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MECHANISM OF TAXATION OF REORGANIZATIONS AND TRANSFERS ESTABLISHED IN THE COUNCIL DIRECTIVE 2009/133/EC

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ABSTRACT

In terms of reorganizations and transfers, specific regulations are applied on a national level and these operations are neutral in terms of corporate income tax. On the EU level, where a common market with free movement of persons and capital exists, the unified taxation of reorganizations and transfers has also been introduced by the Council Directive 2009/133/EC (hereinafter "Directive"). The adopted Directive created a system whereby two objectives are being sought: firstly, to postpone the taxation of capital gains in cases of reorganizations and transfers; secondly, to protect financial interests of the Member States (Finnerty, 2007, p. 23). The present article elaborates on each one of these aims and the course of their implementation.

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INTRODUCTION

The Directive that determined, on an EU level, the mechanism of taxation of reorganizations and transfers was adopted in 1990 and named Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. This Directive had to be implemented in Member States by 1 January 1992.

This legal instrument has been amended four times since its adoption. In 1994, 2003 and 2006, amendments were introduced due to accession of new members to the Union. In 2005, major amendments were made to the Directive, thus expanding its application on persons and operations both. In 2009, the Directive was codified – its original text and all subsequent amendments thereto were integrated into one single document, at the same time changing the title of the Directive to the Council Directive 2009/133/EC 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. This Directive has not replaced the contents of the 1990 Directive (90/434/EC) or further amendments thereto – only the necessary changes to the form required for the codified version have been effected and all references to Directive 90/434/EC are regarded as references to Directive 2009/133/EC. For the sake of convenience, the present article uses the numeration of articles according to Directive 2009/133/EC. In addition, the latter title of the Directive is also given in the name of the present article since this article analyses not only the initial version of the 1990 Directive but also the existing amendments thereto.

Prior to discussing the mechanism of taxation of reorganizations and transfers as prescribed in the Directive, it must be noted which operations are covered by the provisions of this Directive.

Article 1 of the Directive states that it applies to mergers, divisions, transfers of assets and exchanges of shares (after the amendments of the Directive adopted in 2005 provisions thereof are being applied with regard to partial divisions and transfers of assets as well as to the transfers of the registered office of European companies and European cooperative societies). Operations stated in the Directive may be classified as belonging to two types, namely, 1) reorganizations, and 2) transfers. It must be emphasized that the list of operations specified in the Directive is exhaustive.

Furthermore, it is equally important to draw attention to the fact that the provisions of the Directive – according to Article 1 thereof – are being applied only with regard to operations *in which companies from two or more Member States are involved*, i.e. where such an operation has *an international component* and is not carried out on the national level only.

SUBJECTS TO WHICH THE DIRECTIVE IS APPLICABLE

It has already been mentioned that the Directive is applicable only with regard to a specific exhaustive range of *operations*. It is equally important to highlight the fact that the application of the Directive is limited with regard to *persons* as well – provisions thereof apply only in cases where two or more *companies from a Member State* are participating in the said operations.

A Member State company is specifically defined in the Directive. Definition thereof is provided in Article 3 – it's a company that satisfies all three requirements referred to below:

- It takes one of the forms listed in Annex of this Directive;
- According to the tax laws of a Member State, it is considered to be a resident in that Member State for tax purposes and, under the terms of a double taxation treaty concluded with a third country, is not considered to be a resident for tax purposes outside the Community;
- It is subject to one of the taxes listed in the Directive without the possibility of an option or of being exempt.

It must be noted that even though a company must meet *all three* conditions, not all of them must be satisfied in *one Member State* (Terra & Walter, 2012, p. 607, van den Broek, 2012, p. 159). For instance, a company incorporated in Denmark and having a certain form established in this state but managed in the United Kingdom on the grounds of the double taxation treaty concluded between Denmark and the United Kingdom, would be regarded a tax resident of the United Kingdom. Even more so – this company may have a permanent office in Spain and pay the majority of its corporate income tax there. However, this company will still satisfy the requirements of the aforementioned Directive.

Moreover, it should be noted that the Directive deals with "companies taking part in operations" and not with the shareholders of these companies; therefore, the aforementioned requirements shall not be applicable to shareholders. Shareholders of the companies participating in reorganizations and transfers may even be non EU-residents or not legal entities but natural persons – this will have no impact on the application of the Directive (Lozev, 2010).

As far as the form of legal entity is concerned, referring to Annex I of the Directive where it has been stated to which forms of business organization the provisions of the Directive will apply, the majority of Member States have selected specific listing thereof. For instance, Latvia specified *akciju sabiedriba* and *sabiedriba ar ierobezotu atbildibu*, Poland – *spółka akcyjna* and *spółka z ograniczoną odpowiedzialnością*.

Some other states, including Lithuania, chose to include a general clause that the provisions of the Directive shall be applied to the companies incorporated under the laws of a particular state. Such wording has also been chosen by the United Kingdom and Ireland.

Some other states, e.g. The Netherlands, listed both specific forms of companies and specified the criterion of the place of incorporation (Terra & Walter, 2012, p. 606).

With due attention paid to the said provisions of the Directive, the author of this article is of the opinion that in practice, certain problems regarding the application of the provisions of the Directive and national implementing legal acts may arise.

In the context of the civil law, cross-border operations have been regulated on the EU level by Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies (10th Directive). Thus, within the meaning of the civil law, operations which are admissible at present are only cross-border reorganizations of companies, namely mergers. The author of this article holds that the implementation of both other forms of entities and other types of international reorganizations, particularly divisions, as provided in the Directive governing tax-related legal relations, might result in many problems and could hardly be possible from the civil law's perspective.

The fact that the said 10th Directive governs much less narrow legal relations than the Directive discussed in this article and that not all operations specified in the tax law may be practically implemented on an international level and that international community ought to take relevant steps to solve this situation, has been highlighted in scientific works as well (van den Broek, 2012, p. 157).

As it has already been mentioned, the second requirement for the company from a Member State is that of residence. In accordance with the provisions of the Directive, the company, according to the tax laws of a Member State, must be considered to reside in that Member State for tax purposes *and*, under the terms of a double taxation treaty concluded with a third country, must not be considered to be a resident for tax purposes outside the Community (this Directive is not applied to third countries).

Therefore, the Directive actually specifies two conditions. *The first is being* a resident of a Member State following the national legal acts of that country. Here one should draw attention to the fact that the Directive does not eliminate the possibility to apply its provisions with regard to companies that reside in two EU Member States (for instance, in cases where in one of them the determination of the place of residence is subject to the criterion of incorporation whereas in the other, the key criterion is that of place of managing business). The second requirement is *not being* a resident outside the Union under the terms of an international double taxation treaty. This restriction has been explained in the scientific references as the objective to restrict the possibilities of tax avoidance and planning to reside in third countries, since the company which is resident of two states might apply tax exemptions established in legal acts of both countries (Terra & Walter, 2012, p. 607).

It is worth mentioning that the issue of whether the provisions of the Directive should be applicable to Member States of the European Economic Area, which are not Member States of the European Union, i.e. Iceland, Lichtenstein and Norway, has been raised in practice (Helminen, 2011). The decision of the Court of Justice of the European Union made on 12 July 2012 in the case of *A Oy* provided unambiguous answers. First of all, the Court drew attention to the fact that the provisions of the Directive itself are applied only in case where companies from two or more Member States participate in reorganizations or transfers. Therefore, in cases where one of the companies participating in such an operation (which was exchange of shares in the given case) is from a third country (Norway in the case under discussion), the provisions of the Directive do not apply. However, the Court holds that in such a case, one should take into account the freedoms of free movement of capital provided in the Agreement on the European Economic Area and the operation of exchange of shares in cases where the company from Norway also takes part in it, should also be considered as neutral from the tax perspective. That is, it should be made subject to the analogous rules as the ones which would be applied in cases where national companies or companies from EU Member States will be participating.

The last requirement for the mechanism set up by the Directive to be applied with regard to a company is that the company must be subject to one of the taxes listed in Annex I Part B of the Directive without the possibility of an option or of being exempt.

The requirement of not being exempt from taxes is explained in the scientific references rather laconically – with due regard to the fact that one of the objectives of the Directive is to prevent double taxation, Member States cannot be required to avoid double taxation in cases where no single possibility exists.

Elimination of companies eligible to opt whether to pay taxes or not is explained by a very complicated implementation of the provisions of the Directive in such cases and broad possibilities of tax planning.

Moreover, it should also be emphasised that in accordance with the wording given in the Directive, the said requirement must not be interpreted as the *actual* payment of tax, therefore, for example, non-payment of corporate income tax due to the fact that tax-related losses accumulated during previous periods are being deducted or the activities do not yield any profit, does not prevent application of the provisions of the Directive (Terra & Walter, 2012, p. 607, van den Broek, 2012, p. 160). It is also important to note that taxes referred to in the Directive are national corporate income taxes, therefore, the Directive does not apply in cases where the company only pays regional tax or tax set by the municipality (van den Broek, 2012, 159).

TAX NEUTRALITY OF REORGANIZATIONS AND TRANSFERS

Tax neutrality (postponement of taxation of capital gains) in cases of reorganization and transfer on a corporate level has been established by Article 4 of the Directive (applied in cases of mergers, divisions and partial divisions) and Article 9 (applied in cases of transfer of assets – here the reference to Article 4 of the Directive is given). As provided in these articles of the Directive, the said operations are not regarded as grounds for imposing taxes on capital gains, which are calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

The Directive sets value for tax purposes as the value on the basis of which any gains from the increase of asset value would have been computed for the purposes of tax if such assets or liabilities had been sold. The author of the present article agrees with the opinion presented in the scientific references (van den Broek, 2012, p. 200) that the Directive deals with the residual tax value – expenses incurred when acquiring these assets that have been reduced by depreciation costs (increase or decrease of asset value is not taken into account).

The Directive does not provide any definition of real value. Scientific references provide an explanation that this concept ought to be partly interpreted in the same way as value for tax purposes, i.e. value on the basis of which any gain from the increase of asset value would have been computed for the purposes of tax if such assets or liabilities had been sold. As the Commission of the European Communities indicated in 1988, the real value should be computed in accordance with the national legal acts of the Member States, which most often require a detailed assessment of assets and liabilities. Hence, depending on each Member State, real values may differ. For instance, the author of the article holds that in Lithuania, following the requirement to conclude transactions in market prices that has been inscribed in Article 40 of the Law on Corporate income tax, the market value of assets and liabilities is to be considered to constitute real value.

Therefore, in accordance with the provisions of the Directive, reorganizations and transfers may not serve as grounds for taxing capital gains. However, in this case it is equally important to draw attention to the fact that the purpose of the Directive is not only the determination of a favourable taxation regime on an EU level but also the protection of financial interests of Member States. Therefore, in view of the latter objective, non-taxation of capital gains in cases of reorganizations and transfers is not unconditional. To be more specific, the Directive stipulates not the exemption from taxes but rather the *postponement* of taxation on capital gains until the moment when the assets obtained as a result of reorganization or transfer are sold or otherwise transferred in the course of other transactions. The taxation mechanism has been introduced in Article 4 by establishing that Member States must make the application of the provisions of the Directive for capital gains taxation conditional on the receiving company charging any new depreciation and any gain or loss in respect of assets and liabilities transferred in accordance with the principles applicable to the transferring company or companies if the reorganization or transfer did not take place. Thus, both assets and liabilities must be accounted for in the acquiring company on the basis of their historical tax values in place until reorganization or transfer in the transferring entity (operation of reorganization or transfer does not constitute any grounds for the increase in the value of assets or liabilities transferred).

In cases where deviations from the historical value of asset and liability value exist that follow the legal acts of the state of the transferring company and the company acquiring assets and liabilities is allowed to post these assets and liabilities in higher-than historical tax values, the provisions of the Directive on tax neutrality shall not apply to the transferring company (Article 4(5) of the Directive).

Specific attention should be paid to the fact that Article 4 of the Directive stipulates another safety valve protecting financial interests of Member States, that is, it provides that the assets and liabilities being transferred must remain linked to the permanent establishment of the acquiring company in the state of transferring company – in cases of reorganization or transfer assets may not be physically relocated. The requirement of permanent establishment will be discussed further on in this article.

Thus, the essence of the Directive is the *postponement* of taxation on capital gains, which is implemented by way of transferring assets and liabilities to the acquiring company with their historical tax values. When the acquiring company transfers these assets later on, the capital gain calculated as the difference between the price of such a transfer and and the historical value of assets must be taxed accordingly (Finnerty, 2007, p. 27, Lang, Pistone, Schuch & Staringer, 2013, p. 158, Terra & Walter, 2012, p. 669). The burden of taxation on capital gains in cases of reorganizations or transfers is merely transferred to another person (with the exception of exchange of shares where the burden remains within the same person while being linked to other shares) and tax duty must be further met for the same state (due to the requirement to continue activities via permanent establishment in the state of transferring company).

It should also be noted that during reorganization or transfer not only assets/liabilities are transferred but instead of shares of entities, which are transferred or acquired, the shares of receiving or acquiring entities are also issued for participants of such operations. In order to postpone the taxation on capital gains on shareholder level as well, the Directive introduced a mechanism identical to the one applicable at the corporate level. This mechanism has been set out in Article 8 of the Directive. Following this Article, the exchange of shares which has taken place as a result of reorganizations or transfers may not be considered the grounds for imposing taxes on the income of shareholders who have acquired shares because of this exchange.

We should also mention that in this case, following the said article of the Directive, the historical tax values of shares must be maintained for the purposes of protection of financial interests of Member States – for tax purposes, the shareholder who acquired the securities must not assign them a greater value than the value of previously exchanged securities. Therefore, both on the level of shareholders and the companies participating in reorganizations and transfers, the Directive provides the mechanism allowing to postpone the taxation on capital gains but not exemption thereof from taxes (Finnerty, 2007, p. 27, Lang, Pistone, Schuch & Staringer, 2013, p. 153, 168, Terra & Walter, 2012, p. 669, van den Broek, 2012, p. 255). In cases where certain deviations occur from the historical share value, namely those following the legal acts of the country where the shareholder resides, he is allowed to post the acquired shares at some other value, wherein the mechanism of postponement of taxation stipulated in the Directive is not applied (Article 8(8) of the Directive).

REQUIREMENT TO CONTINUE ACTIVITY VIA PERMANENT ESTABLISHMENT – PROTECTION OF FINANCIAL INTERESTS OF MEMBER STATES

In this article we have already drawn your attention to the fact that, aside from the principle of historical values, the Directive stipulates another safety valve aimed at protecting the financial interests of Member States, that is, the assets and liabilities being transferred must remain linked to the permanent establishment of the acquiring company in the state of transferring company – in cases of reorganizations and transfers the assets should not be physically relocated. In other words, reorganizations and transfers do not mean physical movement of assets but rather transfer of the rights of ownership thereto.

As already mentioned, following Articles 4 and 9 of the Directive, merger, division, partial division or transfer of assets is not regarded as grounds for imposing taxes with regard to the capital gains calculated as the difference between the real value of *assets and liabilities transferred* and their value for tax purposes.

The transferred assets and liabilities are defined in the Directive as assets and liabilities of the transferring company, which, as a result of merger, division, partial division or transfer of assets *become effectively linked to the permanent establishment* of the acquiring company in the Member State where the transferring company is located and which take part when generating profit or loss, which is being considered for tax purposes.

Since the definition of permanent establishment *has not been given* in the Directive, the author of the article, having analysed other legal acts and practice of authorities handling disputes, draws a conclusion that upon taking due account of the fact that the Directive regulates international relations, the fact whether a company has a permanent establishment or not and whether assets and liabilities are involved in the generation of profit would be handled in accordance with the relevant double taxation treaties between Member States. The second requirement provided in the Directive in particular, that is, the requirement to be involved in the generation of profit or losses through permanent establishment, shall ensure that in accordance with the provisions of a double tax treaty a permanent establishment will be definitely established in the country of the transferring company and that this country shall not lose its right to tax the assets located in its jurisdiction (i.e. in the said permanent establishment) in any way. Thus, the aim to protect the financial interests of Member States where the transferring entity is located as provided in the Directive, would be properly implemented.

Therefore, disregarding concerns about the lack of a permanent establishment definition in the Directive, Member States were free to decide who and according to which criteria should be considered a permanent establishment, including the extensive discretionary right to decide when to apply a beneficial mechanism stipulated in the Directive, and when not to (Cerioni, 2007, p. 12). The author of this article is of the opinion that the chosen path, which does not provide for any definition of permanent establishment contained in the directive itself was fair, since this issue was actually regulated by effective bilateral agreements between Member States.

TAX LOSS CARRY-OVER

The mechanism introduced by the Directive is attractive not only because of the already discussed postponement of the taxation of capital gains, but also because of the fact that while implementing the reorganizations and transfers provided for in the Directive, the accumulated tax losses are maintained.

Tax loss carry-over is one of the most important (tax-related) aspects when deciding upon both national and international reorganizations and transfers – if the acquiring company is not guaranteed that it will be entitled to carry over the losses of the transferring company, the costs of the said operations undoubtedly increase, since the generated tax profit may not be reduced by the tax loss accumulated during previous tax periods.

In accordance with Article 6 of the Directive, if the operations referred to in Article 1 were effected between companies from the transferring Member State, the Member State would apply provisions to allow the recipient company to take over the losses of the transferring company which has not yet been exhausted for tax purposes, it extends these provisions to cover such losses being taken over by the receiving company's permanent establishments located on its territory.

In other words, this Article of the Directive means that in cases where the transferring state allows the acquiring company to take over the losses of transferring company during national reorganization or transfer, it must apply analogous provisions in cases where the acquiring company is the company of another Member State and allow the *permanent establishment of acquiring company* remaining in its territory to take over non-deducted tax losses (Lang, Pistone, Schuch & Staringer, 2013, p. 164).

When analysing the tax loss carry-over mechanism provided in the Directive, it is very important to first draw attention to the fact that the possibility of tax loss carry-over in the Directive is *directly linked* to national regulation (Helminen, 2001-4, p. 172). Following Article 6 of the Directive, Member States must ensure tax loss carry-over in the permanent establishment *applies solely in cases* where their *national* legal acts provide that the loss carry-over is admissible where national entities participate in reorganizations and transfers. If the national law of a Member State does not provide for any loss carry-over in such cases, then such a Member State is not bound by any duty to ensure the tax loss carry-over during an international reorganization or transfer. Even though such option may be regarded as fair with regard to national entities (it must be noted that the EU law does not forbid positive discrimination (more favourable treatment) in cases where in certain situation there is an international element as compared to situations where only national entities are present in an operation), it does not assist in achieving the aim of the Directive, that is, to create a unified regulation in the field of taxation of international reorganizations and transfers (preamble of the Directive).

When dealing with Article 6 of the Directive, it is important to note that in cases of reorganizations and transfers the Directive ensures the tax loss carry-over only on the level of the permanent establishment of the acquiring company (and not in the acquiring company, as stated in the erroneous interpretation of the Directive in Russo & Offermanns (2006, p. 251)) (Helminen, 2011-4, p. 172, 173, Lang, Pistone, Schuch & Staringer, 2013, p. 165, Terra & Walter, 2012, p. 674). In accordance with the provisions of Article 6 of the Directive, in cases where the national law provides for tax loss carry-over, analogous provisions should be applied also to the *permanent establishment* of the acquiring company in the transferring state.

The author of this article holds that such regulation follows from the general mechanism set out in the Directive. As it has already been discussed earlier, the aim of the Directive is not only to eliminate any obstacles and restrictions in international reorganizations and transfers, but also to secure the interests of the Member States. The latter is achieved in such a way that based on the transferred assets and liabilities there must remain the permanent establishment of the acquiring company in the state of residence of the transferring company. Following such mechanism of operation of the Directive, the transferring company is replaced by the permanent establishment of the acquiring company which, as a universal transferee of rights and duties, gains the right to carry over the accumulated tax losses.

Another aspect that is worth mentioning while analysing Article 6 of the Directive is that the Directive does not regulate how many tax losses may be subject to carry-over. It goes without saying that this is not an issue when one company, for example, is merged into another and the acquiring company gains all assets and liabilities. In this case, the permanent establishment of the acquiring company is entitled to carry over all tax losses accumulated prior to reorganization. However, in cases where only part of the activity is being transferred, that is, only some part of assets and liabilities of the company are transferred, the answer might not be so obvious.

Scientific references state that in this case the spirit of the Directive would be in line with the principle where only tax losses related to the transferred activity would be carried over in the permanent establishment. At the same time, it is emphasised that this issue has not been dealt with in the Directive; therefore, this might become the issue of discussions with tax administrator and relevant authorities handling such disputes. It is evident that the taxpayer would face considerable difficulties when calculating such part of the losses (Bezzina, 2002, p. 61).

Harm van den Broek (2012, p. 239) agrees with the stated position, while also pointing out that – in terms of differentiation of a particular part of losses attributable to specific activities – international operations should not generate more discussions than national ones since the provisions of the Directive merely expand the scope of application of national legal provisions with regard to international cases.

The author of this article agrees with the opinions referred to above.

Finally, it should be noted that, apart from the aforementioned questions that have not been regulated for one or another reason, the Directive does not define losses, either.

Some authors consider this an intolerable gap (Bezzina, 2002, p. 65).

As we have pointed out in previous sections of this article, which has also been reiterated by J. Bezzina herself in her article (2002, p. 57), the Directive is merely an instrument which has to ensure that the national and international operations within the meaning of taxation would be treated *equally,* this instrument does not create a uniform mechanism for tax loss carry-over but rather prevents discrimination.

We have stated that, following the provisions of the Directive, tax losses are carried over on the level of permanent establishment, which remains in the state of the transferring company (and not in the acquiring company). For tax purposes, the permanent establishment is the resident of the transferring country, therefore, these losses continue to be subject to the rules that would have been applied should the reorganization or transfer did not take place. Upon establishing a specific definition of tax losses in the Directive, it is likely that this would result in changes of certain rules for carry over of losses. With due account of the aforementioned, the author of the present article holds that the definition of losses is not required under the Directive.

CONCLUSION

Directive 2009/133/EC applies only to a specific exhaustive range of *operations*; its application is also limited with regard to *persons* – provisions thereof are applied in cases where two or more *companies from a Member State* are participating in the said operations. The company from a Member State is specifically defined in the Directive.

When it comes to the mechanism of taxation of reorganizations and transfers provided in the Directive, its essence is the *postponement* of taxation of capital gains which is implemented by way of transferring assets and liabilities to the acquiring company in their historical tax values. The said mechanism of taxation is also attractive because of the fact that while implementing the reorganizations and transfers provided for in the Directive, the accumulated tax losses are maintained: they can be carried over in the permanent establishment of the acquiring company in the transferring state.

The aforementioned principle of historical values and a requirement for permanent establishment provided in the Directive are safety valves aimed at protecting the financial interests of the Member States.

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