instead, relevant parts of the Merger Directive are reflected in various acts, i.e. Income Tax Act (ITA), Act on Accounting (AA), Decree on Accounting principles (AP).

Current AA and AP are valid as from 1 January 2003, current ITA is valid from 1 January 2004. However, both the accounting rules as well as the tax laws were subject to numerous amendments since they were enacted. The Merger Directive has been implemented into the above laws gradually through the amendments. No amendments were implemented after 31 January 2008.

With respect to the Merger Directive, the ITA was amended by

- (a) Act No. 534/2005 implementing rules applicable in case of transfer of registered seat - carrying over of losses and tax base (Article 10c);
- (b) Act No. 621/2007 which clarified that the tax base of a company being dissolved without liquidation does not change in case when the legal successor is a tax payer with registered seat in EU who takes over the rights and liabilities relating to assets which are part of the permanent establishment in Slovakia. The reason for this change was the clarification of Section 17 (13) of ITA due to interpretation uncertainties.

The AA were amended by Act No. 689/2004 stipulating that valuation differences in case of the merger defined in Article 2 (a) first subparagraph will be accounted for in the same way as for other types of merger. This amendment should probably remove the accounting gap that existed before. Only very limited official guidelines exist and no draft legislation is in place with respect to the relevant provisions of the Slovak legislation implementing the Merger Directive.

The tax neutrality inherent in the Merger Directive is generally reflected by the AA and AP. A merger transaction should, principally, be a balance sheet transaction without a direct impact on the P&L account. The tax treatment of transactions follows, in principle, their accounting treatment.

However, some types of transactions (partial division, exchange of shares) are not directly reflected in the Slovak legislation. Moreover, the Slovak legislation is not clear enough and quite superficial (lacks of detailed provisions). Relevant practical experience is also missing. Therefore, it is quite difficult to draw a straightforward conclusion regarding the compliance of the Slovak legislation with individual Articles.

### 23.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

No precise implementation of the expression 'companies involved' is contained in the Slovak legislation. Therefore, a general rule referring to the seat of the company is applicable.

The benefits of the Merger Directive are conferred only upon foreign taxpayers if they are obliged to keep accounting books in line with the AP.

The Slovak legislation might not be in compliance with Article 1 of the Merger Directive.

#### Article 2

A 'partial division' and the 'exchange of shares' as defined by the Merger Directive have not been implemented into the Slovak legislation. Other types of merger specified in the Directive are reflected in the Slovak legislation.

#### Article 3

No incompatibility problems have been found with the implementation of Article 3 of the Merger Directive.

#### Article 4

The term 'value for tax purposes' has been implemented only for assets valued more than SKK 30,000 and the economic life is longer than one year. Consequently, the value for tax purposes of other types of assets/liabilities (e.g. stock, assets of small value) may differ from the 'value for tax purposes' as envisaged by the Merger Directive.

Based on the above, Article 4 of the Merger Directive might not be properly implemented as regards assets not covered by the above paragraph.

#### Article 5

No specific implementation of rules for permanent establishments (PE) situated outside Slovakia are existing.

No specific provisions governing the carry over of provisions and reserves have been implemented. Hence accounting treatment is applied which does not reflect the tax treatment of provisions or reserves. Consequently, a carry over of a wholly or partially tax exempt reserve or provision is not guaranteed.

Based on the above, the Slovak legislation is not in compliance with Article 5 of the Merger Directive.

#### Article 6

Slovakia has not implemented any provisions with respect to carrying over of losses relating to transfer of assets. Thus the Slovak legislation is not in compliance with Article 6 of the Merger Directive with respect to transfer of assets.

#### Article 7

Slovak legislation is in compliance with Article 7 of the Merger Directive.

#### Article 8

The avoidance of economic double taxation is unclear as far as it regards mergers that are not recognized by the Slovak legislation, i.e. partial division, exchange of shares.

Thus, the Slovak legislation might not be in compliance with Article 8 of the Merger Directive.

#### Article 9

Tax deferral is granted for the capital gain arising on the transfer of assets valued more than SKK 30,000 and economic life longer than one year. The limitation of tax deferral only to depreciable assets is contrary to the Merger Directive.

There are no specific provisions regarding exit taxation as envisaged by the Slovak tax law. However, Slovakia recognizes a separate entity approach, i.e. a tax base of a PE cannot be lower than tax base of an unrelated party. Therefore, a theoretical risk of exit taxation might exist in case of PE's. No practical experience or administrative guidance is available.

#### Article 10

There is no specific implementation of Article 10(1) of the Merger Directive. If the PE keeps books under the AA and AP, the implementation of Merger Directive may be utilized. The utilization of losses of foreign PE's is restricted. Utilization of losses of a PE in the country of the receiving entity may be possible.

Consequently, Slovak legislation may not be in compliance with Article 10 of the Merger Directive.

The Article 10(2) of the Merger Directive is not applicable in the Slovak Republic.

#### Article 10a

Foreign fiscally transparent entities are taxed as corporations. There is no specific implementation of the Merger Directive.

#### Article 10b

There is no specific implementation of Article 10b of the Merger Directive in the Slovak legislation. Different terms are used for 'head office' and 'place of effective management'. There is no practical experience available in this respect. Rules valid for joint stock companies are also applicable to Societas Europa. There is no exit taxation in this respect.

Based on the above, the Slovak legislation might not be in compliance with Article 10b of the Merger Directive.

#### Article 10c

There is no specific implementation of Article 10c of the Merger Directive. The Interpretation of current recapture rules is unclear. The losses generated by a PEs of Slovak companies may be utilized by that companies if that tax loss cannot be utilized in the respective Member State by the PE

Thus, the Slovak legislation might not be in compliance with Article 10c of the Merger Directive.



### Article 10d

Slovak legislation contains only vague provisions for the transfer of registered office of a company. No 'deemed' liquidation for tax purposes is envisaged, but the taxation of the PE created by the transfer of assets should follow the separate entity approach. There are no exit taxation provisions under the Slovak tax law.

The Slovak legislation may not be in compliance with Article 10d of the Merger Directive.

### Article 11

There is no specific implementation of Article 11 into the Slovak legislation. However, anti-abuse provisions currently contained in the Slovak legislation seem to fulfill the envisaged aim.

Based on the above, the Slovak legislation is in compliance with Article 11 of the Merger Directive.

Stan Jakubek

Michael Kuroпка

Tomas Vavrak

## 24. Slovenia

### 24.1 General comments

The Merger Directive was primarily transposed into Slovene legislation via the Corporate Income Tax Act (CITA), which came into force on 1 January 2005. Although the EC Merger Directive was not implemented into CITA until 2005, the aforementioned act expressly stated that the provisions of the Directive had direct applicability to operations carried out as of Slovenia's accession to the EU in May 2004. Subsequent changes made to the Directive were implemented into national law by the amended CITA, effective as of 1 January 2007. Due to the fact that the abovementioned act solely regulates tax pertaining to legal entities and to associations of natural persons that are not subject to personal income tax, provisions of the Directive referring to natural persons are also transposed into the Personal Income Tax Act. Furthermore, the actual implementation of anti-abuse measures foreseen by the Directive and substantively provided for in CITA, is further elaborated in the Tax Procedure Act.

Further guidance as to the actual execution of provisions transposed from the Merger Directive into national law, is by our assessment somewhat limited. A vague outline further elaborating the implementation of provisions encompassed in the Directive, is entailed in the Regulations on the Execution of CITA issued by the Ministry of Finance. Slovene tax law is relatively undeveloped, which is reflected in its lack of case law and limited experience of the tax authorities. Due to the limited scope of regulations, case law and official opinions issued by government authorities, sufficiently elaborating the execution of provisions implementing the Directive, it may be helpful also to refer to publications that address CITA and are widely used as a helpful tool for the interpretation of these provisions. Although these publications are of an unofficial nature and not regarded as legally binding, they are nevertheless generally commissioned by legislative bodies and considered as helpful instruments of guidance for the comprehension and implementation of legal texts.

### 24.2 Comments relating to specific provisions of the Merger Directive

Although the Merger Directive does not bind EU Member States to a duty of application of the common system of taxation to operations carried out within the territory of Slovenia, Slovene legislators nevertheless implemented a comprehensive system of common taxation into national legislation.

Upon review of the CITA, it may be concluded that the provisions of the Merger Directive are relatively comprehensively implemented into national law. Limited inconsistencies may be detected upon comparison of the CITA with the Directive. These inconsistencies and undefined grey areas ultimately arise from a limited scope of guidelines appropriately defining terms and phrases encompassed in the Directive and from a general lack of case law. Furthermore, it is not certain how the tax authorities would consider EC case law when interpreting the provisions of the law and granting tax relief.

#### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive.

## Article 2

The definitions listed in Article 2 of the Merger Directive and applied for the purpose of the Directive, are by large directly transposed into CITA or otherwise adequately defined in the scope of specific legislative acts. The Companies Act does not provide for any additional types of merger other than those provided for in the Directive.

## Article 3

Furthermore, Article 3 of the Merger Directive, is reflected in the Annex of the Regulation on the Execution of CITA, where the forms of companies and the taxes to which they must be subject to, without the possibility of an option or of being exempt, in order for tax relief to be granted, are enumerated.

The system of common taxation applying to the transfer of assets, exchange of shares, thus to mergers and divisions, is individually regulated for each respective category of operation in a specific sub-chapter of CITA. The definition of 'operation', for the purpose of the Directive, is adequately transposed into the relevant sub-chapters of national legislation.

## Article 4

The concept of permanent establishments, implemented into CITA, complies with the definition found in the OECD Model Convention. The term 'effectively connected', encompassed in Article 4 of the Merger Directive however, is translated as 'belonging to', which may provide for a considerably higher threshold of connectivity, than that referred to in the Directive. Moreover, tax treatment of assets and liabilities that are not effectively connected to the permanent establishment remains unclear. We also are not familiar with any official opinions and case law in this regard.

## Article 5

We are not aware of the authorities issuing guidelines, specifically providing for the implementation of this Article.

## Article 6

No specific regulations have been issued as to the allocation of losses to permanent establishments, nor has legislation been enacted regulating the carry-over of tax loss concerning divisions, partial divisions and transfer of assets.

## Article 7

Although EU Member States are only obliged to grant tax relief to recipient companies that are holders of a minimum of 15% of the capital of the acquired company, Slovene regulations do not stipulate a minimal holding percentage as a requirement for the application of relief. CITA provides that the acquiring company is granted complete tax relief for capital gain arising from the cancellation of its holding in capital in the transferring company.

## Article 8

The provisions of the Directive regulating the exchange of shares are fully implemented into national legislation. It must be noted however, that the consolidation of a majority of shares is expressly subject to a statutory limitation of six months. This limitation is not provided for in the Directive.

## Article 9

No incompatibility problems have been found with the implementation of Article 9 of the Merger Directive.

## Article 10

With regards to the implementation of Article 10 of the Merger Directive, it is important to emphasize that the concept of transparent entities is not recognized by Slovene legislation, thus the treatment of foreign transparent entities by the Slovene tax authorities remains unclear. Furthermore, Slovene legislators implemented the possibility of applying the system of taxing worldwide profits of permanent establishments, found in Article 10(2) of the Merger Directive.

Provisions minimising abusive application rights arising from the Directive, have been effectively implemented into both CITA and the Tax Procedure Act. The duty of notification was adopted as a means of monitoring the eligibility of applicants to tax relief arising from the Directive. Not only should this legal institute enhance the transparency of transactions, it should simultaneously enforce the principle of legal predictability as it provides companies involved in the operation with the possibility of requesting a preliminary legally binding decision, determining their eligibility for tax relief, prior to the execution of the operation. It is important to note however, that failure to notify the tax authorities of the operation should not preclude an entity's right to applying for tax relief in its annual tax return.

## Article 10a

Article 10a of the Merger Directive has not been implemented into national legislation as yet (see Article 10).

## Article 10b

Slovene legislation appears to be compliant with this Article.

## Article 10c

Slovene legislation appears to be compliant with this Article.

## Article 10d

Slovene legislation appears to be compliant with this Article.

## Article 11

This Article of the Merger Directive is also transposed into the Tax Procedure Act where it follows that tax authorities may refuse tax relief, should they assess that the relevant operation does not comply with statutory requirements, or that it is carried out for the purpose of tax evasion or tax avoidance. What is more, regulations provide for a presumption whereby a transaction is deemed to have the principle objective of tax evasion or tax avoidance, if there is no evidence of rationalisation or restructuring of the activities of the companies participating in the operation.

National regulations implement the relevant provisions of the Directive ensuring tax relief of properly constituted provisions and reserves attributed to the transferring company, thus allowing for the take-over of tax losses which had not been exhausted for tax purposes, by the receiving company. CITA entails an additional obligation of disclosure of hidden reserves upon the execution of a merger or a division. Although an obligation of disclosure is not explicitly provided for in the Directive, Slovene legislators assessed its implementation and relevant tax relief thereof, as necessary for the comprehensive implementation of the Directive. It is important to note that regulations fail to provide any guidance regarding the carry-over of tax loss concerning divisions, partial divisions, and transfer of assets, thus their applicable method of allocation.

Lucijan Klemencic

Matej Kovacic

Ursula Smuk

## 25. Spain

### 25.1 General comments

The 1990 Merger Directive has been implemented in Spain through the following pieces of legislation:

- (a) Law 29/1991 of 16 December 1991 ('Ley de adecuación de determinados conceptos impositivos a las Directivas y Reglamentos de las Comunidades Europeas') that came into force on 1 January 1992.
- (b) The tax regime introduced by Law 29/1991 was later included in the Corporate Income Tax Act number 43/1995 which came into force on 1 January 1996. This initial CITA was revoked and substituted for technical reasons, -such as the renumbering of Articles-, by the CITA that is presently in force (approved by Royal Decree 4/2004, of 5 March 2004). Law 29/1991 modified the Stamp Duty Act to introduce the Capital Duty tax exemptions applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares (the Stamp Duty Act presently in force was approved by Royal Decree 1/1993 of 24 September 1993). Law 29/1991 also modified the VAT Act to introduce the non-subjection to VAT of mergers, divisions, partial divisions, transfers of assets and exchanges of shares under certain conditions.
- (c) The amendments made by the Directive 2005/19 of 17th of February were implemented by Law 25/2006, of 17 July 2006 ('Ley por la que se modifica el régimen fiscal de las reorganizaciones empresariales y el sistema portuario y se aprueban medidas tributarias para la financiación sanitaria y para el sector de transporte por carretera'.), which introduced these amendments into the CITA.

The Spanish General Directorate of Taxes has issued numerous binding and non-binding rulings, upon request from taxpayers, on the interpretation of the above legislation, that are generally relied upon as an indication of the tax authorities' criterion. There are also several resolutions from the Tax Courts and judgments from judicial courts on these provisions.

### 25.2 Compliance of Spanish law with the Merger Directive

Spanish Tax Law is mostly compliant with the Merger Directive. However, some provisions of the Spanish Tax Law may generate the possibility of being non-compliant with the Merger Directive.

Please find below an article-by-article summary of the Spanish compliance status:

#### Article 1

No incompatibility problems have been found with the implementation of Article 1 of the Merger Directive.

## Article 2

National legislation is compliant with this Article although the tax authorities establish an additional requirement regarding the branch of activity, which is that such branch of activity, must also exist in the transferring company.

## Article 3

National law is compliant with this Article but a minor difference can be found in the implementation of this Article, as under Spanish Law, the benefits of the Directive are limited where the shareholders are resident in tax havens, even if they may qualify as EU residents.

## Article 4

Differences with the Merger Directive can derive from the fact that the national legislation does not include the meaning of 'real values' and 'value for tax purposes' nor mentions the requirements that the assets and liabilities effectively connected with a permanent establishment play a part in generating the profits or losses taken into account for tax purposes.

In addition, Spain imposes exit tax upon migration of companies or individuals from Spain and has not amended the legislation as a result of case Law.

## Article 5

No incompatibility problems have been found with the implementation of Article 5 of the Merger Directive.

## Article 6

Article 6 of the Merger Directive foresees the allocation of tax losses to permanent establishments. Spanish tax law does not cover the allocation of losses to the permanent establishment. According to tax rulings, losses may only be allocated to a permanent establishment when the transferring entity has no other presence in Spain.

Losses can only be transferred when the transferring company ceases to exist (total divisions and mergers). Consequently it is not possible to transfer losses in case of a partial division or in contribution of assets (branch of activity) to other entities in exchange for shares.

## Article 7

Under Spanish Law, losses realized upon de cancellation of a holding shall not be taxable provided that the holding company has a holding of at least 5% in the transferring company and the loss corresponds to existing or in built losses of the transferring company.

## Article 8

No incompatibility problems have been found with the implementation of Article 8 of the Merger Directive.

## Article 9

No incompatibility problems have been found with the implementation of Article 9 of the Merger Directive.

## From Article 10 to Article 10d

The Spanish loss recapture rules for permanent establishments is compliant with the Merger Directive.

Spain has opted not to transpose Article 10 a of the Merger Directive.

## Article 11

The national legislation has not been amended to reflect the conclusions of the 'N' case.

Although the wording of the Spanish tax Law is compliant with the Merger Directive, the tax authorities are taking the view that the mere existence of a tax advantage determines the non-application of the tax free regime. The point of view of the tax authorities regarding what must be understood by valid economic reasons is very restrictive.

Rocio Reyero

Laura Ezquerra



## 26. Sweden

### 26.1 General comments

The 1990 Merger Directive was implemented in Sweden in 1995 (Sweden entered the EU the same year) through a new provision. In 1999, this act was amended and the rules were transferred to a number of different tax acts. Currently the rules are included in the Swedish Income Tax Act (1999:1229). The rules have been amended several times, the latest amendment came into force on 1 January 2008.

From a company law perspective, mergers between two Swedish limited liability companies have been possible for several years. As regards cross-border mergers a new legislation has been enacted which came into force 15 February 2008.

### 26.2 Comments relating to specific provisions of the Merger Directive

#### Article 1

No incompatibility issues have been found with the implementation of Article 1 of the Merger Directive.

#### Article 2

The term 'securities' have been interpreted as 'shares'. The term 'branch of activity' differs from the Directive in some cases.

#### Article 3

In the preparatory works to the Swedish legislation enacting the amended Merger Directive, the Finance Department has commented on whether there are any entities that should be considered as transparent from a Swedish perspective. However, the Department concluded that it was neither possible nor meaningful to investigate this question further. The solution was instead to interpret if the entity as hand is considered to be a legal person according to general provisions in the ITA.

#### Article 4

No incompatibility issues have been found with regard to the implementation of Article 4 of the Merger Directive

#### Article 5

No incompatibility issues have been found with regard to the implementation of Article 5 of the Merger Directive.

#### Article 6

No incompatibility issues have been found concerning the implementation of Article 6 of the Merger Directive.

## Article 7

No incompatibility issues have been found with regard to the implementation of Article 7 of the Merger Directive.

## Article 8

If the shareholder is an individual the received shares should be considered to be acquired for the value for tax purposes (see definition above). If the seller is an individual he or she should be tax resident in Sweden. This requirement could be incompatible with the Directive.

If the shareholder is a company the taxable gain is computed at the time of the transaction but the actual taxation will occur at the time the shares are sold. This method implies a kind of 'deferred taxation'.

## Article 9

No incompatibility issues have been found according to the implementation of Article 9 of the Merger Directive.

## From Article 10 to Article 10d

The Swedish legislation appears to be compliant with these Articles.

Sweden has not implemented Article 10a of the Merger Directive. The reason for this is, according to the preparatory work, that it should be rather unusual that entities covered by this Article should be part of a transaction covered by the Directive. According to the Finance Department in case an entity does not qualify as a legal person under Swedish law, it is not suitable that this entity should benefit from the Directive. Taxation should instead follow the general rules.

There is no specific implementation of Article 10b of the Merger Directive. According to the preparatory works, the Swedish tax legislation already covers this situation and thus, there is no need to implement Article 10c of the Merger Directive in particular.

## Article 11

The Article has not been transposed into Swedish law, however, the Swedish Tax Avoidance Act could be applicable if certain conditions are met.

Carl Pihlgren

Sofia Almén

## 27. United Kingdom

### 27.1 General comments

The relief described in Merger Directive is incorporated into UK legislation through a mixture of existing legislation and specific legislation implemented as follows:

- (a) FA 1992 s44-45 covering divisions;
- (b) FA (No 2) 2005 s51 covering the formation of SE's by merger; and
- (c) SI 2007/3186 covering partial divisions, cross border mergers, and transparent entities.

The last of the above items of legislation came into force with effect from 29 November 2007 so as at 1 January 2008 the UK believed that its implementation of the Directive was complete.

### 27.2 Comments relating to specific provisions of the Merger Directive

A summary of the compliance of the United Kingdom's legislation with the Directive is summarised below by Article.

#### Article 1

The United Kingdom may be non-compliant with this Article on two counts:

If the term 'involved' with respect to a transaction covered by the Directive is interpreted as encompassing companies which are passively involved in the transaction (i.e., shareholders) as well as those actively involved (i.e. the transferring and receiving companies) then UK legislation is non-compliant. This is because UK legislation defines mergers, divisions and partial divisions that qualify for relief with respect to actively involved companies only. A merger between, say, two companies located in Germany with a United Kingdom parent company would not qualify for relief.

The definition of a merger, division or partial division in UK legislation only considers the case where transactions occur exclusively between companies located in the EU. Therefore, the case where a transaction occurs between two companies located in different countries within the EU and one or company located outside of the EU does not appear to qualify. However, from a practical perspective, such a transaction may be carried out in two steps, one step carried out exclusively between companies located within the EU and the other including the companies located outside the EU.

#### Article 2

All types of mergers, divisions and partial divisions have been implemented under United Kingdom law.

However, United Kingdom legislation could be incompliant with the Directive on as follows:

In the case of

- (a) a merger, division or partial division where the United Kingdom retains taxing rights on the branch of activity being transferred since it carried on activity through a permanent establishment located in the United Kingdom;
- (b) the transfer of assets; or
- (c) exchanges of shares.

Then the legislation requires the transfer to occur in exchange only for shares or debentures. However, through 'Her Majesty's Revenue and Customs' (HMRC) practice, in the case of exchanges of shares where there is an element of cash consideration, the transaction is treated as occurring in two steps, one being treated as a disposal of shares for cash and subject to tax under normal rules, and the other being treated as an exchange of shares qualifying for relief. There is insufficient practise to be able to conclude whether the same treatment would be granted in the case of other transactions where there was an element of cash consideration.

### Article 3

Although different areas of legislation use differing definitions of the term 'company', UK legislation appears to be compliant with this Article.

### Article 4

In general, assets are not taxed on transfer under a division, partial division or merger (except in the derogations from the Directive permitted in Articles 10(2) and 10a(1) of the Merger Directive). However, there are two instances where the UK implementation of the legislation may be incompliant with this Article.

- (a) Merger of a UK trade where the receiving company is not an SE

In this instance, there appears to be no relief in the case of assets transferred to a receiving company to enable the transfer to take place without generating a tax charge in the hands of the transferring company. In this instance, the transfer should be deemed to take place at market value and, consequently, a gain or loss may arise on the transfer.

- (b) Division, partial division or merger of a non-UK trade

Although the UK has implemented the above derogations from the Directive, the implementation may be incompliant with the Directive. This is because, whilst the UK legislation grants a notional tax credit for overseas taxes suffered on a division or partial division on 'gains', the transfer of an asset qualifying for capital allowances generates items known as 'balancing charges' (in the case of an excess) and 'balancing allowances' (in the case of a deficit). These may not be regarded as the same as gains and, hence, any notional overseas taxes arising on these items may not be available for credit against the UK tax arising.

## Article 5

Reserves and provisions may not be transferred either in the purely domestic situation or in the cross border situation. Therefore, UK legislation appears to be compliant this Article.

## Article 6

Losses may not be transferred either in the purely domestic situation or in the cross border situation (unless certain conditions are met eg 75% common ownership threshold) are met. Therefore, UK legislation appears to be compliant this Article.

## Article 7

Cancellations of holdings in respect of transactions under the Directive are not taxable in the hands of the transferring company. Therefore, UK legislation appears to be compliant with this Article.

## Article 8

The issue of new share capital to shareholders in the transferring company does not, of itself, create a taxable event. Therefore UK legislation appears to be compliant with this Article.

## Article 9

Notwithstanding the comments in respect of Article 2 of the Merger Directive above in respect of any cash elements arising on a transfer of assets, any transfer of assets where those assets remain subject to UK taxation after the transaction is treated as giving rise to neither a gain nor a loss. However, the United Kingdom has taken advantage of the derogation available to it in order to tax the transfer of assets (with a tax notional tax credit for any overseas tax that would have been suffered but for the Directive) where it loses the right to tax the assets in the future. Therefore, UK legislation appears to be compliant with this Article.

However, it should be noted that there may be significant practical difficulties in calculating the amount of notional tax credit available on such a transaction:

- (a) In order to calculate the notional overseas tax credit available, it is unlikely to be a simple case of substituting the overseas tax rate for the United Kingdom tax rate on the gains arising from the transaction as the rules relating to the taxation of the transfer are likely to be different in the two jurisdictions, for example, in the calculation of any gains arising.
- (b) It may not be straightforward to calculate the amount of overseas gain that would have existed 'but for the provisions of this Directive' as it may be difficult to envisage how the rules taxing the transaction in question would otherwise have operated, particularly where legislation enacting the Directive has replaced previously existing legislation.
- (c) It is unclear what evidence is would be necessary to present to the UK tax authorities in order to demonstrate what tax would have been paid.

- (d) It is unclear how a taxpayer could obtain confirmation from the overseas tax authority of the amount of tax that would have been due under the transaction 'but for the provisions of this Directive'.

#### Article 10

The United Kingdom has taken advantage of the derogation from the Directive permitted in this Article in the case where a branch of activity leaves the UK tax net by way of transfer to a company in a non-UK Member State. Therefore, with the exception of the comments in respect of Article 4 above UK legislation appears to be compliant with this Article.

#### Article 10a

The United Kingdom has taken advantage of the derogation from the Directive permitted in this Article in the case where the transferring company is treated as being transparent. Therefore, UK legislation appears to be compliant with this Article.

#### Article 10b

The transfer of the registered office of an SE or SCE is not taxable in the UK provided the SE or SCE continues to be subject to tax in the UK through a permanent establishment located there. Therefore, UK legislation appears to be compliant with this Article.

#### Article 10c

Whilst UK legislation does not generally recognise the concept of taxable provisions or reserves, losses arising in a SE or SCE would continue to be available to that SE or SCE as the result of a change of registered office, provided the SE or SCE maintained a taxable presence in the UK through a permanent establishment located there. Therefore, UK legislation appears to be compliant with this Article.

#### Article 10d

The transfer of the registered office of an SE or SCE should not trigger a deemed liquidation in the hands of the shareholders under UK tax law. Therefore, UK legislation would appear to be compliant with this Article.

#### Article 11

Relief under the areas of UK legislation enacting the Directive provided the transaction in question:

- (a) is effected for bona fide commercial purposes; and
- (b) does not form part of a scheme of arrangements of which the main purpose, or one of the main purposes, is the avoidance of UK tax.

However, in order to obtain the relief available under the Directive in respect of the transfer of Intangible assets, it is necessary for the transferring company to obtain clearance from HMRC that the transfer has been carried out for bone fide commercial purposes and it is not part of a scheme of arrangements of which the main purpose, or one of the main purposes, is the avoidance of UK tax. It is possible that this requirement to obtain clearance is overly burdensome upon taxpayers and there is a possibility that United Kingdom legislation may not be totally compliant with this Article.

David Evans





## C. Survey of Findings

This Summary of Findings illustrates key tension areas within each Member State through a 'Red/Amber/Green' flagging system, to identify aspects of domestic tax law that are, in our view, possibly noncompliant (Red), doubtfully compliant (Amber), or compliant (Green), respectively.

The tax experts from the Member States were requested to provide specific comments at least in such cases where they evaluated items as possibly noncompliant (Red) or doubtfully compliant (Amber).



	Austria	Belgium	Bulgary	Cyprus	Czech Republic	Denmark	Estonia
ARTICLE							
1.1 - Scope - Involved Companies	●	●	●	●	●	●	●
1.2 - Scope - Foreign Member States and third State merger	●	●	●	●	●	●	●
2.1 - Operations - The term "securities"	●	●	●	●	●	●	●
2.2 - Operations - Cash payments	●	●	●	●	●	●	●
2.3 - Operations - Further types of merger	●	●	●	●	●	●	●
2.4 - Operations - Qualifying exchange of shares	●	●	●	●	●	●	●
2.5 - Operations - Consolidation of qualifying holding	●	●	●	●	●	●	●
2.6 - Operations - The term "branch of activity"	●	●	●	●	●	●	●
3.1 - Companies - Types of entities	●	●	●	●	●	●	●
3.2 - Companies - Transparent entities	●	●	●	●	●	●	●
3.3 - Companies - Qualification tax residency	●	●	●	●	●	●	●
3.4 - Companies - Subject to tax clause	●	●	●	●	●	●	●
3.5 - Companies - Shareholder requirements	●	●	●	●	●	●	●
4.1 - Carry over of Balance Sheet Values - Concepts of "real values" and "values for tax purposes"	●	●	●	●	●	●	●
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	●	●	●	●	●	●
4.3 - Carry over of Balance Sheet Values - Concepts of "effectively connected" and "permanent establishment"	●	●	●	●	●	●	●
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	●	●	●	●	●	●
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●	●
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	●	●	●	●	●	●
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	●	●	●	●	●	●
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	●	●	●	●	●	●
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	●	●	●	●	●	●
5.1 - Carry over of Provisions and Reserves - The term "provisions and reserves"	●	●	●	●	●	●	●

## Summary

	Austria	Belgium	Bulgary	Cyprus	Czech Republic	Denmark	Estonia
ARTICLE							
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	●	●	●	●	●	●
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	●	●	●	●	●	●
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	●	●	●	●	●	●
6.1 - Carryover of losses - Concept of carry-over of losses	●	●	●	●	●	●	●
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	●	●	●	●	●	●
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	●	●	●	●	●	●
6.4 - Carryover of losses - Further conditions for carry over of losses	●	●	●	●	●	●	●
7.1 - Cancellation of holding - Amended holding threshold	●	●	●	●	●	●	●
7.2 - Cancellation of holding - Treatment of losses	●	●	●	●	●	●	●
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	●	●	●	●	●	●
8.2 - Tax relief for shareholders - Computation of the capital gains	●	●	●	●	●	●	●
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	●	●	●	●	●	●
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	●	●	●	●	●	●
9.2 - Transfer of assets - Further conditions for tax relief	●	●	●	●	●	●	●
9.3 - Transfer of assets - Tax deferral	●	●	●	●	●	●	●
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	●	●	●	●	●	●
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	●	●	●	●	●	●
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation / credits system	●	●	●	●	●	●	●
10.4 - Permanent establishment in a third Member State - Tax deferral	●	●	●	●	●	●	●
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	●	●	●	●	●	●
10a.2 - Transparent entities - Tax base for notional tax credit	●	●	●	●	●	●	●
10a.3 - Transparent entities - Determination of notional tax credit	●	●	●	●	●	●	●
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	●	●	●	●	●	●

	Austria	Belgium	Bulgary	Cyprus	Czech Republic	Denmark	Estonia
ARTICLE							
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	●	●	●	●	●	●
10b.1 - Transfer of registered office - Assets- Exit taxation	●	●	●	●	●	●	●
10b.2 - Transfer of registered office - Assets - The term "head office"	●	●	●	●	●	●	●
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	●	●	●	●	●	●
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●	●
10b.5 - Transfer of registered office - Assets - Tax deferral	●	●	●	●	●	●	●
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term "comparable circumstances"	●	●	●	●	●	●	●
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	●	●	●	●	●	●
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	●	●	●	●	●	●
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	●	●	●	●	●	●
11.1 - Anti-abuse provisions -Transposition of anti abuse provisions	●	●	●	●	●	●	●
11.2 - Anti-abuse provisions - Abuse of rights	●	●	●	●	●	●	●
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	●	●	●	●	●	●
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	●	●	●	●	●	●
11.5 - Anti-abuse provisions - The concept of "valid commercial reasons"	●	●	●	●	●	●	●
11.6 - Anti-abuse provisions - Burden of proof	●	●	●	●	●	●	●

## Summary

	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Lithuania
ARTICLE								
1.1 - Scope - Involved Companies	●	●	●	●	●	●	●	●
1.2 - Scope - Foreign Member States and third State merger	●	●	●	●	●	●	●	●
2.1 - Operations - The term "securities"	●	●	●	●	●	●	●	●
2.2 - Operations - Cash payments	●	●	●	●	●	●	●	●
2.3 - Operations - Further types of merger	●	●	●	●	●	●	●	●
2.4 - Operations - Qualifying exchange of shares	●	●	●	●	●	●	●	●
2.5 - Operations - Consolidation of qualifying holding	●	●	●	●	●	●	●	●
2.6 - Operations - The term "branch of activity"	●	●	●	●	●	●	●	●
3.1 - Companies - Types of entities	●	●	●	●	●	●	●	●
3.2 - Companies - Transparent entities	●	●	●	●	●	●	●	●
3.3 - Companies - Qualification tax residency	●	●	●	●	●	●	●	●
3.4 - Companies - Subject to tax clause	●	●	●	●	●	●	●	●
3.5 - Companies - Shareholder requirements	●	●	●	●	●	●	●	●
4.1 - Carry over of Balance Sheet Values - Concepts of "real values" and "values for tax purposes"	●	●	●	●	●	●	●	●
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	●	●	●	●	●	●	●
4.3 - Carry over of Balance Sheet Values - Concepts of "effectively connected" and "permanent establishment"	●	●	●	●	●	●	●	●
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	●	●	●	●	●	●	●
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●	●	●
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	●	●	●	●	●	●	●
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	●	●	●	●	●	●	●
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	●	●	●	●	●	●	●
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	●	●	●	●	●	●	●
5.1 - Carry over of Provisions and Reserves - The term "provisions and reserves"	●	●	●	●	●	●	●	●
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	●	●	●	●	●	●	●

	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Lithuania
ARTICLE								
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	●	●	●	●	●	●	●
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	●	●	●	●	●	●	●
6.1 - Carryover of losses - Concept of carry-over of losses	●	●	●	●	●	●	●	●
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	●	●	●	●	●	●	●
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	●	●	●	●	●	●	●
6.4 - Carryover of losses - Further conditions for carry over of losses	●	●	●	●	●	●	●	●
7.1 - Cancellation of holding - Amended holding threshold	●	●	●	●	●	●	●	●
7.2 - Cancellation of holding - Treatment of losses	●	●	●	●	●	●	●	●
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	●	●	●	●	●	●	●
8.2 - Tax relief for shareholders - Computation of the capital gains	●	●	●	●	●	●	●	●
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	●	●	●	●	●	●	●
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	●	●	●	●	●	●	●
9.2 - Transfer of assets - Further conditions for tax relief	●	●	●	●	●	●	●	●
9.3 - Transfer of assets - Tax deferral	●	●	●	●	●	●	●	●
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	●	●	●	●	●	●	●
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	●	●	●	●	●	●	●
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation / credits system	●	●	●	●	●	●	●	●
10.4 - Permanent establishment in a third Member State - Tax deferral	●	●	●	●	●	●	●	●
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	●	●	●	●	●	●	●
10a.2 - Transparent entities - Tax base for notional tax credit	●	●	●	●	●	●	●	●
10a.3 - Transparent entities - Determination of notional tax credit	●	●	●	●	●	●	●	●
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	●	●	●	●	●	●	●
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	●	●	●	●	●	●	●
10b.1 - Transfer of registered office - Assets- Exit taxation	●	●	●	●	●	●	●	●

## Summary

	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Lithuania
ARTICLE								
10b.2 - Transfer of registered office - Assets - The term "head office"	●	●	●	●	●	●	●	●
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	●	●	●	●	●	●	●
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●	●	●
10b.5 - Transfer of registered office - Assets - Tax deferral	●	●	●	●	●	●	●	●
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term "comparable circumstances"	●	●	●	●	●	●	●	●
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	●	●	●	●	●	●	●
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	●	●	●	●	●	●	●
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	●	●	●	●	●	●	●
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	●	●	●	●	●	●	●
11.2 - Anti-abuse provisions - Abuse of rights	●	●	●	●	●	●	●	●
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	●	●	●	●	●	●	●
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	●	●	●	●	●	●	●
11.5 - Anti-abuse provisions - The concept of "valid commercial reasons"	●	●	●	●	●	●	●	●
11.6 - Anti-abuse provisions - Burden of proof	●	●	●	●	●	●	●	●



	Luxembourg	Latvia	Malta	Netherlands	Poland	Portugal
ARTICLE						
1.1 - Scope - Involved Companies	●	●	●	●	●	●
1.2 - Scope - Foreign Member States and third State merger	●	●	●	●	●	●
2.1 - Operations - The term "securities"	●	●	●	●	●	●
2.2 - Operations - Cash payments	●	●	●	●	●	●
2.3 - Operations - Further types of merger	●	●	●	●	●	●
2.4 - Operations - Qualifying exchange of shares	●	●	●	●	●	●
2.5 - Operations - Consolidation of qualifying holding	●	●	●	●	●	●
2.6 - Operations - The term "branch of activity"	●	●	●	●	●	●
3.1 - Companies - Types of entities	●	●	●	●	●	●
3.2 - Companies - Transparent entities	●	●	●	●	●	●
3.3 - Companies - Qualification tax residency	●	●	●	●	●	●
3.4 - Companies - Subject to tax clause	●	●	●	●	●	●
3.5 - Companies - Shareholder requirements	●	●	●	●	●	●
4.1 - Carry over of Balance Sheet Values - Concepts of "real values" and "values for tax purposes"	●	●	●	●	●	●
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	●	●	●	●	●
4.3 - Carry over of Balance Sheet Values - Concepts of "effectively connected" and "permanent establishment"	●	●	●	●	●	●
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	●	●	●	●	●
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	●	●	●	●	●
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	●	●	●	●	●
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	●	●	●	●	●

## Summary

	Luxembourg	Latvia	Malta	Netherlands	Poland	Portugal
ARTICLE						
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	●	●	●	●	●
5.1 - Carry over of Provisions and Reserves - The term "provisions and reserves"	●	●	●	●	●	●
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	●	●	●	●	●
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	●	●	●	●	●
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	●	●	●	●	●
6.1 - Carryover of losses - Concept of carry-over of losses	●	●	●	●	●	●
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	●	●	●	●	●
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	●	●	●	●	●
6.4 - Carryover of losses - Further conditions for carry over of losses	●	●	●	●	●	●
7.1 - Cancellation of holding - Amended holding threshold	●	●	●	●	●	●
7.2 - Cancellation of holding - Treatment of losses	●	●	●	●	●	●
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	●	●	●	●	●
8.2 - Tax relief for shareholders - Computation of the capital gains	●	●	●	●	●	●
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	●	●	●	●	●
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	●	●	●	●	●
9.2 - Transfer of assets - Further conditions for tax relief	●	●	●	●	●	●
9.3 - Transfer of assets - Tax deferral	●	●	●	●	●	●
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	●	●	●	●	●
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	●	●	●	●	●
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation / credits system	●	●	●	●	●	●
10.4 - Permanent establishment in a third Member State - Tax deferral	●	●	●	●	●	●

	Luxembourg	Latvia	Malta	Netherlands	Poland	Portugal
ARTICLE						
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	●	●	●	●	●
10a.2 - Transparent entities - Tax base for notional tax credit	●	●	●	●	●	●
10a.3 - Transparent entities - Determination of notional tax credit	●	●	●	●	●	●
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	●	●	●	●	●
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	●	●	●	●	●
10b.1 - Transfer of registered office - Assets- Exit taxation	●	●	●	●	●	●
10b.2 - Transfer of registered office - Assets - The term "head office"	●	●	●	●	●	●
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	●	●	●	●	●
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●
10b.5 - Transfer of registered office - Assets - Tax deferral	●	●	●	●	●	●
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term "comparable circumstances"	●	●	●	●	●	●
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	●	●	●	●	●
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	●	●	●	●	●
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	●	●	●	●	●
11.1 - Anti-abuse provisions -Transposition of anti abuse provisions	●	●	●	●	●	●
11.2 - Anti-abuse provisions - Abuse of rights	●	●	●	●	●	●
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	●	●	●	●	●
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	●	●	●	●	●
11.5 - Anti-abuse provisions - The concept of "valid commercial reasons"	●	●	●	●	●	●
11.6 - Anti-abuse provisions - Burden of proof	●	●	●	●	●	●

## Summary

	Romania	Slovenia	Slovakia	Spain	Sweden	United Kingdom <sup>1)</sup>
ARTICLE						
1.1 - Scope - Involved Companies	●	●	●	●	●	●
1.2 - Scope - Foreign Member States and third State merger	●	●	●	●	●	●
2.1 - Operations - The term "securities"	●	●	●	●	●	●
2.2 - Operations - Cash payments	●	●	●	●	●	●
2.3 - Operations - Further types of merger	●	●	●	●	●	●
2.4 - Operations - Qualifying exchange of shares	●	●	●	●	●	●
2.5 - Operations - Consolidation of qualifying holding	●	●	●	●	●	●
2.6 - Operations - The term "branch of activity"	●	●	●	●	●	●
3.1 - Companies - Types of entities	●	●	●	●	●	●
3.2 - Companies - Transparent entities	●	●	●	●	●	●
3.3 - Companies - Qualification tax residency	●	●	●	●	●	●
3.4 - Companies - Subject to tax clause	●	●	●	●	●	●
3.5 - Companies - Shareholder requirements	●	●	●	●	●	●
4.1 - Carry over of Balance Sheet Values - Concepts of "real values" and "values for tax purposes"	●	●	●	●	●	●
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	●	●	●	●	●
4.3 - Carry over of Balance Sheet Values - Concepts of "effectively connected" and "permanent establishment"	●	●	●	●	●	●
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	●	●	●	●	●
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	●	●	●	●	●
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	●	●	●	●	●
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	●	●	●	●	●

	Romania	Slovenia	Slovakia	Spain	Sweden	United Kingdom <sup>1)</sup>
ARTICLE						
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	●	●	●	●	●
5.1 - Carry over of Provisions and Reserves - The term "provisions and reserves"	●	●	●	●	●	●
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	●	●	●	●	●
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	●	●	●	●	●
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	●	●	●	●	●
6.1 - Carryover of losses - Concept of carry-over of losses	●	●	●	●	●	●
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	●	●	●	●	●
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	●	●	●	●	●
6.4 - Carryover of losses - Further conditions for carry over of losses	●	●	●	●	●	●
7.1 - Cancellation of holding - Amended holding threshold	●	●	●	●	●	●
7.2 - Cancellation of holding - Treatment of losses	●	●	●	●	●	●
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	●	●	●	●	●
8.2 - Tax relief for shareholders - Computation of the capital gains	●	●	●	●	●	●
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	●	●	●	●	●
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	●	●	●	●	●
9.2 - Transfer of assets - Further conditions for tax relief	●	●	●	●	●	●
9.3 - Transfer of assets - Tax deferral	●	●	●	●	●	●
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	●	●	●	●	●
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	●	●	●	●	●
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation / credits system	●	●	●	●	●	●
10.4 - Permanent establishment in a third Member State - Tax deferral	●	●	●	●	●	●

## Summary

	Romania	Slovenia	Slovakia	Spain	Sweden	United Kingdom 1)
ARTICLE						
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	●	●	●	●	●
10a.2 - Transparent entities - Tax base for notional tax credit	●	●	●	●	●	●
10a.3 - Transparent entities - Determination of notional tax credit	●	●	●	●	●	●
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	●	●	●	●	●
10a.5 - Transparent entities - Comparison with a resident fiscally transparent company	●	●	●	●	●	●
10b.1 - Transfer of registered office - Assets- Exit taxation	●	●	●	●	●	●
10b.2 - Transfer of registered office - Assets - The term "head office"	●	●	●	●	●	●
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	●	●	●	●	●
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	●	●	●	●	●
10b.5 - Transfer of registered office - Assets - Tax deferral	●	●	●	●	●	●
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term "comparable circumstances"	●	●	●	●	●	●
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	●	●	●	●	●
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	●	●	●	●	●
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	●	●	●	●	●
11.1 - Anti-abuse provisions -Transposition of anti abuse provisions	●	●	●	●	●	●
11.2 - Anti-abuse provisions - Abuse of rights	●	●	●	●	●	●
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	●	●	●	●	●
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	●	●	●	●	●
11.5 - Anti-abuse provisions - The concept of "valid commercial reasons"	●	●	●	●	●	●
11.6 - Anti-abuse provisions - Burden of proof	●	●	●	●	●	●

1) UK has analyzed the situation of a parent company in a separate question 1.3

Austria		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Encompassing only the merging companies.
1.2 - Scope - Foreign Member States and third State merger	●	Encompassing comparable foreign mergers (including cross-border mergers).
2.1 - Operations - The term 'securities'	●	Shares (nominal capital), participation rights according to the Banking Act and Insurance Regulatory Act, profit participation rights (entitling the holder to a participation in all the profits and liquidation proceeds of the company), shareholders can receive new shares, or shares held by the absorbing entity or its shareholders.
2.2 - Operations - Cash payments	●	10% limit is calculated from newly issued shares and own shares used by the transferee to compensate the transferor.
2.3 - Operations - Further types of merger	●	Conversions (' <i>Umwandlungen</i> '), Formation of a partnership (' <i>Zusammenschluss</i> '), Partnership-division (' <i>Realteilung</i> ').
2.4 - Operations - Qualifying exchange of shares	●	The RTA covers the contribution of shares, if the contributed shares constitute a minimum of 25% of the total nominal share capital OR the contributed shares together with already existing shares lead to or widen a majority of the transferee in the target company.
2.5 - Operations - Consolidation of qualifying holding	●	No further conditions.
2.6 - Operations - The term 'branch of activity'	●	In the latest adaptation of the RTGI in August 2007 it was included in the Guidelines that in case of cross-border contributions which fall within the scope of the Merger Directive the definition of a 'branch of activity' in the meaning of the Merger Directive is decisive.

Austria		
ARTICLE		SPECIFIC COMMENTS
3.1 - Companies - Types of entities	●	Companies which are comparable to Austrian corporations. Concerning EU-companies, RTA excludes a list of entities in an Annex that refers to the Annex to the MD. The current version of the Annex was amended after the accession of Bulgaria and Romania.
3.2 - Companies - Transparent entities	●	A ' <i>Typenvergleich</i> ' comparing legal characteristics of Austrian and foreign entities is applied.
3.3 - Companies - Qualification tax residency	●	A corporation is tax resident in Austria, if it has its place of management or its seat in Austria.
3.4 - Companies - Subject to tax clause	●	A subject-to-tax clause of Article 3c of the Merger Directive as such has not been included in the RTA.
3.5 - Companies - Shareholder requirements	●	None.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	Real value is defined as fair market value of the business attributed to the single assets.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	No.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	Assets are deemed to belong to the unit to which they are linked.



Austria		
ARTICLE		SPECIFIC COMMENTS
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	Confusio profits are taxable, former depreciations of participations decrease transferred loss carry forwards.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Gains are subject to tax if Austria loses the taxation right. In relation to EU countries taxation might be deferred. Rules concerning immediate taxation in case of intangible long term assets are potentially an infringement of community law (although the tax administration argues for the contrary).
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	Austria did not use the possibility to tax specific gains according to Article 7(2) of the Merger Directive.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	In case Austria loses its taxing right in relation to EU/certain EEA-countries, deferred taxation applies. Newly introduced rules concerning intangible long term assets seem to infringe community law (see 4.5).
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	In general Austria applies the ' <i>Typenvergleich</i> '. In case assets are transferred to Austria which were not subject to tax before the reorganization, Austria will grant a step up to fair market value. In case Austria loses its taxing rights, gains are taxed; in relation to EU/specific EEA-countries deferred taxation is applied.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	Merger has to be comparable. Transferred assets have to have a positive fair market value.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Austria applies the authoritative principle (' <i>Maßgeblichkeit</i> '). Generally, the definition of GAAP applies.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	Austria normally applies the exemption method according to Article 23A OECD-Model. Provisions and reserves are attributed to the unit to which they are linked.

Austria		
ARTICLE		SPECIFIC COMMENTS
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	Assets (including provisions and reserves) are to be allocated to that unit to which they are linked - assets without link to any unit can be allocated to any unit.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	In case of de-mergers and contributions, the assets have to qualify as business units, branches, partnership shares or qualified participations in companies.
6.1 - Carryover of losses - Concept of carry-over of losses	●	Losses are only transferred if the business unit, branch or other asset that caused the losses is transferred. The business unit, branch or other asset has to belong to the surrendering entity at the date of reorganization (and has to be transferred). Furthermore, loss carry forwards at the level of the absorbing entity are lost if the business unit, branch or other asset that caused the losses does not belong to the absorbing entity anymore. Additionally, business unit, branch or other asset have to exist in a comparable size to allow for future use of tax loss carry forwards. This concept is also applied to purely domestic mergers.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	Tax loss carry forwards stick to the units that caused them. In case the unit (business unit, branch or other asset) is transferred, the loss is also transferred.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	No.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	Foreign losses cannot be pulled into Austria. At least if the loss carry forwards cannot be used abroad after the reorganization, this seems to constitute an infringement of the fundamental freedoms as interpreted by the ECJ in ' <i>Marks &amp; Spencer</i> '. <sup>1</sup> .

Austria		
ARTICLE		SPECIFIC COMMENTS
7.1 - Cancellation of holding - Amended holding threshold	●	Article 7 of the Merger Directive has not been implemented. Gains are not taxed.
7.2 - Cancellation of holding - Treatment of losses	●	Gains are not taxed. Losses are not deductible.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	Austria's system applies double taxation. Tax burden is mitigated by the fact that CIT is significantly lower than the highest marginal tax rate applicable to individuals and dividends and income from alienation of shares at individuals is normally subject to half the average tax rate. This leads to a tax burden similar to the highest tax rate for individuals. In principle reorganizations do not change the situation. Thus, we do not know about arguments that this is an infringement of community law.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Normally deemed to be income from alienation.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	No.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	Economic double taxation is part of the Austrian system. Accrued reserves remain taxable at both levels at contributions. (Please see 8.1)
9.2 - Transfer of assets - Further conditions for tax relief	●	Contributed assets have a positive fair market value, only contribution of qualifying assets are subject to tax relief, reorganizations have to be filed with the competent authorities within 9 months.
9.3 - Transfer of assets - Tax deferral	●	Austria applies deferred taxation in general. Rule concerning intangibles seems to be an infringement (see 4.5).

Austria		
ARTICLE		SPECIFIC COMMENTS
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	No recapture rule.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Austria only applies taxation of capital gains if Austria's taxing rights are restricted. According to RTGI normally this should not happen if foreign assets are contributed to a foreign entity.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	MD does not seem to prohibit world-wide taxation. See 4.5 concerning deferred taxation and it's pitfalls.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	In case Austria loses its taxing right in relation to EU/certain EEA-countries, deferred taxation applies. In case of a later alienation or change of taxing power to a non-privileged country, taxation will be levied.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Austria has not opted for implementing a specific rule for hybrid entities. Austria applies a 'Typenvergleich' to characterize foreign entities as partnerships or companies.
10a.2 - Transparent entities - Tax base for notional tax credit	●	N/A.
10a.3 - Transparent entities - Determination of notional tax credit	●	N/A.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	N/A.

Austria		
ARTICLE		SPECIFIC COMMENTS
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	N/A.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Assets that remain subject to tax (e.g. Austrian PEs) in Austria are not taxed. In case Austria's right for taxation is restricted in relation to EU/specific EEA-countries, deferred taxation applies. For issues of compatibility concerning intangible see 4.5.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	There are no specific definitions for the term 'head office' in connection with SE.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Tax residency of companies is given if either the seat or the place of effective management is in Austria. Place of effective management should normally coincide with the head office.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Transfer of residence will normally cause Austria to lose taxing power concerning assets and liabilities not effectively connected with a PE. This will trigger exit taxation. In relation to EU-/certain EEA-countries deferred taxation will apply (see 10b.1).
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Exit taxation has been adapted to be in line with ECJ case law. However, the treatment of intangible long-term assets seems to contravene community law (see also 4.5 and 4.7).

Austria		
ARTICLE		SPECIFIC COMMENTS
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	There is no specific definition of 'comparable circumstances'. The question whether a remaining permanent establishment can continue to carry forward the tax loss carry forwards after the registered office has been transferred is not clarified in the Austrian law or in the guidelines. According to an opinion in the literature the transfer of the registered office outside Austria has no impact on the availability of Austrian tax loss carry forwards for the remaining permanent establishment.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Reorganizations do not trigger recapture of foreign PE losses.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	The transfer of seat and head office does not give rise to a deemed liquidation according to the Austrian understanding because the SE is not dissolved. At the level of the shareholders the transfer of the registered office does not give rise to a taxation according to the literature, because there is no realization event at the level of the shareholders. Theoretically (depending on the tax treaties), the change of residence of the SE might trigger exit tax. However, in relation to EU member states, deferred taxation should apply.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	According to the OECD-Model Austria would not have taxing right in capital gains in shares held by residents of third countries. Thus, change of SE's residence should not lead to a restriction of taxing rights. Thus, Austria should not tax capital gains.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Relief is only granted if restructuring measures do not serve the circumvention or the reduction of taxes.

Austria		
ARTICLE		SPECIFIC COMMENTS
11.2 - Anti-abuse provisions - Abuse of rights	●	RTA refers to the general anti abuse provision.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	There have been no changes in the national provisions regarding anti-abuse following the 'Cadbury' judgment. However, interpretation mainly depends on case-law of Austrian high courts and changes are thus possible without amendment of the law.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	No.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Should be recognized according to jurisprudence of the High Courts.
11.6 - Anti-abuse provisions - Burden of proof	●	The burden of proof is on the taxpayer in case of a tax audit. This might be an infringement at least of the case law up to 'Cadbury'.

Belgium		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Only domestic mergers are covered by Belgian law.
1.2 - Scope - Foreign Member States and third State merger	●	The tax-free regime for domestic mergers and (partial) divisions applies irrespective the tax residence of the parent companies, i.e. Belgian, (foreign) Member State (s) or third (non-EU) State (s). However, the tax-free regime only applies when the receiving company is a Belgian company. The ITC defines a Belgian company as a company incorporated in Belgium or abroad and that has its statutory seat, principal establishment or seat of management in Belgium and is not excluded from the corporate income tax. Belgian commentators have taken the position that this condition violates the EU Merger Directive and the freedom of establishment as provided for in the EC Treaty.
2.1 - Operations - The term 'securities'	●	Full exemption only if issuance of shares.
2.2 - Operations - Cash payments	●	No full exemption if cash payment.
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	Exemption if DRD conditions are met.
2.5 - Operations - Consolidation of qualifying holding	●	Please see 2.4.
2.6 - Operations - The term 'branch of activity'	●	The term 'branch of activity' is not defined in the ITC. The ITC clarifies that financial fixed assets and share investments as such do not constitute a branch of activity, but can only be a part of a branch of activity.



Belgium		
ARTICLE		SPECIFIC COMMENTS
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	Not implemented.
3.5 - Companies - Shareholder requirements	●	However, please see 1.1.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	In general the ITC qualifies a realized capital gain as the difference between the consideration received or the sales price (i.e. the 'real value') minus, on the one hand, the costs related to the transfer or the sale, and, on the other hand, the acquisition or investment value minus reductions in value or depreciations that have been accepted for tax purposes (i.e. 'the value for tax purposes').
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	The notion 'sound economic or financial needs' as such is not defined by the Belgian Income Tax Code. The tax authorities generally take the position that the merging companies should be able to demonstrate that the merger is to the benefit of the concerned companies and will have a positive economic and/or financial impact on the concerned companies.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	Article 4(1)(b) of the Merger Directive has not been implemented in Belgian national legislation within the framework of mergers or (partial) divisions. This concept is relevant, however, within the framework of the tax-free rollover regime for the contribution of a universality of goods or one or more branches of activity into a company of a EU Member State.

Belgium		
ARTICLE		SPECIFIC COMMENTS
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	In case of a cross border merger where the receiving company is outside Belgium, tax is due irrespective whether the assets are connected or not.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	No full exemption due to DRD conditions.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	The 'N'-case has no impact on the authorities' point of view. Also with respect to cross-border mergers (which are currently not possible under a tax-free regime) no account has been taken of the Case law of the ECJ.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Not implemented.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	Not implemented. Please see 1.1, 4.3, 4.5, 4.7.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Article 5 of the Merger Directive is not implemented.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	See 5.1.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	See 5.1.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	See 5.1.

Belgium		
ARTICLE		SPECIFIC COMMENTS
6.1 - Carryover of losses - Concept of carry-over of losses	●	Art. 6 has not been implemented; carry over of losses is only possible with a domestic merger.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	See 6.1.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	
6.4 - Carryover of losses - Further conditions for carry over of losses	●	See 6.1.
7.1 - Cancellation of holding - Amended holding threshold	●	Taxation possible (at least partially) even if minimum holding is present within DRD system.
7.2 - Cancellation of holding - Treatment of losses	●	
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	No double taxation.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Cash payment is taken into account as a dividend and may lead to taxation with the transferring company.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	To the extent DRD applies, the exemption is not complete and even then several conditions must be fulfilled in order for DRD to apply, which are not provided for in the Directive.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	In principle, no double taxation.

Belgium		
ARTICLE		SPECIFIC COMMENTS
9.2 - Transfer of assets - Further conditions for tax relief	●	Compliant if condition of 'sound economic or financial needs' is applied/interpreted in line with the directive, i.e. that tax neutrality is the rule, denial the exception subject to the tax authorities to provide evidence that there is no sufficient business purpose.
9.3 - Transfer of assets - Tax deferral	●	No exit tax provision in Belgian tax law.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	No recapture rule in Belgian tax law.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Tax neutrality applies.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	No such legislation in Belgium.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	No such legislation in Belgium.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Article 10a of the Merger Directive is not implemented and tax may occur in case of a contribution of one or more or all branches of activities in a foreign transparent entity.
10a.2 - Transparent entities - Tax base for notional tax credit	●	No notional tax credit in Belgium.
10a.3 - Transparent entities - Determination of notional tax credit	●	Not relevant for Belgium.

Belgium		
ARTICLE		SPECIFIC COMMENTS
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Not implemented.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Not implemented.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Exit taxation upon emigration of a company, including SE/SCE.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	Implemented as far as company law is concerned.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	See 10b.1.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Exit tax applies to all assets.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	ECJ case law not taken into account.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	No transfer of provisions, reserves or losses to a PE situated in the member state from which the registered office was transferred.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	No recapture rule in Belgian tax law.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Exit tax applies as well as dividend withholding tax, unless exemption under the parent-subsidiary directive.

Belgium		
ARTICLE		SPECIFIC COMMENTS
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Exit tax applies as well as dividend withholding tax, unless exemption under domestic law for treaty countries applies (conditions are very similar to parent-subsidiary directive).
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Transposition and interpretation of the tax authorities debatable.
11.2 - Anti-abuse provisions - Abuse of rights	●	Lack of business purposes is formulated merely as an indication justifying a presumption (subject to counter - evidence) that the operation aims at tax evasion or avoidance, which may allow a member state to deny tax neutrality.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No steps taken to implement 'Cadbury' case law.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	Compliance of interpretation and practice with directive debatable.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	See 11.1, 11.2.
11.6 - Anti-abuse provisions - Burden of proof	●	See 11.1, 11.2.

Bulgaria		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	With respect to securities ('Акции' or 'Дялове'), in the meaning of CITA reference can be made to the definitions contained in the Bulgarian corporate law and in particular the Commerce Act.
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	There is a discrepancy in the definition of 'branch of activity', contained in the Bulgarian tax law and the one of Article 2 (i) of the Merger Directive. To the extent Bulgarian courts follow an EU law conform interpretation of this provision, no violation of EU legislation can be identified. However, there is no indication of the approach of the Bulgarian tax administration on this matter.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	All entities are treated as corporate entities regardless of their treatment under foreign tax legislation.
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	

Bulgaria		
ARTICLE		SPECIFIC COMMENTS
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	Bulgarian CITA does not use the term 'real value' but uses the term 'market price' as defined in the TSSPC.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	There is no specific guidance has been issued for divisions and partial divisions.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	The Bulgarian CITA does not contain a reference to the concept of 'effectively connected'. No administrative guidance has been issued on the interpretation and implementation of the 'effectively connected' and 'permanent establishment' by the Bulgarian National Revenue Agency.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Where the transferred assets and liabilities are not effectively connected with a permanent establishment after the reorganization, they are deemed realized at market prices and written off.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Please see 4.5 above. It should be noted that Bulgarian CITA has implemented the concept of deferring the taxation to the date of the disposal for newly acquired shares only. No further legislative amendments was made, following the judgment in Case C-470/04 'N'.



Bulgaria		
ARTICLE		SPECIFIC COMMENTS
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Article 4 (2) of the Merger Directive is not implemented in the Bulgarian CITA because there are no tax transparent entities under Bulgarian tax legislation.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The term provision follows IAS 37, to the extent IFRS are the applicable accounting standards in Bulgaria.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	There is no specific regulation under Bulgarian CITA as the Bulgarian tax authorities apply the direct method to calculate profit of a permanent establishment. Bulgaria follows the exemption method in most of its tax treaties and the exclusion of provisions and reserves from PEs is of no practical importance.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	See 5.2.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	Not relevant, since carry over is not possible (see 6.1).
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Not relevant, since carry over is not possible (see 6.1).
6.4 - Carryover of losses - Further conditions for carry over of losses	●	

Bulgaria		
ARTICLE		SPECIFIC COMMENTS
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	No guidance on this issue.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	The relief under Article 8 of the Merger Directive to non-resident shareholders which are legal entities has been made subject to their obligation to submit annually to the Sofia Territorial Tax Office a declaration that they have not disposed of the shares received in exchange. Failure to submit such a declaration leads to the presumption of disposition of the shares received in exchange. In our view this condition can only be seen as compatible with EU law if this presumption is refutable.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	

Bulgaria		
ARTICLE		SPECIFIC COMMENTS
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	
10.4 - Permanent establishment in a third Member State - Tax deferral	●	
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	This provision is not relevant for Bulgaria as it treats all entities as corporate tax liable persons.
10a.2 - Transparent entities - Tax base for notional tax credit	●	See 10a.1.
10a.3 - Transparent entities - Determination of notional tax credit	●	See 10a.1.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	See 10a.1.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	See 10a.1.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The term 'head office' is not explicitly defined in the Bulgarian tax legislation.

Bulgaria		
ARTICLE		SPECIFIC COMMENTS
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Should assets and liabilities not effectively connected with the permanent establishment, any gain on such assets is taxable as the preferential treatment for SEs and SCEs is not applicable. These assets and liabilities are deemed realized at market prices and written off.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	See 10b.4, 4.5 and 4.7.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The term has not been defined in the law, nor has it been developed in administrative guidelines.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	

Bulgaria		
ARTICLE		SPECIFIC COMMENTS
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	The concept of 'wholly artificial arrangement' has not been developed in the Bulgarian legislation or case law or administrative guidelines.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	The specific anti abuse provision have not been applied yet by the Bulgarian tax authorities.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	No guidelines have been issued in this respect by the Bulgarian tax administration.
11.6 - Anti-abuse provisions - Burden of proof	●	

Cyprus		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Wide scope of involved companies.
1.2 - Scope - Foreign Member States and third State merger	●	There are no geographical restrictions to the company reorganization relief rules.
2.1 - Operations - The term 'securities'	●	The company reorganization relief rules refer to shares and not to securities except for the partial division section.
2.2 - Operations - Cash payments	●	There are no specific rules or guidelines as to whether the 10% cash payment threshold of 10% applies on a per shareholder or on an overall basis but the latter is considered most likely.
2.3 - Operations - Further types of merger	●	The company reorganization relief rules cover the same three types of merger.
2.4 - Operations - Qualifying exchange of shares	●	The company reorganization relief rules can be applied in case of a gradual increase in an existing majority stake of a target company.
2.5 - Operations - Consolidation of qualifying holding	●	Relief for exchange of shares consolidating an existing majority holding is granted without further conditions.
2.6 - Operations - The term 'branch of activity'	●	There are no specific rules or guidelines regarding the concept 'branch of activity'.
3.1 - Companies - Types of entities	●	The ITL gives a broad definition of the term 'company'.
3.2 - Companies - Transparent entities	●	A disparity may occur for legal body corporates from countries not included in the First Schedule yet (Romania and Bulgaria) which are included in the Annex to the Merger Directive but are not considered to be a company based on domestic rules.
3.3 - Companies - Qualification tax residency	●	Cypriot tax residency is based on the place of (effective) management and control. Some double tax treaties include deviating tie-breaker rules.

Cyprus		
ARTICLE		SPECIFIC COMMENTS
3.4 - Companies - Subject to tax clause	●	The subject-to-tax clause is not part of the company reorganization relief rules.
3.5 - Companies - Shareholder requirements	●	There are no geographical restrictions to the company reorganization relief rules.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The concepts of 'real values' and 'value for tax purposes' are not applied in the company reorganization relief rules (but not required in the absence of exit taxation rules).
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	There are no specific rules or guidelines regarding (partial) divisions.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	There are no specific rules or guidelines regarding the concept 'effectively connected' (but not required in the absence of exit taxation rules).
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	Carry-over of losses is restricted to domestic situations (but is allowed for both companies and permanent establishments in Cyprus).
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Cyprus has no rules that govern and ensure the domestic taxation of undisclosed reserves in case a company ceases to be a taxpayer in Cyprus.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	A merger is tax exempt at the level of the receiving company in Cyprus.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Case law of the ECJ has not had any impact on the Cypriot tax legislation or interpretation thereof so far (but not required in absence of exit taxation rules).
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Tax transparent if not a company as per definitions.

Cyprus		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	Relief under Article 4 of the Merger Directive has not been made subject to other conditions.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The term 'provisions and reserves' has not been defined in Cypriot tax legislation or in administrative guidelines (but not required in the absence of exit taxation rules).
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	Cypriot tax legislation does not distinguish between provisions and reserves (but not required in the absence of exit taxation rules).
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	There are no specific rules or guidelines for the allocation of provisions and reserves (but not required in the absence of exit taxation rules).
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	Carry-over of provisions and reserves is not subject to other conditions.
6.1 - Carryover of losses - Concept of carry-over of losses	●	There are no specific rules or guidelines regarding the term 'loss'.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	There are no specific rules or guidelines regarding the allocation of losses to a permanent establishment.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Carry-over of losses is arranged in a general provision. There are no specific rules or guidelines regarding loss carry-over in case of (partial) divisions or transfer of assets.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	Carry-forward of losses is allowed applying the general domestic rules.
7.1 - Cancellation of holding - Amended holding threshold	●	The Cypriot tax legislation does not contain a threshold.



Cyprus		
ARTICLE		SPECIFIC COMMENTS
7.2 - Cancellation of holding - Treatment of losses	●	There are no specific rules or guidelines regarding losses upon cancellation of a holding under a company reorganization (but not relevant).
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	The ITL states that the shares received shall have the same value for tax purposes as the shares exchanged had immediately before the reorganization (but not relevant since profit from a sale of securities is exempt from CIT).
8.2 - Tax relief for shareholders - Computation of the capital gains	●	There are no specific rules or guidelines regarding the computation of a capital gain in case of a cash payment.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	Relief under the company reorganization relief rules is not subject to other conditions.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	The ITL states that the assets received shall be computed according to the same conditions as applying to the transferring company.
9.2 - Transfer of assets - Further conditions for tax relief	●	Relief under the company reorganization relief rules is not subject to other conditions.
9.3 - Transfer of assets - Tax deferral	●	Case law of the ECJ has not had any impact on the Cypriot tax legislation or interpretation thereof so far (but no exit tax provisions).
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	There is no specific provision regarding recapture of losses at once in case a permanent establishment is transferred in a company reorganization (but not relevant).
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	There are no specific rules or guidelines regarding taxation of profits of a permanent establishment abroad in case of a company reorganization (but not relevant).

Cyprus		
ARTICLE		SPECIFIC COMMENTS
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	There are no specific rules or guidelines regarding taxation of profits of a permanent establishment abroad in case of a company reorganization (but not relevant).
10.4 - Permanent establishment in a third Member State - Tax deferral	●	Case law of the ECJ has not had any impact on the Cypriot tax legislation or interpretation thereof so far (but not relevant).
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	There are no specific rules or guidelines regarding transparent entities.
10a.2 - Transparent entities - Tax base for notional tax credit	●	There are no specific rules or guidelines regarding profit of an acquired company.
10a.3 - Transparent entities - Determination of notional tax credit	●	There are no specific rules or guidelines regarding notional tax credits in case of an acquired company.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	There are no specific rules or guidelines regarding an option right for tax transparent acquiring/receiving companies and their shareholders.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	There are no specific rules or guidelines regarding transparent entities.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Cyprus does not levy exit taxation (except in case of trading stock).
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	There are no specific rules or guidelines defining the term 'head office'.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	

Cyprus		
ARTICLE		SPECIFIC COMMENTS
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Cyprus has no exit taxation rules.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Transfer of registered office is a qualifying reorganization.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	There are no specific rules or guidelines regarding the term 'comparable circumstances' (but not relevant as no exit taxation provisions).
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Cypriot tax legislation provides for loss recapture in case a permanent establishment outside Cyprus starts to generate taxable profit (but not relevant as no exit taxation provisions).
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Cypriot tax legislation does not include the concept of deemed liquidation or deemed dividend distributions.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	The country of residence of the shareholders of an SE is not relevant.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	The company reorganization relief rules do not include a specific anti-abuse provision.
11.2 - Anti-abuse provisions - Abuse of rights	●	Cypriot tax legislation contains two general (and limited) anti-abuse provisions.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	Case law of the ECJ has not had any impact on the Cypriot tax legislation or interpretation thereof so far (but not relevant considering no exit tax provisions and limited anti-abuse rules).

Cyprus		
ARTICLE		SPECIFIC COMMENTS
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	The IRD has not sought to rely on Article 11 (1) (a) of the Merger Directive to impose requirements.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	The concepts of 'valid commercial reasons', 'restructuring' and 'rationalization' have not been interpreted in domestic tax laws.
11.6 - Anti-abuse provisions - Burden of proof	●	There are no specific rules or guidelines regarding the burden of proof for 'valid commercial reasons'.

Czech Republic		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	The benefits of the Merger Directive are not extended to companies from a third State.
2.1 - Operations - The term 'securities'	●	Only general definition given in Czech law.
2.2 - Operations - Cash payments	●	It seems that the cash payment generally applies on an overall basis, however, not clear from the Czech implementation of the Directive.
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	Amended wording of 2005/19/EC not reflected.
2.5 - Operations - Consolidation of qualifying holding	●	Please see 2.4.
2.6 - Operations - The term 'branch of activity'	●	The ITA uses the term enterprise (' <i>podnik</i> ') for all branches of activity of the company and the term separate part of enterprise (' <i>samostatna cast podniku</i> ') for a branch of activity.
3.1 - Companies - Types of entities	●	It seems that not applicable to Czech tax resident SE.
3.2 - Companies - Transparent entities	●	No clear guidance is given in respect of transparent entities.
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	

Czech Republic		
ARTICLE		SPECIFIC COMMENTS
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The concepts have not been transposed to the Czech tax legislation.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	No specific guidance was issued.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	No specific definition of 'effectively connected' given in Czech legislation.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Provided the assets and liabilities are not effectively connected with a permanent establishment of the receiving/successor company located within the territory of the Czech Republic, the transaction does not qualify for the tax relief under the implementing legislation. As a result, standard rules for transfer of assets under ITA would be subsequently applied.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No direct response to case law. The tax is deferred until the disposal of the assets by the receiving/successor company if the conditions for the tax relief under ITA are generally met.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Not implemented.

Czech Republic		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Both provisions and reserves are defined by the Act No. 593/1992 Coll., on Reserves, ('AoR').
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	No specific rules or guidance given.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No specific rules or guidance given.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	No specific guidance is given by ITA in respect of allocation of losses to the permanent establishment.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	General rules apply.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	Not implemented.
7.2 - Cancellation of holding - Treatment of losses	●	Not implemented.

Czech Republic		
ARTICLE		SPECIFIC COMMENTS
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	No direct response to the judgment ('N' case).
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	Not implemented.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	There are no specific rules in relation to the transfer of permanent establishment.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	There are no specific rules in relation to the transfer of permanent establishment.



Czech Republic		
ARTICLE		SPECIFIC COMMENTS
10.4 - Permanent establishment in a third Member State - Tax deferral	●	No direct response to the judgment ('N' case).
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Not implemented. Please see 3.2.
10a.2 - Transparent entities - Tax base for notional tax credit	●	Not implemented.
10a.3 - Transparent entities - Determination of notional tax credit	●	Not implemented.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Not implemented.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Not implemented.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	No specific provision giving rise to exit taxation given in Czech tax law.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	No explicit definition of the term 'head office' provided in the Czech tax law.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	As the tax law speaks about 'registered office' in connection with the implementation of Article 10b, it is not likely that the criteria used to determine tax residence would be applied.

Czech Republic		
ARTICLE		SPECIFIC COMMENTS
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	There are no specific provisions regarding the taxation of such assets in Czech tax law.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	There is no direct response to the judgment.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	There is no definition of the term available in the Czech tax law or administrative guidelines.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	There are no specific rules in the Czech tax law.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	There are no specific rules in the Czech tax law.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	This is not clear from the Czech implementation of the Directive.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No direct response to the 'Cadbury' judgment.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	

Czech Republic		
ARTICLE		SPECIFIC COMMENTS
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	No specific guidance given.
11.6 - Anti-abuse provisions - Burden of proof	●	

Denmark		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Does not refer to shareholders.
1.2 - Scope - Foreign Member States and third State merger	●	Benefits of the Merger Directive apply to a merger between companies from one or more EU Member States only.
2.1 - Operations - The term 'securities'	●	The legislation should also apply to other securities, e.g. convertible bonds.
2.2 - Operations - Cash payments	●	According to Danish tax practice subsequent dividend distributions have been deemed as 'cash payments'. It is uncertain whether this will be changed after the 'Kofoed' case.
2.3 - Operations - Further types of merger	●	No other types of merger than listed in the Merger Directive is possible.
2.4 - Operations - Qualifying exchange of shares	●	It is a requirement that all shares are exchanged within 6 months after the first exchange + it is a requirement that all shares are exchanged within 6 months after permission is obtained.
2.5 - Operations - Consolidation of qualifying holding	●	According to Danish tax practice it is generally a requirement that any ownership changes in the receiving company is reported to the tax authorities in a period of 3 years.
2.6 - Operations - The term 'branch of activity'	●	The definition of a "branch of activity" in the Danish legislation implementing Article 2 (i) of the Merger Directive is worded exactly as the definition in EU Directive. The tax practice regarding partnership interests seem to be more strict than allowed under the EU Merger Directive.
3.1 - Companies - Types of entities	●	Tax practice has restricted certain types of entities from benefiting from the Directive.
3.2 - Companies - Transparent entities	●	No but not all entities have been tested by the Danish tax authorities.

Denmark		
ARTICLE		SPECIFIC COMMENTS
3.3 - Companies - Qualification tax residency	●	Generally, Denmark applies the registration principle. Also foreign companies which have their daily management in Denmark are fully taxable.
3.4 - Companies - Subject to tax clause	●	The disqualification of cooperatives can be argued.
3.5 - Companies - Shareholder requirements	●	The directive applies for companies in the EU regardless of the country of residence of the shareholders.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The concepts of "real values" and "value for tax purposes" have not been transposed into Danish tax legislation. According to the EU Merger Directive a merger, transfer of assets or division may not trigger taxes. However, according to Danish tax practice such restructurings may trigger Danish taxes on loan between the companies if there is a gain on such loans. This does not seem to comply with the EU Merger Directive
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	See 4.1.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	The concepts have been transposed into Danish tax legislation.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	Tax practice requires a notification to be made the tax payer. This does not seem in line with the Merger Directive.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Assets which are not effectively connected to a Danish permanent establishment are considered sold at the market value at the time of the transaction, and any taxable gains on the assets will trigger Danish taxes.

Denmark		
ARTICLE		SPECIFIC COMMENTS
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	The profit is tax exempt.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No specific accounts in regard to the Merger Directive have been taken. As a consequence of ' <i>Lasteyrie de Saillant</i> ' Danish tax law was amended and does not - in relation to exit taxation for individuals - require the tax payer to provide the tax authorities with security (bank guarantee etc.) for the deferred taxes.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Relief is not granted to transparent entities, however, a notional credit is granted.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	No further conditions apply.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The term is not defined in Danish tax legislation or guidelines.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	Danish tax law comprise no exceptions as to provisions and reserves to permanent establishments abroad in respect to mergers between two Danish companies.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	The provision and reserve should relate to the assets transferred.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	No further conditions apply.
6.1 - Carryover of losses - Concept of carry-over of losses	●	It is not possible to tell how the rule would be interpreted in Danish practice and tax losses may therefore not be carried over to a PE in the same circumstances as to a Danish company.

Denmark		
ARTICLE		SPECIFIC COMMENTS
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	See 6.1.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	No specific legislation has been enacted.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	Generally the conditions should be the same.
7.1 - Cancellation of holding - Amended holding threshold	●	N/A.
7.2 - Cancellation of holding - Treatment of losses	●	Tax losses has no tax implications.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	The succession principle apply to shareholders.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Any payments received by the shareholder is taxable. No cash payment may be received due to a transfer of assets.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	No further conditions apply.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	Risk of economic double taxation which is not in line with the objective of the Merger Directive.
9.2 - Transfer of assets - Further conditions for tax relief	●	Subsequent transactions in a period of three years should be notified. This does not seem in line with the Merger Directive.
9.3 - Transfer of assets - Tax deferral	●	No actions has been taken.

Denmark		
ARTICLE		SPECIFIC COMMENTS
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	Recapture rules apply..
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	No special rules apply.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Denmark has implemented Article 10 (2) of the Merger Directive in Danish tax legislation.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	No special rules apply.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Tax payer is granted a notional credit.
10a.2 - Transparent entities - Tax base for notional tax credit	●	The profit is calculated on the basis of fair market value.
10a.3 - Transparent entities - Determination of notional tax credit	●	The profit is calculated on the basis of fair market value.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Denmark has decided not to apply the benefits from the EU Merger Directive to transparent entities. On that basis the taxation of such restructurings undertaken by such transparent entities will trigger Danish taxes regardless of whether the restructuring is carried out as a domestic or cross-border restructuring.



Denmark		
ARTICLE		SPECIFIC COMMENTS
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Please see 10a.4.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	A transfer of the registered office gives rise to exit taxation unless the assets remain under Danish taxation
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The term has not been defined in tax law.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	The concepts of 'head office' and 'daily management' does not necessarily coincide.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	See 10b.1 and 4.5.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Denmark has taken no action as to tighten up the exit taxation legislation regarding companies. It is uncertain whether the unconditioned Danish exit taxation is in accordance with EU law.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The term has not been defined in tax law.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	No special rules have been enacted.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	No tax practice exists.

Denmark		
ARTICLE		SPECIFIC COMMENTS
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Foreign tax payers should not be taxable in Denmark due to a transfer of the registered office.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	The anti abuse clause has not been transposed into Danish tax legislation but is applied by the tax authorities when determining whether the transaction is based on valid business reasons. In our opinion the Danish tax authorities set very strict conditions that sometimes seem to go beyond Article 11.
11.2 - Anti-abuse provisions - Abuse of rights	●	See 11.1.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	The Cadbury judgment does not seem to have influenced the tax practice regarding anti abuse.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	See 11.1.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	The term has not been defined in tax law. According to tax practice the tax payer must demonstrate a valid commercial reason.
11.6 - Anti-abuse provisions - Burden of proof	●	No rules available. However, in practice the initial burden of proof is given to the tax payer.

Estonia		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	The expression 'in which companies from two or more Member States are involved' has been interpreted considering the directly involved companies not the parent entities.
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	The term 'securities' is defined as a share in a company's share capital. In case of a corporation 'security' is considered to be a share in the registered share capital and in case of other legal entities it is representing the membership in a legal entity.
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	No further types of merger applicable.
2.4 - Operations - Qualifying exchange of shares	●	
2.5 - Operations - Consolidation of qualifying holding	●	Provisions safeguarding the tax neutrality of share exchange transactions are incomplete which could lead to taxation of private individuals and non-residents
2.6 - Operations - The term 'branch of activity'	●	The legislation in Estonia defines the term 'branch of activity' as enterprise - an economic unit through which an undertaking operates.
3.1 - Companies - Types of entities	●	All companies listed in the Annex, except for ' <i>tulundusühistu</i> ', are covered and the national legislation does not apply the Merger Directive to more types of entities than those listed in the Annex.
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	

Estonia		
ARTICLE		SPECIFIC COMMENTS
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	Real value can be defined as fair market value. Value for tax purposes (applicable only to non-residents and resident natural persons, since resident legal entities are subject to tax only on distributed profits) is the acquisition cost as defined in ITA.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	There are no exit taxes in Estonia, unless the permanent establishment or legal entity distributes profit.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	According to the best of our knowledge there has been no account taken of the case law of the ECJ as there has been no discrimination in Estonia similar to those in the judgment in Case C-470/04 'N'.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	

Estonia		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The term 'provisions and reserves' has not been defined in the Estonian tax legislation since 1 January 2000, as corporate income tax is no longer calculated on the basis of earned, but on the basis of distributed profits.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	The article has not been implemented at all.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	

Estonia		
ARTICLE		SPECIFIC COMMENTS
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	Avoidance of economic double taxation at the level of the transferring company is achieved according to the general principles of the Estonian tax legislation, i.e. non-taxation of accrued but undistributed profits .
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Unrealized capital gains are not taxed; cash-basis principle is applied. Profit that has been subject to tax on the level of the PE is tax exempt on the level of the Estonian company; profits derived from the PE may be distributed tax exempt.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	

Estonia		
ARTICLE		SPECIFIC COMMENTS
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	
10a.2 - Transparent entities - Tax base for notional tax credit	●	
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	There are no exit taxes or comparable fiscal liabilities in relation to the relocation of the SE if the economic activities are continued. If a resident company is deleted from the commercial register without liquidation and the company terminates its economic activity in Estonia, the market price of the holdings (shares or contributions) of the non-resident in the company minus the acquisition value of the holdings is subject to taxation as gains of the non-resident. We concur that the non-taxation of resident legal entities in the same circumstances could result in violation with the EC Primary Law, however it does not contradict with the Merger Directive as such.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The term 'head office' has been defined in Estonian legislation as one of the criteria to determine non-resident's permanent establishment in Estonia.

Estonia		
ARTICLE		SPECIFIC COMMENTS
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	
10b.5 - Transfer of registered office - Assets - Tax deferral	●	
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Please see 10b.1.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	No specific anti abuse provisions enacted to the ITA, general anti abuse clauses of the Taxation Act followed by tax authorities.
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	The concept 'wholly artificial arrangement' has been interpreted by several rulings of the Supreme Court.



Estonia		
ARTICLE		SPECIFIC COMMENTS
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	
11.6 - Anti-abuse provisions - Burden of proof	●	

**Notes:** The Merger Directive has been implemented into the Estonian tax law through general provisions of the Income Tax Act (ITA). Tax neutrality of mergers, divisions and reorganizations has been explicitly stated, non-taxation of fiscal reserves among the transferred assets follows from the general principles of the Estonian tax system.

Finland		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Based on case law extends beyond the requirements of the Merger Directive.
1.2 - Scope - Foreign Member States and third State merger	●	Case law has extended the application also to the transactions involving companies from EEA member states and stated that the principles of the Merger Directive are also applicable in the case of single member state transaction.
2.1 - Operations - The term 'securities'	●	There is the requirement to use 'new shares'. However, it is our understanding that a draft Government Bill is pending which would abolish the requirement of shares being new.
2.2 - Operations - Cash payments	●	No specific mention whether applies on a shareholder or overall basis. In practice, has been applied overall basis.
2.3 - Operations - Further types of merger	●	No other types of merger covered.
2.4 - Operations - Qualifying exchange of shares	●	Tax deferral is applicable to the exchange of shares that leads to a stake of more than 50% of the other company's voting rights and any subsequent gradual increase.
2.5 - Operations - Consolidation of qualifying holding	●	Tax deferral is applicable to the exchange of shares that leads to a stake of more than 50% of the other company's voting rights and any subsequent gradual increase.
2.6 - Operations - The term 'branch of activity'	●	According to EVL §52c a 'branch of activity' means all the assets and liabilities of a division of a company which - from an organizational point of view - constitute an independent business, meaning an entity capable of functioning by its own.
3.1 - Companies - Types of entities	●	Based on case law extends beyond the requirements of the Merger Directive.

Finland		
ARTICLE		SPECIFIC COMMENTS
3.2 - Companies - Transparent entities	●	It is likely that none of the entities listed in the Annex be treated as being transparent for Finnish tax purposes, though this may be a matter of argument with the tax authorities.
3.3 - Companies - Qualification tax residency	●	Incorporation is the sole criterion for tax residency in Finnish tax law.
3.4 - Companies - Subject to tax clause	●	No specific guidance.
3.5 - Companies - Shareholder requirements	●	No such requirements.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	General definitions apply.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	No specific guidance.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	No specific definitions.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	No limitations.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	EVL §52e stipulates that if the receiving company does not have a permanent establishment in Finland, or if the assets thus transferred cease to be effectively connected to the permanent establishment, the difference between the fair market value and the tax book value of the items will be treated as taxable income.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	Merger gain not taxable.

Finland		
ARTICLE		SPECIFIC COMMENTS
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No account has been taken of the ECJ case law. Tax deferral is not possible.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Possible that none of the entities listed treated as transparent.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	No further conditions.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	No specific definition.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	This has not been explicitly dealt with in the Finnish tax laws implementing the Merger Directive.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	Specific rules for divisions and transfers of assets.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	No further conditions.
6.1 - Carryover of losses - Concept of carry-over of losses	●	The concept of 'loss' has not been specifically defined for the purposes of implementing Article 6 of the Merger Directive. Generally speaking, if the business operations of a company yield a net loss, this tax loss may be carried forward for tax purposes and set off against future business profits. The loss can be carried forward for up to 10 tax years. There are some restrictions regarding the use of losses e.g. in the case of ownership change.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	Same principles apply as to Finnish companies.

Finland		
ARTICLE		SPECIFIC COMMENTS
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Yes.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	No further conditions.
7.1 - Cancellation of holding - Amended holding threshold	●	Merger gain is always tax exempt.
7.2 - Cancellation of holding - Treatment of losses	●	Merger loss is always non-deductible.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	Yes, acquired shares valued at fair market value.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	General capital gain tax principles apply.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	3-year rule likely non-compliant. Tax deferral not possible.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	No but participation exemption may be available for subsequent sale of shares.
9.2 - Transfer of assets - Further conditions for tax relief	●	No further conditions.
9.3 - Transfer of assets - Tax deferral	●	We think this is not relevant in this context.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	Implemented as effective from 1 January 2007.

Finland		
ARTICLE		SPECIFIC COMMENTS
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Finnish tax laws implementing the Merger Directive should cover this situation.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Implemented as in the Merger Directive.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	No account has been taken of the ECJ case law.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	The 'option right' has not been implemented in Finnish tax law. Based on the entity classification, it is unlikely that any of the entities covered by the Merger Directive would be treated as transparent for Finnish tax purposes (please see 3.2).
10a.2 - Transparent entities - Tax base for notional tax credit	●	Please see 10a.1.
10a.3 - Transparent entities - Determination of notional tax credit	●	Please see 10a.1.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Please see 10a.1.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Please see 10a.1.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Not possible for other companies than SE/SCE, exit taxation if assets do not remain part of the PE.

Finland		
ARTICLE		SPECIFIC COMMENTS
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	Defined as registered office.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Criterion of incorporation which corresponds to the head/registered office of the company.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Exit taxation if assets do not remain part of the PE.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Tax deferral is not possible.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	Treatment as if the registered office were not transferred.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Implemented as effective from 1 January 2007. Unclear whether permitted under the Merger Directive.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Not treated as deemed liquidation.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Not treated as deemed liquidation.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Implemented partly.
11.2 - Anti-abuse provisions - Abuse of rights	●	General anti-abuse provision based on substance-over-form but specific anti-avoidance provision takes precedence.

Finland		
ARTICLE		SPECIFIC COMMENTS
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	The impact of the ECJ case law on anti abuse provisions has not been expressly taken into account in tax law, but it could affect the interpretation of such provisions. Based on case-by-case evaluation.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	No further requirements.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Based on case-by-case evaluation.
11.6 - Anti-abuse provisions - Burden of proof	●	Initially on tax authorities. Possible to request binding advance ruling.



France		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	French legislation does not refer to shareholders.
1.2 - Scope - Foreign Member States and third State merger	●	Merger from a single Member State or a single third State is covered.
2.1 - Operations - The term 'securities'	●	According to administrative guidelines 4 I-2-02, the securities, which may result from a capital increase or a distribution of shares of treasury stock, must represent the capital of the receiving company.
2.2 - Operations - Cash payments	●	Transfer of assets: no implementation of the 10% cash payment (administrative guidelines only provide for the possibility to allow a cash payment not exceeding the value of one share of the beneficiary company).
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	Exchange of shares aiming at consolidate an existing majority may benefit from the favourable tax merger regime only if a ruling is granted. Double taxation resulting from the qualification of exchange of shares as transfer of assets.
2.5 - Operations - Consolidation of qualifying holding	●	The ruling required in case of an exchange of shares aiming at consolidate an existing majority is granted if the transferor commits itself to hold the shares received for 3 years.
2.6 - Operations - The term 'branch of activity'	●	The 'branch of activity' is appreciated at both the level of the transferee and the level of the transferor, at both the date of realization and the date of effectiveness of the operation.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	French legislation does not recognize the concept of tax transparency.

France		
ARTICLE		SPECIFIC COMMENTS
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	French legislation refers to legal entities liable to corporate income tax, and not only to entities subject to corporate income tax.
3.5 - Companies - Shareholder requirements	●	No limitation of benefit.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	For operations realized at real value, latent capital gains on current assets are immediately taxed and may not benefit from the favourable tax merger regime.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	Specific guidance only relates to the definition of a 'branch of activity' (from a practical viewpoint, a prior validation is required).
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	For permanent establishments, French legislation refers to domestic regulations and tax treaties so that to ensure an effective future taxation of the latent capital gains.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	For operations realized at real value, latent capital gains on amortizable fixed assets must be reintegrate over a fixed period of time in order to compensate for the possibility to amortize those assets on their real value.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Transferred assets and liabilities which are not registered in the balance sheet of the French permanent establishment would be subject to immediate taxation of the relating capital gains.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	No taxation of the capital gain deriving from the cancellation of shares of the absorbed company hold by the absorbing company.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	ECJ case-law has not been taken into account.

France		
ARTICLE		SPECIFIC COMMENTS
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	French legislation does not recognize the concept of tax transparency.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	For divisions and transfer of assets, the transferor or the shareholders of the divided company must commit themselves to hold the shares received for 3 years. For transfer of shares, the transferor must commit itself to hold the shares received for 3 years and the transferee must commit itself to hold the received shares as long as being detained by the transferor.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The term 'provisions and reserves' have not been transposed into French legislation which simply referred to the accounting and tax concepts as defined by domestic regulations.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	For divisions and transfer of assets, the transferor or the shareholders of the divided company must commit themselves to hold the shares received for 3 years.
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	

France		
ARTICLE		SPECIFIC COMMENTS
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	For divisions and transfers of assets, the transferring company is allowed under certain conditions, to retain the receivable corresponding to carry-back losses and carry-over losses.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	Transfer of losses to the transferee is subject to prior ruling which is granted is the activity generating the losses is maintained for at least 3 years. (Such condition is not considered as fulfilled in case of a pure financial or real estate holding).
7.1 - Cancellation of holding - Amended holding threshold	●	No implementation of the holding threshold.
7.2 - Cancellation of holding - Treatment of losses	●	French legislation provides guidance for losses realized on the cancellation of a holding.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	No avoidance of economic double taxation.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Immediate taxation of the cash payment.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	Mergers, divisions, exchange of shares: requirement to fill-in a special statement and a register. Exchange of shares: anti-abuse provision for exchange of shares recently issued by way of capital increase. French 'Partial divisions' equivalent: 3 years holding requirement.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	No avoidance of economic double taxation.

France		
ARTICLE		SPECIFIC COMMENTS
9.2 - Transfer of assets - Further conditions for tax relief	●	The 'branch of activity' is appreciated at both the level of the transferee and the level of the transferor, at both the date of realization and the date of effectiveness of the operation. For transfer of assets, the transferor must commit itself to hold the shares received for 3 years. For transfer of shares, the transferor must commit itself to hold the shares received for 3 years and the transferee must commit itself to hold the received shares as long as being detained by the transferor. From a practical
9.3 - Transfer of assets - Tax deferral	●	ECJ case-law has not been taken into account.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	French legislation does not apply a worldwide taxation: no offset of PE losses, no recapture of PE losses.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Transfer of a branch of activity in exchange of shares: 'unofficial' requirement to realize a two-steps operation: transfer to a French company, further transfer to another French company. In such cases, the French holding company must commit itself to hold the shares for a minimum period of time and the foreign company must commit itself to hold the shares for as long as the French holding company.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	No taxation of unrealized capital gains as provided for Article 10(2).
10.4 - Permanent establishment in a third Member State - Tax deferral	●	ECJ case-law has not been taken into account.

France		
ARTICLE		SPECIFIC COMMENTS
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	French legislation does not recognize the concept of tax transparency.
10a.2 - Transparent entities - Tax base for notional tax credit	●	
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Compliance of the exit taxation with EC Law is doubtful.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	'Head office' may be interpreted as covering both statutory registered office and effective place of management.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Compliance of the exit taxation with EC Law is doubtful.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	ECJ case-law has not been taken into account.

France		
ARTICLE		SPECIFIC COMMENTS
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	French legislation does not apply a worldwide taxation: no offset of PE losses, no recapture of PE losses.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Requirement of a prior ruling which is granted if the following cumulative conditions are fulfilled: the operation is justified by economical reasons, the operation is not motivated by fraud or tax evasion, and the operational modalities ensure the future taxation of the latent capital gains.
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	ECJ case-law relating to 'wholly artificial arrangement' has not been implemented in respect of the conditions set out for the prior ruling.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	The application of the favourable tax merger regime is subject to several requirements (e.g., holding requirements, two-steps operation with the interposition of a French holding company), depending on the case at hand.

France		
ARTICLE		SPECIFIC COMMENTS
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	
11.6 - Anti-abuse provisions - Burden of proof	●	



Germany		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Does not refer to shareholders, see Article 8 of the Merger Directive
1.2 - Scope - Foreign Member States and third State merger	●	Merger from a single Member State is covered.
2.1 - Operations - The term 'securities'	●	Controversily discussed for jouissance rights. Requirement of 'new shares' for the transfer of assets in Sec. 20 and 21 RTA is incompliant with the Merger Directive.
2.2 - Operations - Cash payments	●	No cap on cash payments implemented in the RTA. Cash payments made by the receiving/acquiring company to remaining shareholders increase the taxable profit of the transferring company/shareholders of the acquired company.
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	View of the acquiring shareholder is decisive.
2.5 - Operations - Consolidation of qualifying holding	●	Consolidation is covered by the tax privileged share exchange even if shares are non-voting rights.
2.6 - Operations - The term 'branch of activity'	●	The term 'Teilbetrieb' as defined by the German tax authorities differs from the term 'branch of activities'. This can result in an incompliance with the Merger Directive. In certain cases, the definition of 'branch of activities' must be applied for pure domestic transactions following the 'Leur-Bloem' principles.
3.1 - Companies - Types of entities	●	The RTA applies for companies in the meaning of Art. 48 EC and Art. 34 EEA.

Germany		
ARTICLE		SPECIFIC COMMENTS
3.2 - Companies - Transparent entities	●	Determination of transparent companies on the basis of a test comparing the legal characteristics of the foreign entity with German corporations.
3.3 - Companies - Qualification tax residency	●	The criteria for tax residency are place of management and statutory seat.
3.4 - Companies - Subject to tax clause	●	The restriction was not implemented.
3.5 - Companies - Shareholder requirements	●	No requirements with respect to the tax residency of the shareholder.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The RTA defines real value as fair market value in the meaning of the market price by selling the single asset. In our view in the meaning of the Merger Directive the valuation should be based on a going concern value for the business.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	No.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	The extensive allocation of assets to the head office under German tax administrative guidelines is incompliant with the Merger Directive.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	The recapture clause with respect to shares in the receiving company held by the transferring company is doubtful incompliant with the Merger Directive.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	The immediate taxation in case Germany loses the taxing right might be regarded as a violation of Art. 43 and 48 EC, see the principles outlined in the 'N' case.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	The taxation of 5% of the merger profit is incompliant with the Merger Directive in case of a qualifying participation.

Germany		
ARTICLE		SPECIFIC COMMENTS
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	The immediate taxation in case Germany loses the taxing right might be a violation of Art. 43 and 48 EC, see the principles outlined in the 'N' case.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	The immediate taxation in case Germany loses the taxing right could be treated as a violation of Art. 43 and 48 EC (see the principles outlined in the 'N' case). It does not violate the Merger Directive.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	No.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The definition follows domestic generally accepted principles.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	OECD standards are to be applied.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	Provisions and reserves principally qualify as neutral assets. The taxpayer is free to allocate those assets to a ' <i>Teilbetrieb</i> ' whereas the branch as defined in the case ' <i>Andersen og Jensen</i> ' is much closer.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	For tax purposes provisions for pensions will be valued below fair market value. This shifts tax deductible expenses into the future and is, therefore, a violation of the Merger Directive.

Germany		
ARTICLE		SPECIFIC COMMENTS
6.1 - Carryover of losses - Concept of carry-over of losses	●	The denial of loss/interest expense take-over might be regarded as a violation of Art. 43 EC under the concept of a hidden discrimination. However, taking into account the current stand of EC Primary law these doubts are in our view not strong enough to evaluate the German principle as doubtfully compliant in context with the purpose of this survey, i.e. the implementation of the Merger Directive into German tax law.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	N/A.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Please see 6.1.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	N/A.
7.1 - Cancellation of holding - Amended holding threshold	●	Please see 4.6.
7.2 - Cancellation of holding - Treatment of losses	●	In principle, profits and losses will be denied.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	The economic double taxation is mitigated by the tax treatment of capital gains at the level of the shareholder. In our view the Merger Directive does not principally prohibit economic double taxation.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Please see 2.2.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	Please see also 11.4.

Germany		
ARTICLE		SPECIFIC COMMENTS
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	Please see also 9.2.
9.2 - Transfer of assets - Further conditions for tax relief	●	Please see also 11.4.
9.3 - Transfer of assets - Tax deferral	●	Please see also under 2.2.2.2 ('new shares'), 2.6 ('Teilbetrieb'), 4.1 ('real value'), 4.3 ('effectively connected with a permanent establishment'), 4.7 ('tax deferral').
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	The German loss recapture rule for permanent establishments in a Member State is compliant with the Merger Directive and Primary EC law.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Please see 10.1.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	The concept is compliant with the Merger Directive. With respect to the 'N' case see 10.4.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	With respect to the doubtful compliance with Primary EC law see 4.7.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Germany exercised the right not to apply the Merger Directive.

Germany		
ARTICLE		SPECIFIC COMMENTS
10a.2 - Transparent entities - Tax base for notional tax credit	●	Germany grants a notional tax credit. The decisive profit is the difference between fair market value and tax book value. The concept is in line with EC law, however with respect to the determination of the fair value see 4.1 and for the allocation of assets 2.6.
10a.3 - Transparent entities - Determination of notional tax credit	●	It is discussed whether or not the German foreign tax credit system is in line with EC law. Commentators take the position that under EC law at least a per-community limitation is required and that a carry forward of foreign tax credits must be allowed.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	In both cases the principles of tax transparency apply.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Because of the tax transparency principle applicable in both cases there is no different tax treatment.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	The exit tax rules for corporations apply. For the different tax treatment of the exit tax rules for individuals see 10b.5.1 in the questionnaire.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	There is no legal definition existing.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	The meaning of head office and place of management is slightly different.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Please see 10b.5 and 4.5.

Germany		
ARTICLE		SPECIFIC COMMENTS
10b.5 - Transfer of registered office - Assets - Tax deferral	●	The exit tax without deferral is incompliant with Primary EC law, see 4.7.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The term is without relevance as under German tax rules the change from the tax status of unlimited liable to limited liable has no impact on tax losses/tax loss carry forwards.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Please see 10.1.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	If only the registered seat is transferred while the actual seat is maintained, this could result in a liquidation of the SE/SCE.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Taxation of hidden reserves generated after the transfer of the office (resulting in a loss of the taxing right) is incompliant with the Merger Directive.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	No.
11.2 - Anti-abuse provisions - Abuse of rights	●	The general anti abuse provision would principally apply .
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	The concept of wholly artificial arrangements has not been implemented.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	The specific anti abuse provisions provide - inter alia - for five and seven year holding periods and are not compliant with the Merger Directive and Primary EC law.

Germany		
ARTICLE		SPECIFIC COMMENTS
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	The concept was not taken over in the RTA.
11.6 - Anti-abuse provisions - Burden of proof	●	Initial burden of proof is with the taxpayer.



Greece		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	Currently, it does not seem possible under Greek law to apply the benefits of the Merger Directive if the Merging companies were from a single (Foreign) Member State or from a third (non-EU) State or States.
2.1 - Operations - The term 'securities'	●	Tax law adopts the definitions introduced by domestic corporate law.
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	There are no administrative guidelines dealing with the subject matter. By reference to the wording of Law 2578/1998, it can be argued that the relief is granted only in respect of the exchange that finally leads to the acquisition of a majority holding.
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	The term 'branch of activity' (or business sector) includes the total of tangibles and intangibles, such as movables and real estate, receivables, liabilities, clientele, goodwill, trademarks, etc, organized as an independent unit.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	

Greece		
ARTICLE		SPECIFIC COMMENTS
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	No restriction has been introduced under Greek law.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The law transposing the Directive adopts the wording and terminology of the Directive.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	There are no specific implementation or interpretative administrative guidelines in this respect.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	There are no specific implementation or interpretative administrative guidelines in this respect. Based on the wording adopted by Law 2578/1998, the term 'effectively connected' should be regarded as meaning that such assets are used in a trade carried on by the permanent establishment at stake in order to generate profits. The term 'permanent establishment' is defined in Greek Income Tax Law and the definition adopted is quite similar to the one found in Article 5 of the OECD Model Tax Treaty.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Assets and liabilities not effectively connected with a permanent establishment would be subject to the local capital gains taxation (i.e. 25% tax), unless relief could be invoked under a relevant double taxation treaty.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	Given that no practical experience of the Merger Directive exists in Greece, we cannot answer either in the affirmative or in the negative as regards the question posed.

<u>Greece</u>		
ARTICLE		SPECIFIC COMMENTS
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No account of the ECJ case law has been taken.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	The Greek law introduces further conditions for the tax relief from real estate transfer tax. Specifically, under tax incentive L.1297/1972 the transfer by the absorbed company of its real estate to the absorbing company is exempt from real estate transfer tax on the condition that the property will be used for the needs of the absorbing company for a period of at least 5 years starting from the date of the merger's completion. Please note that during said 5 year period and provided that the principal activity of the absorbing company does not alter, the absorbing company is allowed: a) to lease the real estate property contributed or b) to sell such property provided that the proceeds from the sale shall be used within the next 2 years from such sale for the acquisition of real estate or other new fixed assets intended for the operational needs of the company or for the settlement of debts existing at the time of sale from bank loans and credits or from tax liabilities towards the State and social security contributions.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	There is no specific definition of the term "provisions and reserves" in the said laws transporting both Directives. Therefore, for the purpose of specifying such term within the framework of the Directive's implementation, it may be argued that one could find recourse to Greek tax incentive laws providing for Greek tax provisions and reserves.

Greece		
ARTICLE		SPECIFIC COMMENTS
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	There is no specific rule excluding the provisions and reserves deriving from permanent establishments abroad since such provisions and reserves may not be utilized under the Greek tax law by Greek head offices.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	N/A.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	The provisions and reserves are carried over provided that they are transferred and recorded in special accounts of the receiving entity.
6.1 - Carryover of losses - Concept of carry-over of losses	●	The term 'loss' has not been specifically defined or interpreted for the purposes of applying the Directive; hence, the general rules of Greek tax law would be applicable.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	No special rules exist for the allocation of losses to permanent establishment.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	The above rules are equally applicable.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	The carry over of losses is applicable to the extent that the domestic law grants such possibility to mergers of Greek companies effected under the provisions of Article 1 - 5 of Greek law 2166/1993 or Article 16 Para. 5 of Law 2515/1997. It should be mentioned that currently, carry over of losses is not possible for mergers of Greek companies effected in accordance with Law 2166/1993 or Article 16 Para. 5 of Law 2515/1997.

Greece		
ARTICLE		SPECIFIC COMMENTS
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	It has not been dealt in the Greek legislation.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	The Greek law has adopted to a great extent the wording of the Directive and it has not made any specific reference to any provisions for the avoidance of the double taxation.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	No guidance has been issued. Therefore, the general rules of Greek tax law should apply.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	The Greek law has not made any specific reference to any provisions for the avoidance of the double taxation.
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	

Greece		
ARTICLE		SPECIFIC COMMENTS
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	There is neither a carry-back nor a carry-forward option for foreign tax credit, i.e. it is lost for tax purposes.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	
10a.2 - Transparent entities - Tax base for notional tax credit	●	
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	There is no definition of the term 'head office' in Greek legislation.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	

Greece		
ARTICLE		SPECIFIC COMMENTS
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	There is no guidance as regards the tax treatment of such assets, our impression is that it should be subject to taxation under the general tax rules.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Please see 4.7 and 10b.4.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	There are no administrative guidelines for the definition of the above term.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Losses attributable to permanent establishment in a third Member State may not be utilized in Greece.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	N/A.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No account of the 'Cadbury' judgment has been taken by the Greek tax authorities.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	

Greece		
ARTICLE		SPECIFIC COMMENTS
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	The concept of 'valid commercial reasons' has been redefined as economically fair reasons while the other two terms have been interpreted as such.
11.6 - Anti-abuse provisions - Burden of proof	●	Law 2578/1998 does not make any reference as to which party has the initial burden of proof. According to Greek case law regarding other tax matters (e.g. transfer pricing), it is the tax authority the party that has such burden of proof.



Hungary		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	Unclear, since no definition of 'securities' as such is included in Hungarian law.
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	The definition of 'branch of activity' included in Hungarian law follows the same wording as in the Merger Directive. Nevertheless, its interpretation for Hungarian tax purposes is unclear.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	

Hungary		
ARTICLE		SPECIFIC COMMENTS
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The Act on Accounting determines real value as 'fair value', meaning 'the amount for which an asset can be exchanged (sold or purchased) or for which a debt can be settled between properly informed parties with intent to enter into a business deal under a transaction (contract) concluded under customary market conditions.'
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	There is no specific guidance has been issued for divisions and partial divisions.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	The definition of permanent establishment of the Act on CIT follows the definition of the OECD Model Convention. However, Hungarian legislation remains silent as regards the concept of 'effectively connected' and no administrative guidance has been issued in this respect.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Hungarian law does not specify in detail which assets or liabilities are effectively connected to the permanent establishment.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Hungarian law prescribes some tax base increasing items which result in corporate income tax being imposed on the company migrating abroad.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Hungarian law does not recognize any transparent entities for domestic purposes. However, Hungarian law is bound to recognize a transparent entity which is treated as transparent in its country of residence.

Hungary		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Only the term 'provisions' has been defined by Hungarian law.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	Hungarian law remains silent as regards provisions and reserves attributable to a foreign permanent establishment or business division.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	See 5.2.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	Unclear whether losses can be carried forward in case of cross border situation, however, the loss carry forward should be possible based on the interpretation of the domestic law.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	

Hungary		
ARTICLE		SPECIFIC COMMENTS
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	The Hungarian transfer pricing legislation is unlikely to be fully coherent with the Merger Directive.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	Hungarian law prescribes some tax base increasing items which result in corporate income tax being imposed on the company migrating abroad.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	The Hungarian legislation is not clear in this respect.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	

Hungary		
ARTICLE		SPECIFIC COMMENTS
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	The Hungarian tax laws do not recognize the concept of the fiscally transparent entities, therefore it is unclear how the directive should be applied.
10a.2 - Transparent entities - Tax base for notional tax credit	●	See 10a.1.
10a.3 - Transparent entities - Determination of notional tax credit	●	See 10a.1.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	See 10a.1.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	See 10a.1.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	please note that a Hungarian case (C-210/06 'Cartesio' ) was referred to the ECJ by a Hungarian Court and is still pending.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The term 'head office' has been translated into Hungarian legislation as 'place of management'. It means the place 'where the management governs the operations of the company'.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Should assets and liabilities not effectively connected with the permanent establishment, any gain on such assets is taxable as the preferential treatment for SEs and SCEs is not applicable.

Hungary		
ARTICLE		SPECIFIC COMMENTS
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Please see 4.5, 4.7 and 10b.4.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	Hungarian legislation has not been amended to reflect the 'Cadbury' judgment. However, please see 11.2.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	
11.6 - Anti-abuse provisions - Burden of proof	●	

Ireland		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Although inconsistent, enacting legislation appears to cover all companies in the Annex.
1.2 - Scope - Foreign Member States and third State merger	●	No specific Irish legislation facilitating 'mergers'. However, legislation provides Revenue with power to give relief if transaction covered by Directive is not specifically facilitated in the Irish tax code. If the merger is effected by way of an exchange of shares there is no territorial restriction.
2.1 - Operations - The term 'securities'	●	On the basis that the term 'securities' in the Directive does not explicitly include a reference to debentures or loan stock.
2.2 - Operations - Cash payments	●	Unclear whether presence of cash payments as part of a partial division would prevent relief. No specific provisions for mergers and divisions.
2.3 - Operations - Further types of merger	●	No additional types of mergers covered but Irish legislation does not refer specifically to mergers outlined in Article 2(a) either.
2.4 - Operations - Qualifying exchange of shares	●	Share exchange rules comply with Directive.
2.5 - Operations - Consolidation of qualifying holding	●	No additional conditions.
2.6 - Operations - The term 'branch of activity'	●	The term 'branch of activity' has been transcribed into Irish law as a 'trade'. While 'trade' would appear to have a narrower meaning than a 'business' or 'branch of activity' the taxation of non-resident companies is linked to the existence of a 'trade' carried on by a branch or agency.
3.1 - Companies - Types of entities	●	See 1.1.
3.2 - Companies - Transparent entities	●	The Irish authorities have not issued a list of what is regarded as transparent.

<u>Ireland</u>		
ARTICLE		SPECIFIC COMMENTS
3.3 - Companies - Qualification tax residency	●	Follows OECD guidelines.
3.4 - Companies - Subject to tax clause	●	Irish rules no more restrictive than required by Directive.
3.5 - Companies - Shareholder requirements	●	No restrictions apply.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	In general the transferee inherits the tax attributes of the assets of the transferor with no tax cost.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	In general the transferee inherits the tax attributes of the assets of the transferor with no tax cost.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	No guidance issued on the meaning of 'effectively connected' or 'permanent establishment'. As Irish corporation tax rights are generally linked to existence of a trade carried on by a branch or agency, the appropriate analysis is of the connection with such a branch rather than a 'permanent establishment'. There is no reason to suspect that the revenue takes a restrictive interpretation.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	No limitation of relief specified.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	The relief is only available where the assets continue to be used for the purpose of a trade carried on by the receiving company in Ireland. Otherwise it will be subject to the normal rules on transfers of assets between companies.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	No specific Irish legislation facilitating 'mergers'.



Ireland		
ARTICLE		SPECIFIC COMMENTS
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No account taken of the 'N' case.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	See 3.2. No guidance issued.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	While there are no specific provisions facilitating mergers, divisions or partial divisions, if reliance is to be placed on the 'share for share' provisions or on an application for discretionary relief under the Directive there is a 'bona fide commercial reasons' test. It is unclear if discretionary relief would be subject to additional conditions.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Irish tax law does not allow for the creation of tax exempt provisions or reserves so no specific reference to the transfer of such provisions or reserves is required.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	See 5.1. Irish tax code does not provide for exempt provisions or reserves.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	See 5.1 Irish tax code does not provide for exempt provisions or reserves.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	See 5.1 Irish tax code does not provide for exempt provisions or reserves.
6.1 - Carryover of losses - Concept of carry-over of losses	●	Same treatment as for domestic transactions.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	See 6.1.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	See 6.1.

<b>Ireland</b>		
ARTICLE		SPECIFIC COMMENTS
6.4 - Carryover of losses - Further conditions for carry over of losses	●	See 6.1.
7.1 - Cancellation of holding - Amended holding threshold	●	No specific treatment for cancelled shares.
7.2 - Cancellation of holding - Treatment of losses	●	Gains/losses on share exchanges are not taxed/allowed until realised. Gains and losses are treated consistently. However, there is no specific treatment for cancelled shares.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	Economic double taxation not always avoided but share exchanges and partial divisions would not permit a tax charge (except in circumstances permitted by Article 10a).
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Cash receipts are treated and taxed as a part disposal.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	See 4.9. The transaction must have been carried out for bona fide commercial reasons and not have tax avoidance as one of its main purposes. This would seem to be permitted by Article 11.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	Economic double taxation can normally be avoided in practice.
9.2 - Transfer of assets - Further conditions for tax relief	●	See 4.9. The transaction must have been carried out for bona fide commercial reasons and not have tax avoidance as one of its main purposes. This would seem to be permitted by Article 11.
9.3 - Transfer of assets - Tax deferral	●	No account taken of the 'N' case but in practice exemptions from exit charge often apply.

<b>Ireland</b>		
ARTICLE		SPECIFIC COMMENTS
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	Ireland applies the derogation available in Article 10(2).
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	See 10.1.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Ireland follows the wording of the directive quite closely. It is unclear if the foreign tax authority certification requirements go further than required by the Directive.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	No account taken of the 'N' case.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	The derogation contained in Article 10a appears to have been transcribed into Irish law correctly for transferring companies. No reference has been made to transparent 'acquired', 'receiving' or 'acquiring' companies. If a transaction envisaged by the Directive is not covered by specific legislation discretionary relief may be sought.
10a.2 - Transparent entities - Tax base for notional tax credit	●	See 10a.1. Profits of an 'acquired' company have not been defined.
10a.3 - Transparent entities - Determination of notional tax credit	●	See 10a.1.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	See 10a.1.

Ireland		
ARTICLE		SPECIFIC COMMENTS
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	While this part of the Directive has not been transposed into Irish law there is no provision in the Irish tax code for Irish 'fiscally transparent companies'.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	The transfer of a registered office does not automatically result in the cessation of tax residence. Absent the Directive an exit charge might apply but this is subject to the exceptions referred to in 9.3.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The term 'head office' has not been used in the national legislation implementing Article 10b.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Not necessarily. See 3.3.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	See 4.5.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	No account taken of the 'N' case.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	Irish branches can use trading losses in same manner as if they were separate entities.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	No loss recapture.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	No deemed liquidation.

<u>Ireland</u>		
ARTICLE		SPECIFIC COMMENTS
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	See 10d.1.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Generally tax relief is not available if the related transaction is carried out for bona fide commercial purposes or where tax avoidance was the main purpose or one of the main purposes of the transaction.
11.2 - Anti-abuse provisions - Abuse of rights	●	A general anti-avoidance rule (GAAR) also exists but this has been relatively sparingly used to date.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No attempt has been made to introduce into Irish law the phrase 'wholly artificial' as used in the 'Cadbury' judgment. Whether or not Irish anti-avoidance rules are compliant with ECJ case law is ultimately a matter to be determined by the courts.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	For transfers of assets, a 6 year holding period for shares received is required but a breach of this condition will not necessarily result in a tax cost.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Wording is broadly similar to Directive.
11.6 - Anti-abuse provisions - Burden of proof	●	Initial burden of proof falls upon taxpayer.

Notes:

Ireland has implemented the Directive's provisions on the transfer of assets. With the exception of transactions involving an SE or SCE further amendments have not been introduced to specifically facilitate mergers, divisions, partial divisions or exchanges of shares. The rationale for this was that Ireland had existing rules providing for share exchanges and that mergers and divisions were not permissible under Irish company law. Partial divisions would appear to be facilitated by provisions applying to reconstructions and amalgamations.

Italy		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	See 3.5.
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	No definition is given by Italian Tax Law. The term 'securities' may be interpreted in the light of the Italian Civil Code. Accordingly, the 'securities' refer to shares of joint-stock companies and quotas of limited liability companies.
2.2 - Operations - Cash payments	●	The 10% cash payment related to the intra-Community reorganizations has been allowed under the ITC. The term 'cash payments' should be interpreted in the light of the provisions set forth in the ICC.
2.3 - Operations - Further types of merger	●	The ICC comprises the same forms of mergers covered by the Merger Directive. No other types of mergers are covered.
2.4 - Operations - Qualifying exchange of shares	●	The exchange of shares follows under the provision of the Italian Merger Directive only if at least one of the shareholders involved is resident in Italy or the exchanged shares are held by a qualifying EU company through an Italian permanent establishment.
2.5 - Operations - Consolidation of qualifying holding	●	The Italian Merger Directive covers not only an exchange of shares leading to the obtaining of a majority of the voting rights either by law or according to the statute or voting rules, but also any further exchange that may consolidate that majority.
2.6 - Operations - The term 'branch of activity'	●	The term 'branch of activities' has been implemented in the ITC by using the term 'azienda' (i.e., business) and 'ramo d'azienda' (i.e., business going concern or independent part of a business).

Italy		
ARTICLE		SPECIFIC COMMENTS
3.1 - Companies - Types of entities	●	The companies involved in the transaction should satisfy the following requirements set forth in the ITC: (a) Take one of the forms listed in the Annex A to the Decree. Please note that Italy, with respect to the Italian subjects, has also included cooperative companies, mutual insurance companies and any other private or public company carrying out business activities; (b) Subject to one of the taxes indicated in Annex B to the Decree, with no possibility of an option or of being exempt; (c) According to the tax laws of Member State are considered to be resident in that State for tax purposes and are not considered, under a DTT, resident outside the European Community.
3.2 - Companies - Transparent entities	●	Italian Tax Legislation regards foreign entities as non-transparent for the purpose of the application of the CIT.
3.3 - Companies - Qualification tax residency	●	Italian Tax Law defines as resident in Italy entities that for the majority of the fiscal year have in Italy either their main seat, or the administrative seat, or carry on in Italy their main/core and substantial business activity.
3.4 - Companies - Subject to tax clause	●	Article 3 (c) has been introduced in the ITC by making reference to fulfilment of the subject to tax (Annex B) clause without the possibility of benefiting of an optional tax regime; no reference is made to the possibility of being exempt.
3.5 - Companies - Shareholder requirements	●	ITC requires that at least one of the participants that make the share exchange is either a resident in Italy or an Italian PE to which such shareholding is attributed.

Italy		
ARTICLE		SPECIFIC COMMENTS
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	No specific reference to the 'real value' concept is made in the ITC. However, in general reference could be made to the fair market value. The ITC does not contain any specific provision defining the 'value for tax purposes' concept resembling the Merger Directive one. However, the same concept can be construed by considering several ITC provisions.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	In case of a division, the Merger Directive requires the transfer of all of the assets and liabilities of the transferring company to two or more existing or new companies. Under the ITC it is required for a division that the assets transferred must each be branches of activities (' <i>ramo d'azienda</i> '). There is however a discrepancy between the rules governing the domestic divisions and intra-community divisions whereby the domestic provisions do not require that the assets transferred must each be branches of activities.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	ITC provides detailed provisions regulating positive and negative components of the income of a tax resident entity and the criteria of evaluation of the assets and liabilities forming part of the working capital of such entity.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	No limitations have been set forth in the ITC.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Assets and liabilities not effectively connected with the permanent establishment are considered as realized; consequently, the difference between fair market value and tax value is considered as capital gain subject to tax according to ITC.



Italy		
ARTICLE		SPECIFIC COMMENTS
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	According to ITC, merger profit is tax exempt even if the profit can be allotted to shares of the receiving company in the receiving company.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No specific provisions.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	No further conditions have been set forth in Italian Tax Legislation.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	No specific definition is given under Italian Tax Law. In principle, reference should be made to the Italian Civil Code and to the Italian Accounting Standard Principles.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	Should the merger surplus be distributed or the capital be reduced, the related reserved will be taxable.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No specific regulations are provided for by the ITC in case of intra-Community divisions, partial divisions or transfer of assets.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	No other conditions are set forth in Italian Law other than the Italian Accounting Principles aimed at carrying out the transaction from an Italian accounting point of view.
6.1 - Carryover of losses - Concept of carry-over of losses	●	The concept of 'loss' for the purpose of implementing Article 6 of the Merger Directive is not different from the concept used for Italian tax purposes.

Italy		
ARTICLE		SPECIFIC COMMENTS
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	Tax losses of the Italian transferring company may be carried over to the foreign receiving company to the extent they relate to the assets and liabilities effectively connected with the post-reorganization Italian permanent establishment.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	The rules on the carry over of losses also apply to divisions but not to partial division since Article 181 specifically refers only to mergers and divisions, without mentioning partial divisions.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	No further conditions for carry over of tax losses which were not set out in Article 6 of the Merger Directive has been implemented, but for an anti-abuse requirement, which applies also to domestic divisions.
7.1 - Cancellation of holding - Amended holding threshold	●	No holding threshold has been implemented in the ITC.
7.2 - Cancellation of holding - Treatment of losses	●	Italian Tax Law did not implement this article.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	According to the ITC, no capital gain is realized in case the shareholders attribute to the securities received a tax value equal to the tax value that the exchanged securities had before the reorganization. Accordingly, economic double taxation may arise and no specific Italian legislation has been implemented in order to avoid it.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	The capital gain on cash payments is computed according to national provisions applicable to domestic capital gains.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	Domestic and intra-Community reorganizations are subject to the general anti-avoidance provision.

<b>Italy</b>		
ARTICLE		SPECIFIC COMMENTS
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	No specific Italian legislation has been implemented in order to avoid economic double taxation. However, the Merger Directive does not require Member States to implement such provision.
9.2 - Transfer of assets - Further conditions for tax relief	●	Pursuant to the general anti-abuse provisions, the relief may be denied if the transfer of assets is not carried out for valid business reasons and with the intention of avoiding taxes.
9.3 - Transfer of assets - Tax deferral	●	Roll-over is not granted, and therefore tax deferral not realized, in case the assets transferred to the permanent establishment are subsequently taken out of it.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	Italy does not consider loss recapture as it is stated in Article 10(1) of the Merger Directive: Italy in fact applies the derogation principle available under Article 10(2) in respect of the transfer.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Italy does not consider loss recapture as it is stated in Article 10(1) of the Merger Directive: Italy in fact applies the derogation principle available under Article 10(2) in respect of the transfer.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Italian Tax Law provides for a notional credit system similar to the system set forth in Article 10(2) of the Merger Directive.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	Roll-over is not granted, and therefore tax deferral not realized, in case the assets transferred to the permanent establishment are subsequently taken out of it.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	As far as the entities involved in the intra-Community reorganization satisfy the above mentioned requirements, they are considered entitled to benefit from the Merger Directive as implemented by the Italian Tax Law.

Italy		
ARTICLE		SPECIFIC COMMENTS
10a.2 - Transparent entities - Tax base for notional tax credit	●	N/A.
10a.3 - Transparent entities - Determination of notional tax credit	●	N/A.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	N/A.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	N/A.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	The transfer of the registered office of an SE does not give rise to capital gain if the assets of the transferring company are included in an Italian permanent establishment of the SE.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	Italian tax law does not contain a specific definition of head office.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Italian Tax Law defines as resident in Italy entities that for the majority of the fiscal year have in Italy either their main seat, or the administrative seat, or carry on in Italy their main/core and substantial business activity.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	The assets and liabilities not connected to a permanent establishment in Italy after the transfer of the register office are subject to tax on the capital gain determined as difference between their fair market value and their tax value.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	N/A.

Italy		
ARTICLE		SPECIFIC COMMENTS
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The term 'comparable circumstances' has not been specifically defined for the purpose of implementing the Merger Directive. However, the concept is incorporated in the ITC by the wording of the rules in respect of the use of losses carried forward.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	No loss recapture is provided for in the ITC.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	The transfer of the registered office of an SE/SCE should give rise to capital gain if the assets of the transferring company are not included in an Italian permanent establishment.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Loosing the fiscal residence does not give rise to taxes in the hands of the shareholders of the transferred company irrespectively of their residence status.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	The ITC does not contain a specific anti-avoidance provision applicable to intra-community restructuring transactions. However, the general domestic anti-avoidance provisions are applicable also to intra-community restructurings.
11.2 - Anti-abuse provisions - Abuse of rights	●	General domestic anti-avoidance provisions are applicable also to intra-community restructurings.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	The domestic anti-avoidance provision seems to be in line with the 'Cadbury' Judgement.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	No other requirements are imposed by the Italian domestic provisions.

Italy		
ARTICLE		SPECIFIC COMMENTS
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Italian Tax Law has not defined the 'valid commercial reasons'. Some guidance can be found only in rulings to specific cases scrutinized under the anti-abuse provision. However, transactions should be evaluated on the basis of a factual analysis.
11.6 - Anti-abuse provisions - Burden of proof	●	In principle, the Italian Tax Authorities has the burden of proof.

Latvia		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Does not refer to shareholders.
1.2 - Scope - Foreign Member States and third State merger	●	Merger from a single foreign Member State is covered only if it refers to the permanent establishment of the receiving company in Latvia.
2.1 - Operations - The term 'securities'	●	The term "securities" is compliant with the Merger Directive.
2.2 - Operations - Cash payments	●	10% cap has been implemented.
2.3 - Operations - Further types of merger	●	No further types of merger are defined in the implementing legislation.
2.4 - Operations - Qualifying exchange of shares	●	Exchange of shares qualifies with the condition that the acquiring company has a majority of votes in the acquired company.
2.5 - Operations - Consolidation of qualifying holding	●	In case the acquiring company already owns a majority of holding, any further exchanges of shares would be treated as a qualifying exchange of shares.
2.6 - Operations - The term 'branch of activity'	●	The term "branch of activity" is defined in the implementing legislation in accordance with the provisions of the Merger Directive.
3.1 - Companies - Types of entities	●	The implementing legislation applies the Merger Directive listed in the Annex of the Merger Directive.
3.2 - Companies - Transparent entities	●	The term "transparent entity" is not defined in the Latvian legislation.
3.3 - Companies - Qualification tax residency	●	The main criterion for tax residency under the domestic law is the place of incorporation.
3.4 - Companies - Subject to tax clause	●	Subject to tax clause is implemented according to the provisions of the Merger Directive.

Latvia		
ARTICLE		SPECIFIC COMMENTS
3.5 - Companies - Shareholder requirements	●	No requirements with respect to the tax residency of the shareholder.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	Concepts of "real value" and "value for tax purposes" is compliant with MD.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	No specific guidance is issued in respect of divisions/partial divisions.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	There is no specific definition of "effectively connected" within Latvian legislation.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	The recapture depreciation is provided for new production technology equipment in case of reorganisation. This is incompliant with the provisions of the Merger Directive.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	The results of revaluation would be taken into account for tax purposes. However, there is no clear guidance provided by the legislator for assets and liabilities that are not effectively connected with a permanent establishment.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	Merger is profit tax exempt.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No specific rules for tax deferral.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	No criteria to determine tax transparent entities.



Latvia		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	The securities of the receiving company received by the transferring company shall be in its ownership at least three years after the transfer thereof unless the company proves that the alienation is not made for tax evasion purposes.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The definition follows generally accepted principles.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	No specific rules.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No guidance in respect to allocation of provisions and reserves.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	See No 4.9.
6.1 - Carryover of losses - Concept of carry-over of losses	●	According to Sec. 11 (11) CITA in case of merger (domestic or cross-border) the surviving company is entitled to take over the losses incurred in previous years by the acquired company under condition that both companies before the merger and the surviving company after the merger is controlled by one and the same person or group of persons. We believe that such requirement with regard to controlling holding is in its substance incompliant with the provisions of the Merger Directive.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	General principles for allocation of losses/taxable income to permanent establishments shall be observed.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	The legislation provides specific rules for the proportion of losses applicable to the companies after division/partial division.

Latvia		
ARTICLE		SPECIFIC COMMENTS
6.4 - Carryover of losses - Further conditions for carry over of losses	●	See No 4.9.
7.1 - Cancellation of holding - Amended holding threshold	●	The amended holding threshold has not been implemented in the Latvian laws.
7.2 - Cancellation of holding - Treatment of losses	●	Profits and losses resulting from the revaluation of the transferred shares shall not be taken into account with respect to the receiving company, if the receiving company is the resident of Latvia or the non-resident that has a permanent establishment in Latvia that is the holder of the transferred shares.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	The revaluation of the transferred shares shall not be taken into account with respect to the shareholders.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	The cash payment will be included in the taxable income of the shareholder.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	To qualify for the tax relief the shareholders shall be either the residents of Latvia or the non-resident that has a permanent establishment in Latvia that is the holder of the transferred shares and the shares received in the result of exchange of shares.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	The transfer of assets does not give rise to the taxation at the level of the transferring company.
9.2 - Transfer of assets - Further conditions for tax relief	●	See No 4.9.
9.3 - Transfer of assets - Tax deferral	●	No specific rules for tax deferral.

Latvia		
ARTICLE		SPECIFIC COMMENTS
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	No specific rules have been implemented relating to the permanent establishment in third Member State.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	See No 10.1.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	See No 10.1.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	See No 10.1.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	No rules have been implemented relating to the fiscally transparent entities.
10a.2 - Transparent entities - Tax base for notional tax credit	●	See No 10a.1.
10a.3 - Transparent entities - Determination of notional tax credit	●	See No 10a.1.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	See No 10a.1.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	See No 10a.1.

Latvia		
ARTICLE		SPECIFIC COMMENTS
10b.1 - Transfer of registered office - Assets - Exit taxation	●	The transfer of the registered office of the SE or the SCE would not give rise to exit taxation.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The head office is defined as the address of the location of the administration of the SE.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	The definition of head office and place of incorporation are different.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	The relief is not granted for assets and liabilities not effectively connected with the permanent establishment.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	No specific rules for tax deferral.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The change of tax status has no impact on the availability of Latvia tax loss carry forward of the SE or the SCE.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	No specific rules.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	The transfer of registered office would not be considered to give rise to a deemed liquidation.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	See 10d.2.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Anti abuse provisions are implemented regarding the transfer of registered office of the SE or the SCE.

Latvia		
ARTICLE		SPECIFIC COMMENTS
11.2 - Anti-abuse provisions - Abuse of rights	●	The general anti abuse provision would also apply.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	The concept of wholly artificial arrangement has not been implemented.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	See 4.9.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	The concept "valid commercial reasons" has not been interpreted in the Latvian legislation.
11.6 - Anti-abuse provisions - Burden of proof	●	Generally, initial burden of proof is with the tax authority. In respect of specific anti abuse provisions (See 11.4) the burden of proof is with the taxpayer.

Lithuania		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	Not expressly referred in the Law on CIT.
2.1 - Operations - The term 'securities'	●	Term 'securities' include shares, interests and member shares.
2.2 - Operations - Cash payments	●	More likely to be applied per shareholder basis.
2.3 - Operations - Further types of merger	●	Further type of a partial division allowing the partial transfer of assets, rights, and obligations and separation of shareholders.
2.4 - Operations - Qualifying exchange of shares	●	The majority threshold implemented in the Lithuanian legislation is higher than required by Merger Directive, i.e. control 2/3 or more of the voting rights is required.
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	Unclear guidance of the tax authorities, limited application to certain activities.
3.1 - Companies - Types of entities	●	Application is extended to other types of the Lithuanian entities.
3.2 - Companies - Transparent entities	●	No concept in the Lithuanian legislation.
3.3 - Companies - Qualification tax residency	●	Residency depends on the incorporation.
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	No limitations.

Lithuania		
ARTICLE		SPECIFIC COMMENTS
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The Law on CIT does not directly refer to the concept of real values. However it is stated that any increase in the value of assets in case of the mergers, divisions, partial divisions, transfers of assets, exchanges of shares or transfer of registered office shall not be included in the taxable income of the acquiring entity.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	No concept of 'effectively connected'. The Law on CIT refers to all assets, rights and obligations that are transferred in case of the merger.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	Not limited.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	No concept of 'effectively connected'. Reallocation of assets is not allowed.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Please see 4.5
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	No concept of transparent entities.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	Securities received by the means of an exchange can not be transferred for 3 years.

Lithuania		
ARTICLE		SPECIFIC COMMENTS
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	The terms provisions and reserves are only defined in the accounting standards.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Losses of the transferring entity shall be reduced, no effect in case of exchange of shares.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	No further carry forward of losses if a branch of activity is discontinued.
7.1 - Cancellation of holding - Amended holding threshold	●	No holding threshold is set.
7.2 - Cancellation of holding - Treatment of losses	●	Losses not recognized.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	Economic double taxation is not eliminated (except in case of exchange of shares).
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Cash payments are taxable according to the provisions of the Law on CIT.



<b>Lithuania</b>		
ARTICLE		SPECIFIC COMMENTS
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	Securities received by means of an exchange can not be transferred for 3 years.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	No guidance.
9.2 - Transfer of assets - Further conditions for tax relief	●	Securities received by the means of an exchange can not be transferred for 3 years.
9.3 - Transfer of assets - Tax deferral	●	
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Renouncement of PE taxation not directly transposed into the Lithuanian legislation, compliance remains doubtful.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Transfer of PE does not give rise to taxation.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Not defined in the Lithuanian legislation, however, in practice carried over without any restrictions.
10a.2 - Transparent entities - Tax base for notional tax credit	●	

Lithuania		
ARTICLE		SPECIFIC COMMENTS
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	No exit taxation applicable.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	Place where management or administrative organ is located.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Determined upon the place of incorporation (registration).
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	No concept of 'effectively connected'. Reallocation of assets is not allowed
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Please see 4.5, 4.7 and 10b.4.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The term 'comparable circumstances' was not defined in Lithuanian legislation.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	

Lithuania		
ARTICLE		SPECIFIC COMMENTS
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	General anti-avoidance rules applicable.
11.2 - Anti-abuse provisions - Abuse of rights	●	Substance over form principle.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	According to the Law on CIT, division, partial division, transfer of assets, and exchange of shares is subject to tax relief only if an entity or its members do not sell or otherwise transfer into ownership the shares (interest, member shares) received by means of an exchange for a period of 3 years, except for the subsequent cases of division, partial division, transfer of assets and exchange of shares.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	The concept of 'valid commercial reasons' concept has not been defined in the legislation or interpreted by the tax authorities.
11.6 - Anti-abuse provisions - Burden of proof	●	Shared between the tax authorities and the taxpayer.

Luxembourg		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	In implementing the concept 'branch of activity', Luxembourg law did not refer to this term itself but to the term 'business' ( <i>entreprise</i> ) and 'independent part of a business' ( <i>partie autonome d'entreprise</i> ) that were used for domestic operations before the implementation of the Merger Directive. According to a circular issued by the tax authorities, 'business' or 'independent part of a business' has the same meaning as 'branch of activity'. As the term 'independent part of business' is much broader than the interpretation of 'branch of activity' given by the ECJ in <i>Andersen og Jensen</i> , the term used in Luxembourg should be compliant with the term used in the Merger Directive.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	

<b>Luxembourg</b>		
ARTICLE		SPECIFIC COMMENTS
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	Although the concepts of 'real values' and 'value for tax purposes' have not been transposed as such into the Luxembourg Tax Law, the Luxembourg legislation is in compliance with the directive by completely exonerating the profits realized upon the transfer from Luxembourg taxation.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Luxembourg tax law does not explicitly consider that the transferred assets and liabilities are effectively connected with a permanent establishment. The law is therefore unclear as to whether assets/liabilities that do not remain connected with a permanent establishment would jeopardize the tax neutrality of the whole transfer, including that of the assets and liabilities connected to a permanent establishment, or whether this simply entails that a gain realized upon the transfer of these assets and liabilities that do not constitute a permanent establishment will be taxable.

<b>Luxembourg</b>		
ARTICLE		SPECIFIC COMMENTS
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Please see 4.5.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	The relief under Art. 4 of the Merger Directive has not been made subject to any conditions not set out in that Article. The Luxembourg Tax Law complies with Art. 4 of the Merger Directive.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Luxembourg law has not implemented any specific rules regarding provisions or reserves. The content of provisions and reserves is codified in the Luxembourg commercial code, which generally is also decisive for the tax treatment, as the tax balance sheet is based on the commercial balance sheet in Luxembourg. As a general rule, under Luxembourg law, tax deferrals obtained by the transferring company before the merger or the division are transferred to the receiving company if the latter registers the transferred assets / liabilities at book value. The tax guidelines and the parliamentary commentaries provide for examples of such capital gains subject to tax deferrals. The Luxembourg Law therefore should be in compliance with the Merger Directive.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	

<b>Luxembourg</b>		
ARTICLE		SPECIFIC COMMENTS
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	Avoidance of double taxation available under the implementation of the Parent-Subsidiary Directive.
9.2 - Transfer of assets - Further conditions for tax relief	●	

Luxembourg		
ARTICLE		SPECIFIC COMMENTS
9.3 - Transfer of assets - Tax deferral	●	
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	
10.4 - Permanent establishment in a third Member State - Tax deferral	●	
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	
10a.2 - Transparent entities - Tax base for notional tax credit	●	
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	



Luxembourg		
ARTICLE		SPECIFIC COMMENTS
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The term 'head office' (under Luxembourg law central administration) has replaced the term 'principal establishment' under Luxembourg law implementing the Merger Directive as well as under Luxembourg corporate law in order to comply with Article 7 of Regulations 2157/2001. As the parliamentary guidance refers expressively to the Merger Directive, when introducing the term "head office" to the Luxembourg law, and as no further definition has been given, it can be concluded that the Luxembourg implementation is in compliance with the Merger Directive.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Luxembourg law has not indicated what applies in respect of assets not connected to a Luxembourg permanent establishment. The law is therefore unclear as to whether assets/liabilities that do not remain connected with a permanent establishment would jeopardize the tax neutrality of the whole transfer, including that of the assets and liabilities connected to a permanent establishment, or whether this simply entails that a gain realized upon the transfer of these assets and liabilities that do not constitute a permanent establishment will be taxable.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	No account has been taken of the judgment in Case C-470/04 'N'.

Luxembourg		
ARTICLE		SPECIFIC COMMENTS
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	No specific rules apply to Ses and SCEs.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Luxembourg is compliant. However, a non resident shareholder of a Luxembourg SE/SCE which has held a participation of more than 10% for less than 6 months may become subject to tax but not based on the application of the Merger Directive.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	As the Luxembourg tax law does not foresee any specific anti-abuse rules, no further steps needed to be taken by the Luxembourg tax authorities to bring the Luxembourg provisions in line with the principles of the Cadbury judgment.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	

Luxembourg		
ARTICLE		SPECIFIC COMMENTS
11.6 - Anti-abuse provisions - Burden of proof	●	

Malta		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	Implementing legislation did not incorporate any definitions. Similar definitions to the above have been incorporated in Article 27A of the Income Tax Act dealing with the Minister's powers to enact subsidiary legislation.
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	Branch of activity is defined in Article 27A as 'branch of activity' shall mean all the assets and liabilities of a division of a company which from an organizational point of view constitute an independent business, that is to say an entity capable of functioning by its own means.'
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	

Malta		
ARTICLE		SPECIFIC COMMENTS
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The terms have not been interpreted as yet. The instruments of transposition did not incorporate ad hoc rules.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	There are no domestic ad hoc rules relating to the issue. Additional please note that if there will be a cross-border merger in respect of which the Merger Directive will apply one cannot really speak of a transfer of assets from one company to another because there will merely be a transfer of assets into the amalgamated entity. Consequently we would not expect immediate taxation and one cannot speak of an infringement but the matter should be clarified by the Maltese authorities.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Please see 4.5.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	

<b>Malta</b>		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	No definition in national legislation.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	

Malta		
ARTICLE		SPECIFIC COMMENTS
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	
10.4 - Permanent establishment in a third Member State - Tax deferral	●	
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	

<b>Malta</b>		
ARTICLE		SPECIFIC COMMENTS
10a.2 - Transparent entities - Tax base for notional tax credit	●	
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The term 'head office' has not been defined in our legislation.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Please see 4.5.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Please see 4.5.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	



Malta		
ARTICLE		SPECIFIC COMMENTS
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No specific steps have been taken/general anti-avoidance rules would apply.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	
11.6 - Anti-abuse provisions - Burden of proof	●	

The Netherlands		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	In the context of exchange of shares, the term 'securities' has been defined as shares ('aandelen') and profit-sharing rights ('winstbewijzen').
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	Successive exchanges that finally lead to the acquisition of majority holding seem not to be covered.
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	The Ministry of Finance is of the opinion that there has to be an enterprise; however, it can be argued that other kinds of (passive) investments may be included as well.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	

The Netherlands		
ARTICLE		SPECIFIC COMMENTS
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	No specific implementing legislation applies in this respect. The general Netherlands concept of 'aggregate profit' (' <i>totaalwinst</i> ') applies.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	In case the Netherlands would lose the right to tax the gain on the disposal of the transferred assets with the receiving corporate entity or such right would be limited, the respective transferred assets, including any intangible assets not acquired for a consideration or self-developed must be valued at fair market value in the closing balance sheet of the transferring company and will in principle be taxed.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Immediate taxation, without deferral; no account has been taken of the 'N'-case.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	

The Netherlands		
ARTICLE		SPECIFIC COMMENTS
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	No specific implementation legislation has been enacted in this respect. The general Netherlands rules apply.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	
6.4 - Carryover of losses - Further conditions for carry over of losses	●	Specific detailed rules apply in this respect.
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	Losses are not deductible, unless the participation exemption does not apply.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	

The Netherlands		
ARTICLE		SPECIFIC COMMENTS
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	Immediate taxation, without deferral; no account has been taken of the 'N '-case.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	
10.4 - Permanent establishment in a third Member State - Tax deferral	●	
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	
10a.2 - Transparent entities - Tax base for notional tax credit	●	

The Netherlands		
ARTICLE		SPECIFIC COMMENTS
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Immediate taxation to the extent no permanent establishment remains in the NL, without deferral; no account has been taken of the 'N'-case.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	This term has not been further defined or clarified.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	See 10b.1
10b.5 - Transfer of registered office - Assets - Tax deferral	●	See 10b.1
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	

The Netherlands		
ARTICLE		SPECIFIC COMMENTS
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Divergence between wording of Merger Directive and implementing legislation; questionable when, if at all, postponement of taxation can be considered abusive.
11.2 - Anti-abuse provisions - Abuse of rights	●	General abuse doctrine, provided it is applicable, may diverge with EU concept of abuse.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No concrete action has been undertaken.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	Divergence between wording of Merger Directive and implementing legislation; questionable when, if at all, postponement of taxation can be considered abusive.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Divergence between wording of Merger Directive and implementing legislation; may be incompatible.
11.6 - Anti-abuse provisions - Burden of proof	●	

Poland		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Certain provisions of the CITA implementing the Directive are applicable to all restructuring transactions (not only restructuring involving EU/EEA Member States).
1.2 - Scope - Foreign Member States and third State merger	●	Article 10 (5) No 2 and 3 CITA, Article 12 (4) No. 12 CITA, Article 12 (4d) CITA.
2.1 - Operations - The term 'securities'	●	The term 'securities' has been transcribed into the Polish law as 'shares or interest'. The term 'interest' in this context means interest in a company's capital.
2.2 - Operations - Cash payments	●	Article 492 §2, Article 529 §5 CCC, Article 12 (4d) CITA.
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	Article 12 (4d) CITA.
2.5 - Operations - Consolidation of qualifying holding	●	Article 12 (4d) CITA.
2.6 - Operations - The term 'branch of activity'	●	Polish regulations use the term 'organized part of an enterprise' (OPE). Potential difference in scope between the term 'branch' and OPE possible.
3.1 - Companies - Types of entities	●	The Annex to the CITA (implementing the Annex to the Directive) has not been updated. Consequently, certain types of companies mentioned in the Annex to the Directive are not indicated in the Annex to the CITA.
3.2 - Companies - Transparent entities	●	
3.3 - Companies - Qualification tax residency	●	



Poland		
ARTICLE		SPECIFIC COMMENTS
3.4 - Companies - Subject to tax clause	●	Article 10 (5) No 2 and 3 CITA, Article 12 (4) No. 12 CITA, Article 12 (4d) CITA.
3.5 - Companies - Shareholder requirements	●	Article 10 (5) No 2 and 3 CITA, Article 12 (4) No. 12 CITA, Article 12 (4d) CITA.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The CITA provides the term 'market value' which we believe corresponds to the term 'real value'. The CITA does not include a definition of the term 'value for tax purposes', however this term is generally used to describe the tax initial value of the assets less tax depreciation write-offs.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	The provisions of the CITA governing restructuring transactions do not refer to the terms 'effectively connected' and 'permanent establishment' (PE). For divisions and partial divisions the requirement of a PE seems to be included in the OPE requirement.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	The CITA does not refer to assets effectively connected to a PE. In case of divisions - as mentioned above - tax neutrality is subject to transferred and remaining assets constitute an OPE. If this condition is not met the divisions would not be tax neutral.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	Article 10 (2) No. 2 CITA.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	There have been no specific amendments to the CITA with respect to the findings in the 'N' case.

Poland		
ARTICLE		SPECIFIC COMMENTS
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	In case of Divisions and Partial divisions the OPE is required. The OPE - as stipulated in the CITA - could potentially have a different scope than the PE requirement as stipulated in the Directive.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Terms not defined in the CITA. Also, no provision implementing Article 5 of the Merger Directive.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	Please see 5.1.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	Please see 5.1.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	Please see 5.1.
6.1 - Carryover of losses - Concept of carry-over of losses	●	According to Article of the CITA, loss carryovers are not possible in case of mergers, <u>divisions and partial divisions</u> .
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	The CITA does not include any provisions regarding the allocation of profits to PE.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Article 7 (3) No. 4 CITA.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	Article 10 (2) No. 2 CITA.

Poland		
ARTICLE		SPECIFIC COMMENTS
7.2 - Cancellation of holding - Treatment of losses	●	Article 10 (2) No. 2 CITA mentions only the capital gains. No guidelines with regard to the treatment of losses issued.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	Article 10 (1) No. 6, Article 12 (4) No. 12, Article 15 (1k) No. 2, Article 15 (1m), Article 16g (9) and (19) CITA.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	No further conditions have been implemented.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	No further conditions have been implemented.
9.3 - Transfer of assets - Tax deferral	●	There have been no specific amendments to the CITA with respect to the findings in the 'N' case.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	In case of PE's located in a country with which Poland has signed a Double Tax Treaty providing the tax exemption method, utilization of loss is not possible.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Poland has not implemented Article 10 of the Merger Directive.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Poland has not implemented Article 10 of the Merger Directive. The CITA does not provide for a tax sparing credit.

Poland		
ARTICLE		SPECIFIC COMMENTS
10.4 - Permanent establishment in a third Member State - Tax deferral	●	There have been no specific amendments to the CITA with respect to the findings in the 'N' case.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	The CITA contains no provisions regarding restructuring transactions with transparent entities. However, the CCC allows for such transactions as long as the transparent entity is the transferred entity.
10a.2 - Transparent entities - Tax base for notional tax credit	●	Poland has not implemented Article 10a of the Merger Directive.
10a.3 - Transparent entities - Determination of notional tax credit	●	Poland has not implemented Article 10a of the Merger Directive.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Poland has not implemented Article 10a of the Merger Directive.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Poland has not implemented Article 10a of the Merger Directive.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Poland has not implemented Article 10b of the Merger Directive. However, the transfer of the registered seat of the SE/SCE would be subject to tax or exempt in Poland under the general rules i.e. only if - as a consequence of the transfer of the registered seat - the SE/SCE would be liquidated.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	Article 54 SE Act.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Article 54 SE Act and Article 3 (1) CITA.

Poland		
ARTICLE		SPECIFIC COMMENTS
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Poland has not implemented Article 10b of the Merger Directive.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	There have been no specific amendments to the CITA with respect to the findings in the 'N' case.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	Poland has not implemented Article 10c of the Merger Directive.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Poland has not implemented Article 10c of the Merger Directive.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Article 48-57SE Act provide a special procedure under which could lead to the liquidation of the SE. In such a case the liquidation profits would be subject to tax in Poland
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Poland has not implemented Article 10d of the Merger Directive.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Poland has encompassed Article 11 (1) (a) of the Merger Directive into Article 10(4) of the CITA. There is very little practice with respect to the interpretation/use of anti-abuse provisions.
11.2 - Anti-abuse provisions - Abuse of rights	●	N/A.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	N/A.

Poland		
ARTICLE		SPECIFIC COMMENTS
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	No specific anti-abuse provisions have been implemented.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	There is very little practice with respect to the interpretation/use of anti-abuse provisions.
11.6 - Anti-abuse provisions - Burden of proof	●	

Portugal		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Does not refer to the location of shareholders, except for exchanges of shares.
1.2 - Scope - Foreign Member States and third State merger	●	Not applicable to third countries, but only to Portuguese and EU Member States resident entities.
2.1 - Operations - The term 'securities'	●	No definition in tax law. Companies law applies.
2.2 - Operations - Cash payments	●	10% cap on cash payments implemented in the local tax law for each shareholder.
2.3 - Operations - Further types of merger	●	No other types of merger.
2.4 - Operations - Qualifying exchange of shares	●	Includes both situations - majority of voting rights and increase of majority.
2.5 - Operations - Consolidation of qualifying holding	●	No further conditions apply.
2.6 - Operations - The term 'branch of activity'	●	Tax administration has recognised that the transfer of shares together with other resources may be seen as a 'branch of activity'.
3.1 - Companies - Types of entities	●	Legal mergers between other entities subject to CIT is allowed under tax neutrality.
3.2 - Companies - Transparent entities	●	No consideration for tax transparent entities. As a rule, Portugal does not see foreign entities as tax transparent.
3.3 - Companies - Qualification tax residency	●	The criteria for tax residency are registered office or place of effective management, the latter being the tie-breaker under tax treaties.
3.4 - Companies - Subject to tax clause	●	Implemented.

Portugal		
ARTICLE		SPECIFIC COMMENTS
3.5 - Companies - Shareholder requirements	●	No requirements with respect to the tax residency of the shareholder, except for exchanges of shares.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	Real value should correspond to FMV. Value for tax purposes should correspond to book value adjusted for tax purposes. No specific definitions are stated in the tax law for such concepts.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	No, are applicable the same rules as for mergers.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	No definition. PE definition follows OECD Model tax convention.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	No limitation.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	No specific rules, hence may be taxed under domestic rules.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	No taxation.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Exit tax rules apply for shareholders (individuals and companies). Change of tax residency of individuals implies taxation of deferred capital gains under tax neutrality regime.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	N/A.



Portugal		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	Tax relief dependent of the verification of several conditions.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	No tax definition under tax neutrality regime. Portuguese POC and GAAP applies, being tax relevant if eligible under tax law.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	Certain provisions excluded in relation to PE's located abroad.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No allocation method in tax law. Allocation can be made considering the assets and liabilities being transferred.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	N/A.
6.1 - Carryover of losses - Concept of carry-over of losses	●	No definition of loss.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	Losses allocated to the PE are, as a rule, the ones brought forward by the transferring company.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	No transfer of tax losses in case of partial division. Under a division, tax losses are attributed proportionally to the net assets being transferred to each company.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	Transfer of tax losses dependent of tax administration decision, which will impose an annual cap based on increase of taxable profits and equity values.
7.1 - Cancellation of holding - Amended holding threshold	●	No threshold.
7.2 - Cancellation of holding - Treatment of losses	●	Losses will not be deductible.

Portugal		
ARTICLE		SPECIFIC COMMENTS
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	No rule. Avoidance of economic double taxation could be achieved in practise.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	No guidance.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	Yes, for exchanges of shares tax rollover for foreign shareholders is only available if the acquiring company is tax resident in Portugal.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	No avoidance. Shares received in the receiving company are deemed acquired by an amount equivalent to the net assets book value contributed.
9.2 - Transfer of assets - Further conditions for tax relief	●	The same applicable to merger. Please see 4.9.
9.3 - Transfer of assets - Tax deferral	●	See 4.7.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	No loss recapture.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	N/A.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	Taxation of unrealized gains and foreign tax credit. If the company has no tax basis to offset the foreign tax credit in the same fiscal year, no carry back or carry forward of foreign tax credit is allowed (until 2005, there was a 5-year carry forward system applicable to foreign tax credits)

Portugal		
ARTICLE		SPECIFIC COMMENTS
10.4 - Permanent establishment in a third Member State - Tax deferral	●	N/A.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	N/A.
10a.2 - Transparent entities - Tax base for notional tax credit	●	N/A.
10a.3 - Transparent entities - Determination of notional tax credit	●	N/A.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	N/A.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	N/A.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	No taxation unless there is also a transfer of effective place of management.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	No definition in tax law.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Equivalent to registered office, one of the criterion to determine tax residency.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Taxation of capital gains. Please see 4.5.

Portugal		
ARTICLE		SPECIFIC COMMENTS
10b.5 - Transfer of registered office - Assets - Tax deferral	●	N/A.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	No definition. Losses can be transferred if authorised by the Ministry of Finance.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	No loss recapture.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Taxation for shareholders upon transfer of registered office and place of effective management abroad, regardless of keeping a PE.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	No difference. However, domestic tax exemption may apply for residents.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	General anti-abuse clause also exists, but it is difficult to apply.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No implications so far.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	N/A.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Tax administration is challenging 'valid commercial reasons' whenever transferring companies had negative equity.
11.6 - Anti-abuse provisions - Burden of proof	●	Burden of proof with the taxpayer.

Romania		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	The lack of clarifications or guidance would trigger the conclusion that the Directive applies only to the 'merging' entities.
2.1 - Operations - The term 'securities'	●	The term was translated in Romanian as 'participation titles', which are defined as shares in any Romanian legal entity, or in any other legal entity or open investment fund.
2.2 - Operations - Cash payments	●	No clarification or guidance is provided, as to whether the 10% cash payment applies on a per shareholder basis or on an overall basis.
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	There is an wording difference between the Romanian legislation and the Directive, which can lead to the conclusion that exchange of shares that further consolidate the majority of voting rights are not covered by the Romanian legislation. In addition, the Romanian legislation comprises also exchange of shares which lead to gaining majority of shares (i.e. not only voting rights) within the scope of the implemented Directive. Furthermore, there is not clear whether successive exchange of shares that build up a majority in the target qualifies for the provisions of the implemented Directive.
2.5 - Operations - Consolidation of qualifying holding	●	Such exchange of shares is not specifically included in the scope
2.6 - Operations - The term 'branch of activity'	●	No clarification or guidance is available.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	There are no transparent entities in the Romanian legislation.

Romania		
ARTICLE		SPECIFIC COMMENTS
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	Clarification and/or guidance would be needed.
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	'Real value' was translated in the law as market value. 'Value for tax purpose' was not defined for the purpose of the Directive.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	Clarification and/or guidance would be needed.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	Clarification and/or guidance would be needed.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	There is no guidance in this respect. Given the lack of clarifications and/or additional legislation in this respect, the logical interpretation would be that transfer of assets not connected to a permanent establishment should be taxable. However, there is no provision on how the taxation should take place, as for instance regarding the taxable base or the taxable moment.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	Clarification and/or guidance would be needed.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No account has been taken of the ECJ case law as regards tax deferral.

Romania		
ARTICLE		SPECIFIC COMMENTS
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	Article 4 (2) of the Merger Directive has not been taken over in the Romanian legislation.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	Provisions and reserves are generally defined by accounting legislation.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	No clarification or guidance is available.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No clarification or guidance is available.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	There is specific accounting legislation on business reorganisations, however it is not clear and subject tot different possible interpretations. Clarification and/or guidance is needed both from accounting and tax perspective.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	

Romania		
ARTICLE		SPECIFIC COMMENTS
7.2 - Cancellation of holding - Treatment of losses	●	
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Article 8(9) of the Merger Directive has not been taken over by the Romanian legislation. Hence, the tax treatment in the concerned situation is not clear.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	No account has been taken of the ECJ case law as regards tax deferral.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	Article 10 was not taken over by the Romanian legislation. The Romanian legislation allows the offset of losses of a permanent establishment of a Romanian company only against revenues of the same permanent establishment over the next 5 years.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	Article 10 has not been taken over by the Romanian legislation.



Romania		
ARTICLE		SPECIFIC COMMENTS
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	The Romanian legislation taxes revenues of a permanent establishment of a Romanian company, with a tax credit granted for the tax paid by the permanent establishment, up to the tax payable on the same profits in Romania.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	Article 10 has not been taken over by the Romanian legislation.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Article 10a has not been taken over by the Romanian legislation. Please see 3.2.
10a.2 - Transparent entities - Tax base for notional tax credit	●	Article 10a has not been taken over by the Romanian legislation.
10a.3 - Transparent entities - Determination of notional tax credit	●	Article 10a has not been taken over by the Romanian legislation.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Article 10a has not been taken over by the Romanian legislation.
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Article 10a has not been taken over by the Romanian legislation.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Article 10a has not been taken over by the Romanian legislation.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	Article 10a has not been taken over by the Romanian legislation.

Romania		
ARTICLE		SPECIFIC COMMENTS
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	Article 10b has not been taken over by the Romanian legislation.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	Article 10b has not been taken over by the Romanian legislation. Additional please see 4.5.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	Article 10b has not been taken over by the Romanian legislation.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	Article 10c has not been taken over by the Romanian legislation. Taxation of transfers of registered offices of SEs and/or SCEs is not clear.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Article 10c has not been taken over by the Romanian legislation.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Article 10d has not been taken over by the Romanian legislation. Under the domestic legislation, shareholders of an SE or SCE should not be subject to tax when the company transfers its registered office. Only sale of shares in such company should trigger taxation.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	Article 10d has not been taken over by the Romanian legislation.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	Clarification and/or guidance would be needed.
11.2 - Anti-abuse provisions - Abuse of rights	●	

Romania		
ARTICLE		SPECIFIC COMMENTS
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Clarification and/or guidance would be needed.
11.6 - Anti-abuse provisions - Burden of proof	●	

Slovakia		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	Merged companies are in Slovak law companies 'dissolved without liquidation'.
1.2 - Scope - Foreign Member States and third State merger	●	Only entities that keep books in line with Slovak law are entitled for benefits under merger directive, as the tax neutrality is generally achieved through accounting treatment.
2.1 - Operations - The term 'securities'	●	No specific implementation of the term 'securities'.
2.2 - Operations - Cash payments	●	No cap on payments in the tax laws.
2.3 - Operations - Further types of merger	●	In Slovakia, no other types of merger are possible. Not all types envisaged in the Merged Directive are implemented in the Slovak law.
2.4 - Operations - Qualifying exchange of shares	●	No implemented in the Slovak law. No specific caps.
2.5 - Operations - Consolidation of qualifying holding	●	No implementation.
2.6 - Operations - The term 'branch of activity'	●	Generally implemented properly.
3.1 - Companies - Types of entities	●	The implementation is the same for all entities that keep double entry books (i.e. all commercial companies).
3.2 - Companies - Transparent entities	●	Two types of partnerships are covered, only one of them is in the Annex to the Merger Directive.
3.3 - Companies - Qualification tax residency	●	Seat and place of effective management.
3.4 - Companies - Subject to tax clause	●	General income tax. No restriction implemented.

Slovakia		
ARTICLE		SPECIFIC COMMENTS
3.5 - Companies - Shareholder requirements	●	No restrictions implemented.
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The concept of 'value for tax purposes' implemented only for specific types of assets (assets of economic life longer than 1 year and value more than SKK 30,000). Thus, the tax neutrality of the merger would not achieved in respect of the assets that do not meet this definition (e.g. stock) where the merger could result in tax effective step-up, step-down in value.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	No specific guidance. Accounting rules are followed.
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	No implementation.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	No limitation.
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	No implementation. Based on the ITA, the concept of separate entity approach incorporated in Slovak tax laws may should be used.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	No immediate taxation.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No exit taxation specifically in the ITA.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	No guidance on foreign transparent entities, current approach of tax authorities unclear.

Slovakia		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	No conditions.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	In Slovak law, the term 'provision' provides for a temporary impairment of the value of an asset. According to AP, provisions shall be created when it is reasonable to assume that the value of assets will decrease in comparison with the value showed in the accounting books.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	No specific implementation.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No specific implementation.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	Tax treatment follows accounting treatment only. Hence, the value for tax purposes principle is not followed, and the exemption of provisions/reserves may not be transferred in certain cases.
6.1 - Carryover of losses - Concept of carry-over of losses	●	No specific implementation of Merger Directive.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	No specific implementation.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Based on the part of equity transferred from the dissolved entity. No transfer of losses in case of transfer of assets.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	No other significant conditions.
7.1 - Cancellation of holding - Amended holding threshold	●	No implementation. This type of mergers possible under the Slovak law without immediate taxation.

Slovakia		
ARTICLE		SPECIFIC COMMENTS
7.2 - Cancellation of holding - Treatment of losses	●	Same as above.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	Implemented for types of mergers recognized by the Slovak laws.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Unclear for types of merger not recognized by the Slovak laws.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	General anti-avoidance provisions only.
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	No such implementation. The taxation is only deferred until the realization of received shares.
9.2 - Transfer of assets - Further conditions for tax relief	●	No implementation.
9.3 - Transfer of assets - Tax deferral	●	No implementation.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	No specific implementation.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	No specific implementation. Legal successor, in general terms, may utilize losses incurred by its predecessor (ITA does not stipulate if PE or not).
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	No such system.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	Not reflected in the legislation.

Slovakia		
ARTICLE		SPECIFIC COMMENTS
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Unclear taxation of foreign transparent entities.
10a.2 - Transparent entities - Tax base for notional tax credit	●	Unclear taxation of foreign transparent entities.
10a.3 - Transparent entities - Determination of notional tax credit	●	Unclear taxation of foreign transparent entities.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Unclear taxation of foreign transparent entities.
10a.5 - Transparent entities - Comparison with a resident fiscally transparent company	●	Unclear taxation of foreign transparent entities.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	The ITA does not specify any special tax obligation for an entity changing its tax residency.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	No specific implementation.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	No specific implementation.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	No specific guidelines in this respect. No exit taxes implemented in the ITA, but separate entity principle of taxation of permanent establishments.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	'N' case was not implemented. No exit taxation.



Slovakia		
ARTICLE		SPECIFIC COMMENTS
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	Full carry forward of losses secured. However, as there are no guidance and no practical experience available and the rule is very general, it is not certain that there will be no obstacles for utilization in practice.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	Slovak companies are not allowed to utilize tax losses generated by their PEs located abroad if the tax losses can be utilized under the legislation of the state where the PE is located. Grammatically, if the law of the host state allows the utilization of losses, they cannot be utilized in Slovakia regardless whether they were actually utilized or not.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	No deemed liquidation.
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	No specific implementation.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	No specific implementation.
11.2 - Anti-abuse provisions - Abuse of rights	●	General definition in Civil Code only.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No impact yet.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	Only very limited for carry forward of losses and in kind the accrual accounts are not took over by the legal successor.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	Not implemented in the Slovak legislation.

Slovakia		
ARTICLE		SPECIFIC COMMENTS
11.6 - Anti-abuse provisions - Burden of proof	●	On taxpayer.

Slovenia		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	The tax law does not define the term 'securities'. Nor has it been defined in other Tax Authority guidance. For general purposes, the term 'securities' is defined in the Financial Instruments Market Act.
2.2 - Operations - Cash payments	●	
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	There is a limitation of 6 months for the consolidation of a majority of shares in the acquired company.
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	Similarly to the definition encompassed in the Merger Directive, the Slovene Corporate Income Act defines a 'branch of activity' as a certain part of an entity, including all assets and liabilities, which is, from a business organizational perspective, competent of constituting an independent business and a subject capable of conducting business with its own means. No administrative guidance has been issued in this regard.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	Slovenian tax legislation does not recognise the transparent entity concept.
3.3 - Companies - Qualification tax residency	●	

Slovenia		
ARTICLE		SPECIFIC COMMENTS
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	Slovene regulations define 'real values' (directly translated as the 'fair value') as the value at which a transferred value good/stock may be sold or otherwise exchanged for an equity instrument or other asset, or at which it may settle an obligation, between two parties that are well informed, willing, mutually independent and equal.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	The term 'effectively connected' was translated as 'belonging to' and it is not clear whether the latter is not stricter than the term used in the Directive. The term 'permanent establishment' was translated in line with the OECD Model Convention definition.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	It is not completely clear from the law and tax practice what the tax treatment of those assets and liabilities that are not effectively connected with a permanent establishment, would be.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	

Slovenia		
ARTICLE		SPECIFIC COMMENTS
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	The ECJ case law was not directly implemented into the national legislation but should still be regarded as applicable for interpretation purposes.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	All legal entities established under Slovene law are non-transparent for tax purposes and Slovene tax law is not familiar with the transparent entity concept.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	A general definition of reserves is provided in the Companies Act, which divides reserves into capital reserves, reserves from profits and statutory reserves. These are further regulated by Slovenian and international accounting standards. The tax definition of reserves follows the accounting definition.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	No explicit guidance has been issued on this topic yet.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No explicit guidance has been issued on this topic yet.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	No specific legislation regarding these tax matters.

Slovenia		
ARTICLE		SPECIFIC COMMENTS
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	No specific legislation regarding these tax matters.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	A notification of the transaction must be submitted to the tax authorities in order for the carry-over of losses to be possible. Additional, as a general rule, the carry over of losses is not possible in specific events.
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	Losses are not specifically regulated.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	
9.3 - Transfer of assets - Tax deferral	●	The ECJ case law was not directly implemented into the national legislation but should still be regarded as applicable for interpretation purposes.

Slovenia		
ARTICLE		SPECIFIC COMMENTS
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	
10.4 - Permanent establishment in a third Member State - Tax deferral	●	The ECJ case law was not directly implemented into the national legislation but should still be regarded as applicable for interpretation purposes.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Slovenian tax legislation does not recognise the transparent entity concept and it is thus unclear how the tax authorities would treat any of the foreign transparent entities.
10a.2 - Transparent entities - Tax base for notional tax credit	●	
10a.3 - Transparent entities - Determination of notional tax credit	●	
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	

Slovenia		
ARTICLE		SPECIFIC COMMENTS
10b.1 - Transfer of registered office - Assets - Exit taxation	●	
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	The EC Regulation 2157/2001 was implemented in the Companies Act. The term 'head office' was translated as place of effective management.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	See. 4.5.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	The ECJ case law was not directly implemented into the national legislation but should still be regarded as applicable for interpretation purposes.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The term 'comparable circumstances' has not been implemented.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	



Slovenia		
ARTICLE		SPECIFIC COMMENTS
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	
11.6 - Anti-abuse provisions - Burden of proof	●	

Spain		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	There is no definition of 'companies involved'. There is a general exclusion from the regime of "tax haven" (blacklisted) entities that includes Malta, Cyprus, The Netherlands Antilles and certain Luxembourg entities.
1.2 - Scope - Foreign Member States and third State merger	●	Under Article 84.1 b CITA, the option not to tax also applies to transfers among Spanish companies of permanent establishments located in non EU States to other Spanish entities. We consider that this provision would not be in direct conflict with Directive 90/434/EEC, but rather may be contrary to the EC Treaty (restriction of both the free movement of capital and the freedom of establishment), insofar as the option not to tax (deferral) is afforded only to transfers taking place between Spanish entities.
2.1 - Operations - The term 'securities'	●	There is not a tax definition of 'securities'.
2.2 - Operations - Cash payments	●	A 10% cash payment is allowed. The Law does not clarify whether the limit applies on a per shareholder basis or overall basis.
2.3 - Operations - Further types of merger	●	The national implementation covers the three types of mergers included in the Merger Directive and does not include further types. A recent ruling allows the application of the Merger Directive to mergers that comply with the mercantile definition but not with the tax definition.
2.4 - Operations - Qualifying exchange of shares	●	Relief is granted to successive exchange of shares that contribute to the build-up of a stake in the target.
2.5 - Operations - Consolidation of qualifying holding	●	Relief is granted to successive exchange of shares that contribute to the build-up of a stake in the target.

Spain		
ARTICLE		SPECIFIC COMMENTS
2.6 - Operations - The term 'branch of activity'	●	The definition is compliant although the tax authorities require that the branch of activity exists in the transferring company.
3.1 - Companies - Types of entities	●	Spanish legislation extends the application of the Merger Directive to more types of entities than those listed in the Annex.
3.2 - Companies - Transparent entities	●	Entities listed in the Annex are not regarded as transparent.
3.3 - Companies - Qualification tax residency	●	The criteria for tax residency are place of management, incorporation in accordance with the Spanish legislation and statutory seat.
3.4 - Companies - Subject to tax clause	●	The restriction has been implemented.
3.5 - Companies - Shareholder requirements	●	There are limitations where the shareholders are resident in tax havens (even if they may qualify as EU residents).
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	There is no specific definition of fair market value in the implementation of the Merger Directive. Spanish tax legislation relies on the OECD definition.
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	Same problem than above as regards the definition of fair market value (please see 4.1).
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	The national legislation implementing the Merger Directive does not mention the requirement that the assets and liabilities effectively connected with a permanent establishment play a part in generating the profits or losses taken into account for tax purposes.
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	There is no attempt to claw back relief claimed in respect of prior periods.

Spain		
ARTICLE		SPECIFIC COMMENTS
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	Where the acquiring entity is not a Spanish tax resident and the transferred assets and liabilities are not effectively connected with a permanent establishment in Spain after the transaction, the transferring entity is taxable on the gain (or loss) deriving from these assets and liabilities under the normal rules governing transfers.
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	The merger is tax exempt even in this case.
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	Spain imposes exit tax upon migration of companies or individuals from Spain and has not amended the legislation as a result of case Law.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	The Spanish tax legislation lists entities that are treated as tax transparent.
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	No.
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	No tax definition. They are defined in the accounting legislation.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	No specific regulation in the Spanish legislation.
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	No specific regulation in the Spanish legislation. Generally tax will follow the method applied for accounting purposes.
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	No specific rules.

Spain		
ARTICLE		SPECIFIC COMMENTS
6.1 - Carryover of losses - Concept of carry-over of losses	●	No specific regulation. The implementation relies on the general definition of tax loss.
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	No specific regulation. Guidance has been provided in rulings.
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	Losses can only be transferred when the transferring company ceases to exist (total divisions and mergers). No specific guidance as to how losses must be allocated.
6.4 - Carryover of losses - Further conditions for carry over of losses	●	Restrictions have been implemented the aim of which is to avoid double relief for tax losses in cases where the entities involved in the transaction belong to the same group of companies.
7.1 - Cancellation of holding - Amended holding threshold	●	The Spanish legislation requires a 5% shareholding.
7.2 - Cancellation of holding - Treatment of losses	●	The Spanish legislation also covers losses.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	The Spanish legislation provides for a method to avoid economic double taxation for the exchange of shares and for the transfers of assets in exchange for shares not for mergers or divisions. The Merger Directive does not principally prohibit economic double taxation.
8.2 - Tax relief for shareholders - Computation of the capital gains	●	Cash receipts/payments reduce/increase the value for tax purposes of the securities received.
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	No
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	The Spanish legislation establishes a mechanism to avoid the economic double taxation in case of exchange of shares and transfer of assets in exchange for shares.

Spain		
ARTICLE		SPECIFIC COMMENTS
9.2 - Transfer of assets - Further conditions for tax relief	●	No.
9.3 - Transfer of assets - Tax deferral	●	No changes introduced.
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	The Spanish loss recapture rule for permanent establishments is compliant with the Merger Directive.
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	No special reference to this situation in the Spanish legislation.
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	The Spanish legislation is fully compliant with the Mergers Directive.
10.4 - Permanent establishment in a third Member State - Tax deferral	●	No changes introduced.
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	Spain has opted not to transpose Article 10a of the Merger Directive.
10a.2 - Transparent entities - Tax base for notional tax credit	●	N/A.
10a.3 - Transparent entities - Determination of notional tax credit	●	N/A.
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	Spain has opted to implement Article 10a(3) as the option tax cannot be exercised where the receiving or acquiring company is fiscally transparent.

Spain		
ARTICLE		SPECIFIC COMMENTS
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	N/A.
10b.1 - Transfer of registered office - Assets - Exit taxation	●	The exit tax applies when a Spanish company transfers its tax residence to another State. Exit taxation only arises in respect of elements that do not remain connected to a permanent establishment in Spain.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	There is no legal definition.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	There is no definition of head office.
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	The option not to tax cannot be effected if assets and liabilities are not connected with a permanent establishment in Spain and taxation occurs as if a deemed disposal had taken place.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	None.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	The term is not defined. Guidance is provided by rulings as to how to allocate losses to permanent establishments in other tax free transactions that should apply to these cases.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	See 10.3.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	Taxation only if the assets do not remain connected to a permanent establishment in Spain. No taxation of shareholders in this case.

Spain		
ARTICLE		SPECIFIC COMMENTS
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	See 10d1 above.
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	The ant abuse provision has been transposed.
11.2 - Anti-abuse provisions - Abuse of rights	●	See 11.1 above.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	Although the wording of the law is compliant, the tax authorities are taking the view that the mere existence of a tax advantage determines the inapplication of the tax free regime.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	No.
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	The national legislation is compliant with the Merger Directive. However the tax authorities' interpretation of the Directive and the ECJ case law is very restrictive.
11.6 - Anti-abuse provisions - Burden of proof	●	Burden of proof is with the tax payer.



Sweden		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Involved Companies	●	
1.2 - Scope - Foreign Member States and third State merger	●	
2.1 - Operations - The term 'securities'	●	According to Swedish law, the term is defined as 'shares'.
2.2 - Operations - Cash payments	●	No limitation of the cash amount.
2.3 - Operations - Further types of merger	●	
2.4 - Operations - Qualifying exchange of shares	●	
2.5 - Operations - Consolidation of qualifying holding	●	
2.6 - Operations - The term 'branch of activity'	●	The definition differs from the Directive in some cases.
3.1 - Companies - Types of entities	●	
3.2 - Companies - Transparent entities	●	The Finance department concluded that no investigation as regards the question should be done.
3.3 - Companies - Qualification tax residency	●	
3.4 - Companies - Subject to tax clause	●	
3.5 - Companies - Shareholder requirements	●	
4.1 - Carry over of Balance Sheet Values - Concepts of 'real values' and 'values for tax purposes'	●	The term real value has not directly been defined. Under Swedish GAAP real value is equal to 'fair market value'. The term is not used in the legislation enacting the Directive.

Sweden		
ARTICLE		SPECIFIC COMMENTS
4.2 - Carry over of Balance Sheet Values - Specific guidance for divisions/partial divisions	●	
4.3 - Carry over of Balance Sheet Values - Concepts of 'effectively connected' and 'permanent establishment'	●	
4.4 - Carry over of Balance Sheet Values - Limitation of the scope of relief	●	
4.5 - Carry over of Balance Sheet Values - Assets and liabilities not effectively connected with a permanent establishment	●	An exit taxation could be triggered (see 10b.4).
4.6 - Carry over of Balance Sheet Values - Tax treatment of the receiving company	●	
4.7 - Carry over of Balance Sheet Values - Tax Deferral	●	No specific amendments due to the ECJ case.
4.8 - Carry over of Balance Sheet Values - Criteria to determine tax transparent entities	●	
4.9 - Carry over of Balance Sheet Values - Further conditions for tax relief	●	
5.1 - Carry over of Provisions and Reserves - The term 'provisions and reserves'	●	There is no specific definition of the term 'provisions and reserves' in the Swedish tax legislation.
5.2 - Carry over of Provisions and Reserves - Exclusion of provisions and permanent establishments	●	
5.3 - Carry over of Provisions and Reserves - Allocation method for provisions and reserves	●	

Sweden		
ARTICLE		SPECIFIC COMMENTS
5.4 - Carry over of Provisions and Reserves - Further conditions of losses	●	
6.1 - Carryover of losses - Concept of carry-over of losses	●	
6.2 - Carryover of losses - Allocations of losses to the permanent establishment	●	
6.3 - Carryover of losses - Specific legislation for divisions/partial divisions/transfers of assets	●	
6.4 - Carryover of losses - Further conditions for carry over of losses	●	
7.1 - Cancellation of holding - Amended holding threshold	●	
7.2 - Cancellation of holding - Treatment of losses	●	Requirement of tax liability in Sweden.
8.1 - Tax relief for shareholders - Avoidance of economic double taxation	●	
8.2 - Tax relief for shareholders - Computation of the capital gains	●	
8.3 - Tax relief for shareholders - Further conditions for tax relief	●	If the seller is an individual he or she should be tax resident in Sweden.

Sweden		
ARTICLE		SPECIFIC COMMENTS
9.1 - Transfer of assets - Avoidance of economic double taxation at the level of the transferring company	●	
9.2 - Transfer of assets - Further conditions for tax relief	●	Requirement of a 51% holding at the end of the transaction year.
9.3 - Transfer of assets - Tax deferral	●	
10.1 - Permanent establishment in a third Member State - Loss recapture for permanent establishments in third Member States	●	
10.2 - Permanent establishment in a third Member State - Permanent establishment in the Member State of the receiving company	●	
10.3 - Permanent establishment in a third Member State - Concept of worldwide taxation/credits system	●	
10.4 - Permanent establishment in a third Member State - Tax deferral	●	
10a.1 - Transparent entities - Option right for the application of the MD to deemed fiscally transparent transferring or acquired companies	●	The Swedish Tax Law could have the effect of excluding some entities listed in the Annex to the Directive from its benefits.
10a.2 - Transparent entities - Tax base for notional tax credit	●	
10a.3 - Transparent entities - Determination of notional tax credit	●	

Sweden		
ARTICLE		SPECIFIC COMMENTS
10a.4 - Transparent entities - Option right for the application to deemed fiscally transparent acquiring/receiving companies and their shareholders	●	
10a5 - Transparent entities - Comparison with a resident fiscally transparent company	●	
10b.1 - Transfer of registered office - Assets - Exit taxation	●	Exit taxation should be triggered if the assets are not connected with a PE in Sweden.
10b.2 - Transfer of registered office - Assets - The term 'head office'	●	Has not been defined in the Swedish legislation.
10b.3 - Transfer of registered office - Assets - Head office and tax residency	●	
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected with a permanent establishment	●	An exit taxation could be triggered.
10b.5 - Transfer of registered office - Assets - Tax deferral	●	No amendments have been made due to the ECJ case.
10c.1 - Transfer of registered office - Provisions/reserves/losses - The term 'comparable circumstances'	●	
10c.2 - Transfer of registered office - Provisions/reserves/losses - Loss recapture for permanent establishments	●	
10d.1 - Transfer of registered office - Shareholders - Deemed liquidation	●	

Sweden		
ARTICLE		SPECIFIC COMMENTS
10d.2 - Transfer of registered office - Shareholders - Tax treatment of third country residents	●	
11.1 - Anti-abuse provisions - Transposition of anti abuse provisions	●	
11.2 - Anti-abuse provisions - Abuse of rights	●	
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	No amendments have been made due to the ECJ case.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	
11.5 - Anti-abuse provisions - The concept of 'valid commercial reasons'	●	
11.6 - Anti-abuse provisions - Burden of proof	●	

United Kingdom		
ARTICLE		SPECIFIC COMMENTS
1.1 - Scope - Companies Involved	●	Although inconsistent, enacting legislation appears to cover all companies in Annex.
1.2 - Scope - Companies involved - parent companies	●	Companies involved' has been interpreted as not including parent companies.
1.3 - Scope - Companies involved - mergers in other member states	●	Relief not given to UK shareholders where merger takes place entirely outside of UK.
2.1 - Operations - Definition of securities	●	Transcription of 'securities' into UK enabling legislation goes beyond Directive.
2.2 - Operations - Cash payments	●	Legislation defines certain operations qualifying for relief as taking place exclusively for securities. The implication is that any cash consideration would prevent these transactions from qualifying for relief.
2.3 - Operations - Other types of merger	●	All mergers described in the Directive are covered.
2.4 - Operations - Build up of shareholdings	●	Consolidation of existing holdings qualify provided that after the transaction the receiving company owns more than 25% of the transferring company's ordinary share capital.
2.5 - Operations - Consolidation of existing holdings	●	Relief given provided transaction carried out for bone fide commercial purposes.
2.6 - Operations - Branch of Activity	●	Branch of Activity' has been transcribed into UK Law as 'business'.
3.1 - Companies - Companies to which the Directive applies	●	See 1.1.
3.2 - Companies - Transparent entities	●	Definition of 'transparent' is inconsistent within the legislation but appears compliant with the Directive.
3.3 - Companies - Residence	●	Follows OECD guidelines.
3.4 - Companies - Subject to tax	●	UK rules no more restrictive than those stated in the Directive.

United Kingdom		
ARTICLE		SPECIFIC COMMENTS
3.5 - Companies - Residence of shareholders	●	No restrictions apply.
4.1 - Carry over of Balance Sheet Values - Real values/values for tax	●	In the case of assets qualifying for capital allowances, the transfer of assets is not always either clearly tax neutral or, in the case where a derogation applies, in line with that derogation.
4.2 - Carry over of Balance Sheet Values - divisions/partial divisions	●	See 4.1.
4.3 - Carry over of Balance Sheet Values - effectively connected / PE	●	Concept of 'effectively connected' not defined and little guidance is available. However, there is no reason to suspect that HMRC will be overly restrictive in determining which assets to apply relief to.
4.4 - Carry over of Balance Sheet Values - Limitation of relief	●	No limitations to relief are set out except where derogations are permitted in the Merger Directive.
4.5 - Carry over of Balance Sheet Values - assets not effectively connected	●	See 4.3.
4.6 - Carry over of Balance Sheet Values - ECJ Law	●	Exit taxes still exist in the UK although it has yet to be tested in ECJ courts whether they represent a proportional or reasonable restriction of the Treaty freedoms.
4.7 - Carry over of Balance Sheet Values - Deferral	●	Not considered in the UK.
4.8 - Carry over of Balance Sheet Values - transparent entities	●	See 3.2.



United Kingdom		
ARTICLE		SPECIFIC COMMENTS
4.9 - Carry over of Balance Sheet Values - Conditions governing relief	●	Relief is denied if not carried out for bone fide commercial purposes. Whilst compliant with the Directive, it is not clear if this goes beyond the doctrine of 'wholly artificial' as described in Cadbury Schweppes. Furthermore, relief in respect of Intangible assets is subject to the HMRC clearance which may be overly restrictive in the context of applying the Merger Directive.
5.1 - Carry over of Provisions and Reserves - definitions	●	No definition of 'provisions and reserves' in UK Law, although such transfers do not generally occur within the UK.
5.2 - Carry over of Provisions and Reserves - allocation	●	See 5.1.
5.3 - Carry over of Provisions and Reserves - allocations to divisions/partial divisions	●	See 5.1.
5.1 - Carry over of Provisions and Reserves - Conditions for relief	●	See 5.1.
6.1 - Carry over of losses - Definitions	●	Treatment in the case of a cross border division, partial division or merger is the same as the treatment in a wholly domestic situation.
6.2 - Carry over of losses - Allocations to PEs	●	See 6.1, although it is not always possible to ascertain which losses relate to the part of the company left behind on a partial division. In the event that a direct attribution is not possible, losses should be allocated on a just and reasonable basis.
6.3 - Carry over of losses - Guidance re divisions/partial divisions/ transfers of assets	●	See 6.1.
6.4 - Carry over of losses - Conditions for relief	●	See 6.1.

United Kingdom		
ARTICLE		SPECIFIC COMMENTS
7.1 - Cancellation of holding - Thresholds	●	No restrictions on holding levels.
7.2 - Cancellation of holding - Losses on cancellations	●	Gains and losses on cancellation are deferred until the shares replacing the original shareholding are sold.
8.1 - Tax relief for shareholders - Avoidance of double taxation	●	Economic double taxation not avoided in all circumstances. For example, in the case of a transfer of assets, there will be a gain on the disposal of the assets in the receiving company and also a gain on the disposal of the shares in the transferring company.
8.2 - Tax relief for shareholders - Cash receipts	●	Cash receipts are, by HMRC practice, treated and taxed as separate disposals and taxed under normal rules.
8.3 - Tax relief for shareholders - Conditions for relief	●	See 4.9.
9.1 - Transfer of assets - Avoidance of Double taxation	●	See 8.1.
9.2 - Transfer of assets - Conditions governing relief	●	See 4.9.
9.3 - Transfer of assets - Tax deferral	●	Not applicable to a UK situation.
10.1 - Permanent establishment in a third Member State - Loss recapture	●	The UK applies the derogation allowed in Article 10(2) of the Merger Directive.
10.2 - Permanent establishment in a third Member State - Loss recapture PE and receiving company in same Member State	●	See 10.1.

United Kingdom		
ARTICLE		SPECIFIC COMMENTS
10.3 - Permanent establishment in a third Member State - Worldwide taxation / credits system	●	UK Legislation follows the wording in the Directive closely. However see comments at 4.1 (capital allowances) for potential infringement. In addition, there are significant practical difficulties associated with the operation of this Article which may result in businesses not carrying out transactions covered by the Directive.
10.4 - Permanent establishment in a third Member State - EU Case law	●	See 4.6 and 4.9.
10a.1 - Transparent entities - Option to derogate from Directive	●	The derogation permitted in Article 10a of the Merger Directive appears to have been correctly transcribed into UK legislation.
10a.2 - Transparent entities - Tax base for notional tax credit	●	See 10a.1.
10a.3 - Transparent entities - Calculation of notional tax credit	●	See 10a.1.
10a.4 - Transparent entities - Application to shareholders	●	See 10a.1.
10a.5 - Transparent entities - Comparison with resident transparent companies	●	This element of the Article does not appear to have been transcribed into UK law.
10b.1 - Transfer of registered office - Assets- Exit taxes	●	Whilst the Directive has been followed in respect of exit taxes arising on the transfer of a registered office of an SE, it is not clear whether, absent the directive, this would be compliant.
10b.2 - Transfer of registered office - Assets - Definitions	●	No equivalent term to 'Head Office' has been used in UK legislation.
10b.3 - Transfer of registered office - Assets - Residency	●	Residency tests for an SE are consistent with the rest of UK law and double tax treaties.

United Kingdom		
ARTICLE		SPECIFIC COMMENTS
10b.4 - Transfer of registered office - Assets - Assets and liabilities not effectively connected	●	See 4.3.
10b.5 - Transfer of registered office - Assets - ECJ Case Law	●	See 4.6 and 4.9.
10c.1 - Transfer of registered office - Provisions/reserves/losses - Comparable circumstances	●	Permanent establishments can use their own losses in the same way as if they were a separate legal entity.
10c.2 - Transfer of registered office - Provisions/reserves/losses - Non-resident Pes	●	See 10c.1.
10d.1 - Transfer of registered office - Shareholders - Deemed liquidations on transfer	●	No deemed liquidation triggered.
10d.2 - Transfer of registered office - Shareholders - Treatment of residents in third countries	●	See 10d.1.
11.1 - Anti-abuse provisions - Interpretation of Tax avoidance and evasion	●	Generally tax avoidance is blocked if the transaction generating the tax advantage is not carried out for bone fide commercial purposes. Whether or not this exceeds the remit of 'wholly artificial' as described in Cadbury Schweppes has yet to be tested. Evasion implies fraud and is not permitted under any circumstances.
11.2 - Anti-abuse provisions - Abuse of rights	●	No such concept exists under UK law.
11.3 - Anti-abuse provisions - Impact of ECJ case law	●	UK legislation implementing the Merger Directive has not been updated in the light of 'Cadbury'.
11.4 - Anti-abuse provisions - Specific anti abuse provisions	●	No other restrictions imposed.

United Kingdom		
ARTICLE		SPECIFIC COMMENTS
11.5 - Anti-abuse provisions - Interpretation of 'valid commercial reasons', 'restructuring' and 'rationalisation'	●	See 4.9.
11.6 - Anti-abuse provisions - Establishment of proof	●	Initial burden of proof falls upon taxpayer.

