Obstacles to European Cross-Border Merger Realization*

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Despite the implementation of the Tenth EC Directive on cross-border mergers, individual Member States company law can still impede the legal realization of cross-border mergers. This paper has researched the causes of this state of affairs. It has investigated empirical data concerning cross-border mergers in the Czech Republic from which generalize conclusions can be made for the whole European Union. Data from cross-border mergers announced and carried out in the Czech Republic from 1st January, 2007 to 31st December, 2011 were used for the identification of obstacles to the realization of cross-border mergers. The paper used comparative analysis of data collected from questionnaires in 10 selected European countries in which cross-border mergers were realized during the research period. The starting point of the research period was taken to be the decisive day of the merger, that is, the day when the merging company is legally responsible for the merged companies’ accounts. The research found that approaches taken towards the decisive day differed between countries. The analysis formed a basis for some proposals for legislative changes in the Czech Republic. The paper recommends that a change in the legal determination of the decisive day could help Czech companies realize a greater volume of cross-border mergers. The research conclusions also have implications for other countries legal approaches to the issue of cross-border mergers.

Keywords: cross-border mergers, fair value measurement of assets, registered equity, opening balance sheet, closing balance sheet, decisive day

Introduction

European companies and their mergers are regulated by legal acts falling within the Internal Market of the European Community. The European Community (and the EC as a part of the European Union) has been overseeing cross-border mergers since 1990, when the first Directive concerning this issue was passed. It might come as a surprise that regulation concerning cross-border mergers was covered by the Directive on the Common Taxation System applicable to mergers, divisions, transfers of assets and exchanges of shares of companies of the various Member States (Directive 90/434/EEC). The main aim of this Directive was to create companies in the Member States within the Community conditions analogous to those of an Internal Market, and to ensure effective functioning of the Common Market. Such operations ought not to be hampered by

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restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States.

This Directive, together with the Directive on the Common Taxation System applicable in the case of parent companies and subsidiaries, in different Member States (Directive 90/435/EEC), was issued in 1990. Both Directives should have been transposed into the national law of the member countries by the end of 1992. However, there was a flaw in the Directives. They did not allow cross-border mergers of companies from different Member States. This paradox was commented upon in Czech academic publications (Dědič, 2008; Dědič & Lasák, 2009) and in the rigorous work of Lasák (2009). EU regulation should focus on the tax aspects of cross-border mergers first. Only a common tax system is able to provide a satisfactory solution in this respect. However, the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares. The Directive should enable the restructuring of companies in European Union, regardless of Member States’ borders, and without putting them at a tax disadvantage. Ultimately, such a solution would correspond to ideological pillar of the European Union, namely, the free movement of capital. However, another 15 years had elapsed until the Directive 2005/56/EC of 26th October, 2005, on cross-border mergers of limited liability companies (sometimes referred to as the “Tenth Directive”) was adopted.

The Tenth Directive imposed the obligation on Member States to revise their legal systems in such a way as to facilitate the realization of cross-border mergers between Member States. The Court of Justice supported harmonization of the cross-border merges by their judgment. The important ECJ judgment in SEVIC Systems AG (Case C-411/03) has resulted in the addition of new elements to the Court of Justice’s jurisprudence on the freedom of the establishment of interrelationship with Member States’ company laws. The Court, while dealing with the SEVIC case, has extended the cross-border mobility of companies by applying the principle of freedom of establishment to cross-border mergers.

The objective of this paper is to investigate obstacles to European cross-border mergers as even the transposition of the Tenth Directive has not brought harmonization of Member States’ company law so as to enable the realization of cross-border mergers from the legal perspective. The main motive behind the publication of this paper is to prevent other EU member states from increasing obstacles to the realization of cross-border mergers.

A Review of the Literature: Identifying and Closing the Knowledge Gap

Over the past five years, the professional literature has included a number of references to a specific type of ownership transactions between companies, which are referred to as cross-border acquisitions and mergers. These issues were dealt with by Peláč (2006), for instance, from the viewpoint of the methods applied to the accounting for mergers at an international level. Hlaváč (2009) analyzed the processes of management of the acquisitions and mergers in international transactions. Lasák (2009) had been analyzing the legal aspects of mergers in relation to Community law, while Otavova (2010) commented on the integration of cross-border mergers and demergers to the legal system. Skálová and Podškubka (2009) concentrated on accounting interpretation of cross-border mergers in the Czech Republic based on Czech Accounting Standards. Kuhn and Štenglová (2010) brought comments on the Czech Act on Transformations of Business Companies. Žárová (2006) described the differences in the accounting regulations in the various EU countries. Bohušová and Svoboda (2009) examined the IFRS and U.S. GAAP convergence in the area of mergers. Among the foreign

Despite the relative frequency with which professional literature has dealt with this question, it must be said that business practice uses cross-border mergers in order to realize the acquisition process rather seldom. This conclusion arises from the research (see Tables 1, 2, and 3). The number of international acquisitions often comes to hundreds of cases. However, the specific legal form of the cross-border mergers is only used in extreme cases, as a rule. It is in addition to the more frequently used methods, such as buying shares, securities or purchasing the assets, or even the whole company. Based on the empirical research, analysis has been used to reach the aim of the research. The aim of this research, whose partial results are included in this contribution, is to analyze the causes of this state of affairs.

Some Background Data on Cross-border Mergers Realized in the Czech Republic

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

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

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

When cross-border mergers, announced and carried out in the Czech Republic from 1st January, 2007 to 31st December, 2011, are analyzed, as shown in Table 1, it must be said that the amount is very low.
Table 1

Cross-Border Mergers Noted and Carried out in the Czech Republic

<table>
<thead>
<tr>
<th>Calendar year</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of mergers noted in the Company Register</td>
<td>4</td>
<td>8</td>
<td>15</td>
<td>24</td>
</tr>
<tr>
<td>Number of mergers completed till December 31st 2011</td>
<td>4</td>
<td>7</td>
<td>14</td>
<td>17</td>
</tr>
</tbody>
</table>


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

Table 2

Overview and Numbers of Mergers From the Czech Republic to the EU Member State

<table>
<thead>
<tr>
<th>Mergers from the CZ to the EU member state</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>Total number of mergers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Great Britain</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td>2</td>
<td>4</td>
<td>4</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ireland</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Luxemburg</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>3</td>
<td></td>
<td></td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
<td>5</td>
<td>6</td>
<td>15</td>
<td>29</td>
</tr>
</tbody>
</table>


Table 3

Overview and Numbers of Mergers From the EU Member State to the Czech Republic

<table>
<thead>
<tr>
<th>Mergers from the EU member state to the CZ</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>Total number of mergers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Slovakia</td>
<td>1</td>
<td>5</td>
<td>3</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td></td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Luxemburg</td>
<td></td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>2</td>
<td>10</td>
<td>9</td>
<td>22</td>
</tr>
</tbody>
</table>


When information from the Czech Republic is examined, it can be recognized which countries are the “favorites” for cross-border merger. Without a doubt, the Slovak Republic is on first position. Other countries, historically, more than one cross-border merger with Czech companies, can be seen in the Tables 2 and 3. What is the main reason for this fact? The high numbers of successfully completed mergers were Netherlands and Cyprus, which may be attributable to favorable tax regimes in those countries. But why are there a low number
of cross-border mergers with the nearer countries such as Poland or Hungary? Answers might be found from the following research results.

**Some Hypotheses Concerning the Limited Use of Cross-Border Mergers**

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

When examining obstacles which could put companies off from realizing cross-border mergers, the following possible causes were identified:

- Some legal systems have different approaches to valuating property for business law purposes than they have for accounting purposes;
- Some accounting aspects of mergers are not harmonized, because the Directive has given too great a discretion to the member states. This renders the realization of cross-border mergers impossible;
- Tax regimes are often more favorable to the realization of inland mergers than they are to cross-border mergers. It can lead to some tax disadvantages.

Given its importance in merger situations, the research in this paper focuses on the first point. A questionnaire was made during the research (according to the methods presented in part 1), containing questions concerning the accounting approaches used in mergers, the approach to valuation and some of the tax contexts of mergers. The questions were posed like closed questions according to Crowther and Lancaster (2009), while some of them were posed like open questions.

The questionnaire was sent to consulting firms from the Crowe Horwath network. It is a network of independent consulting firms which are among the medium sized firms on the market. Professional knowledge of the issue was assumed and experiences with these transactions were on the part of this group of respondents. The questionnaires were sent to 27 European countries. The filled questionnaires were received back from the following countries: Belgium, Czech Republic, France, Cyprus, Hungary, Norway, Germany, Poland, Austria, Romania, and Slovakia. Thirty seven percent of the questionnaires sent were returned. Not all questionnaires, however, contained answers to every question, which, as a consequence influenced even the further evaluation.

Questions were aimed at the determination of 10 crucial characteristics from the national accounting regulatory system and the tax regulatory system, which were the subjects of research.

It concerns:

- Date of the accounting aspects of the merger;
- The duty to valuate property of the merging company according to commercial law;
- Who carries out the valuation for commercial law purposes (e.g., appraiser, auditor);
- Whether there exists a duty to carry over changes in valuation to accounting;
- What is the impact of revaluation of property and liabilities from the point of view of the law on income tax?
- Whether there exists a duty to continue in tax depreciation within the framework of inland mergers, or in cross-border mergers;
- Whether there exists a duty to tax the difference between the real value of the property, and its original tax
OBSTACLES TO EUROPEAN CROSS-BORDER MERGER REALIZATION

The results of the questionnaire survey were obtained from the following participating countries: Slovakia, Cyprus, Hungary, Poland, France, Norway, Belgium, Romania, and Austria.

Answers were evaluated and put into the international comparison. The results of the analysis were the subjects of publication activities and were also given to the Czech Ministry of Justice, which can use them to aid in the making of adjustments to the legal system.

The Results of the Survey

The research results point to a basic disharmony between the legal systems of the individual states under examination.

Accounting Aspects of Mergers

The Directive amends the appropriateness of the basic documents which were approved at the general meetings of all participating companies, which in Czech commercial law have the title “Joint Project Merger” (hereafter only “project”). The Tenth Directive uses the term “common draft term” in Article 5. The German law on mergers uses in paragraph 122c, the expression “Verschmelzungsplan”, the Slovak legal system uses the expression “contract on cross-border merger” in paragraph 69a of its commercial code.

The project must be in written form, to be done by the statutory organs of the company participating in the merger and its creation, and it must be entered in the relevant register (the collection of documents kept by the registry court in the CR). It also must be published, according to the laws of the member state (in the CR it is published in the Commercial Journal). The project is, as a rule, written in more languages. In order that the project will have legal force, it must be approved by all participating companies.

The appropriateness of the project is taken from Czech merger law literally from the Tenth Directive. The majority of member states have undergone this process. In addition to basic legal facts concerning the participating company, the project also must contain information about the accounting aspects of the merger.

It concerns:

- the day from which the merging company’s acts is considered, from the accounting point of view, to be carried out in the successor company’s accounts, in other words, in Czech terminology: the decisive day of the merger;
- information about the valuation of the assets and liabilities carried over to the successor company;
- The day the final financial statements of the merging companies is used for setting the conditions for cross-border mergers.

It is precisely that these accounting aspects of cross-border mergers which carry hidden in them are the most problems they need face to.

The decisive day is the expression used in Czech law to denote the day which was defined in all European Directives which deal with mergers, as the day from which the conduct of the merging company is considered from the accounting point of view, as the conduct of the successor company.

The set day from which arise the accounting effects of the merger, takes different forms in the legal systems of various states. This springs from the transposition of Directives, when each state can adjust its legal
OBSTACLES TO EUROPEAN CROSS-BORDER MERGER REALIZATION

system to suit the Directive. Only the achievement of the Directive’s objective is binding on the states. Approaches taken to the decisive day are not identical in all EU countries. The following Table 4 presents comparisons in some European countries:

Table 4
*Comparison of Decisive Day Determination in Some European Countries*

<table>
<thead>
<tr>
<th>State</th>
<th>Legal aspects of mergers</th>
<th>Accounting aspects of mergers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Czech Republic</td>
<td>At the date of registration in the Business register</td>
<td>The decisive day could be 12 months earlier than the date of registration in the Business register¹</td>
</tr>
<tr>
<td>Slovakia</td>
<td>At the date of registration in the Business register</td>
<td>The decisive day could be earlier than the date of registration in the Business register, or the decisive day may not be later than the date of registration in the Business register</td>
</tr>
<tr>
<td>Austria</td>
<td>At the date of registration in the Business register</td>
<td>The decisive day could be 9 months earlier than the date of registration in the Business register</td>
</tr>
<tr>
<td>Germany</td>
<td>At the date of registration in the Business register</td>
<td>The decisive day could be 8 months earlier than the date of registration in the Business register</td>
</tr>
<tr>
<td>Poland</td>
<td>At the date of registration in the Business register</td>
<td>At the date of registration in the Business register</td>
</tr>
<tr>
<td>Romania</td>
<td>At the date of registration in the Business register</td>
<td>At the date of registration in the Business register</td>
</tr>
<tr>
<td>Hungary</td>
<td>At the date of registration in the Business register</td>
<td>At the date of registration in the Business register</td>
</tr>
<tr>
<td>Norway</td>
<td>At the date of registration in the Business register</td>
<td>The day of accounting must correspond to the date when the control over the merging company changed</td>
</tr>
<tr>
<td>Belgium</td>
<td>At the date of registration in the Business register</td>
<td>The decisive day could be 7 months earlier than the date of registration in the Business register</td>
</tr>
<tr>
<td>France</td>
<td>At the date of registration in the Business register</td>
<td>The day of accounting must correspond to the date when the law recognises the expiry of one company, or the merger bringing into existence of the successor company</td>
</tr>
<tr>
<td>Cyprus</td>
<td>At the date of registration in the Business register</td>
<td>The day is determined by the Court that approves merger. The date of the accounting aspects coming into being could be the same day that the law recognises the merger as having taken place</td>
</tr>
</tbody>
</table>

Note. Source: Authors’ own research.

The above mentioned disharmony among the various states causes complications in the preparatory processes of the cross-border merger.

**Accounting Year at the Merger, and the Obligation to Prepare the Opening Balance Sheet**

The Czech legal system imposes further accounting obligations on the participating companies in connection with the decisive day. These obligations concern, mainly, the preparing of final financial statements by the day immediately preceding the decisive day. The decisive day is always the moment when the new accounting period starts. In practice, Czech companies often consider it to be the standard commencement of the accounting period. Furthermore, Czech commercial law requires that the valuation of the property of the merging company and the preparing of the opening balance sheet by the decisive day, even these accounting obligations are not uniformly prepared in all EU member states. Which possible deviations could arise are shown in the following Table 5.

The above mentioned disharmony in the accounting obligations could have undesirable consequences on the possibilities of carrying out mergers between individual countries. If a Czech successor company plans a

¹ Czech legal requirement is changed since January 1st 2012, as explained in part five of this article.
merger with a merging company which has its seat in Poland, where the accounting effects of a merger are linked to the actual expiry of the merging company, then it is not possible to fulfill the requirements of Czech law and prepare the necessary documents for the merger. It is very difficult to prepare an opening balance sheet, from the position of the Czech successor company. The opening balance sheet does not mean any accounting limit for the merging company in Poland, nor does it mean for the company, in the case of a successfully realized merger, a joining of its economic activities (from the accounting perspective) with the successor company.

Table 5

<table>
<thead>
<tr>
<th>Country</th>
<th>Has the successor company prepared the opening balance sheet?</th>
<th>What time limits are placed on the successor company?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Opening balance sheet not required</td>
<td>The merger does not have an influence on the accounting period</td>
</tr>
<tr>
<td>CR</td>
<td>Yes, by the day of accounting effect</td>
<td>From the day of the merger’s accounting effects to the end of the accounting period in which the merger was entered in the Business register</td>
</tr>
<tr>
<td>France</td>
<td>Yes, by the day of accounting effect</td>
<td>From the day of the accounting effects until the end of the normal accounting period which follows the merger’s being entered in the Business register</td>
</tr>
<tr>
<td>Cyprus</td>
<td>The opening balance sheet is not required, but in practice it is prepared</td>
<td>The merger does not have any influence on the accounting period</td>
</tr>
<tr>
<td>Hungary</td>
<td>Yes, only at merge when the days of accounting and legal effect come together</td>
<td>From the day of the accounting/legal effects to the end of the normal accounting period, which follows the merger’s being entered in the Business register</td>
</tr>
<tr>
<td>Norway</td>
<td>Yes, at a maximum of 8 weeks before the day of legal effect (for smaller firms there exists a simplification)</td>
<td>The merger does not have any influence on the accounting period</td>
</tr>
<tr>
<td>Poland</td>
<td>Yes, only at merge when the days of accounting and legal effect come together</td>
<td>The merger does not have any influence on the accounting period, provided a new successor company does not appear</td>
</tr>
<tr>
<td>Romania</td>
<td>Yes, by the day of accounting effect</td>
<td>From the day of the legal effects to the end of the normal accounting period, which follows the merger’s being entered in the Business register</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Yes, only at merge when the days of accounting and legal effect come together</td>
<td>The merger does not have any influence on the accounting period, it is of standard duration</td>
</tr>
</tbody>
</table>

Note. Source: Authors’ own research.

Even if the company chooses the beginning of the accounting period as the decisive day (e.g., 1st of January), then before the decisive day, both companies close their accounting books and prepare their final accounts. Of course, preparing the opening balance sheet by the decisive day, as the commencement of the accounting period is nonsense, because the Polish company carries on in its accounting as an accounting unit to the day of its merge. Therefore, it is impossible to include their assets and liabilities in another accounting unit in the CR.

Conversely, if the Czech company is the merging company, then, it is impossible to fulfill the legal requirement that from the decisive day the operations of the merging company are carried over to the accounts of the successor company, because such “carry over” is prevented by the laws of the country where the successor company is situated. The Polish company carries over assets and liabilities, from the legal and accounting aspects, from the date when the merger legally takes effect. Naturally, if before the legal aspects, there are accounting aspects from the point of view of the Czech company, a paradox could arise that from the decisive day, nobody will want to show the merger (as set out according to Czech regulations) in their accounts.
Consequently, the operations carried out by the successor company will be taxed from the decisive day of the merger to the day of legal effect.

Valuating Property During the Mergers

The problems concerning the valuation of non-financial investment in limited liability companies were first resolved in the EU by the second Directive 77/91EC. Property arising from the merger is in essence a non-financial investment by the previous company into the successor company. If there should be new shares issued as a counter-value for this contribution, it is necessary to value the equity of the merging company. According to the Tenth Directive’s provisions, the valuation must be carried out by an independent expert and appointed by a court or administrative organ. According to Czech commercial law, it will be an expert appointed by the court, and this rule could be different in different countries. As you can see from the following Table 6, the implementation of the above mentioned Directive is not uniform in the EU member states.

Table 6
Comparison of Approaches to Valuation During Mergers

<table>
<thead>
<tr>
<th>Country</th>
<th>What does commercial law require during mergers?</th>
<th>What is the purpose of valuation during mergers?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Valuation of the merging and successor companies, if the shareholders have not decided otherwise</td>
<td>Setting out the exchange rate of shares</td>
</tr>
<tr>
<td>CR</td>
<td>Valuation of the property of the merging company if the successor company increases the basic capital</td>
<td>To determine the value of the merging company’s property for the purpose of increasing or creating the capital stock of the successor company</td>
</tr>
<tr>
<td>France</td>
<td>Valuation of the merging company (if the successor company does not own a 100% share)</td>
<td>Setting out the exchange rate of shares</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Valuation for the purpose of changing the relationship</td>
<td>Setting out the exchange rate of shares</td>
</tr>
<tr>
<td>Hungary</td>
<td>Valuation of the expiring and successor companies if relations are changing</td>
<td>Setting out the exchange rate of shares</td>
</tr>
<tr>
<td>Norway</td>
<td>Valuation of the merging company, if the basic capital of the successor company will be increased when merging the valuation of all expiring companies</td>
<td>Setting the maximum limit of investment in the capital stock of the successor company, setting out the exchange rate of shares</td>
</tr>
<tr>
<td>Poland</td>
<td>Valuation of the merging company under all circumstances</td>
<td>Setting out the changed relations</td>
</tr>
<tr>
<td>Austria</td>
<td>Valuation is not required. An auditor audits the proposed project from the perspective of an equitable change in relations</td>
<td>n/a</td>
</tr>
<tr>
<td>Romania</td>
<td>Valuation of the expiring and successor companies under all circumstances</td>
<td>n/a</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The proposed change in relations to be examined by an auditor or expert</td>
<td>Setting out the changed relations</td>
</tr>
</tbody>
</table>

Note. Source: Authors’ own research.

The following question was part of questionnaire: If the property and liabilities are revalued, what’s the base for revaluation? Majority of respondents answered that it was fair value.

The above mentioned valuation for commercial law purposes has an impact even on the accounting of the participating companies. Even the Tenth Directive takes the image and description of it into account. The Directive, as one of the components of the cross-border merger project, mentions information on the valuation of assets and liabilities carried over to the successor company. Hidden provisions (Fireš & Zelenka, 1997) are considered as very important information in the valuation of merged assets.

According to the Table 7, Belgium is the only state where valuation for the purpose of merger is not separate from accounting. All the other states allow, under certain circumstances, the recognition of the valuation of assets acquired during merger on the basis of fair value. According to the Table 8, this revaluation
is as a rule carried out by an independent person, and is projected in the company’s own capital in a special folder—revaluation reserves. Reserves are used for an increase of equity in the successor company.

Table 7

Impact of Valuation on the Accounting of Companies

<table>
<thead>
<tr>
<th>Country</th>
<th>Can changes in valuation in accountancy take place during merger?</th>
<th>To what moment is overvaluation set out for accounting purposes?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>No</td>
<td>---</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Yes</td>
<td>To the day preceding the day of accounting effect²</td>
</tr>
<tr>
<td>France</td>
<td>Yes</td>
<td>To the day of accounting effects</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Yes, if overvaluation is required within the framework of the IFRS at the recipient company</td>
<td>According to the IFRS</td>
</tr>
<tr>
<td>Hungary</td>
<td>It depends on the decision of the fusing companies</td>
<td>To the day of accounting/legal effect</td>
</tr>
<tr>
<td>Norway</td>
<td>Yes, if valuation is required by the commercial law, if it concerns the merger of independent companies</td>
<td>A maximum of 8 weeks before the day of legal effect</td>
</tr>
<tr>
<td>Poland</td>
<td>Yes, when the merger is realised by the so-called „acquisition method“, and only in relation to the acquirer</td>
<td>To the day of accounting/legal effect</td>
</tr>
<tr>
<td>Austria</td>
<td>Yes</td>
<td>To the day of handing over ownership (the decisive day)</td>
</tr>
<tr>
<td>Romania</td>
<td>Yes, if there are differences between the accounting value and the fair value</td>
<td>To the day of accounting effect</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Yes</td>
<td>To the day preceding the day of accounting effect</td>
</tr>
</tbody>
</table>

Note. Sources: Authors’ own research.

Table 8

Comparisons of Other Aspects of Valuation

<table>
<thead>
<tr>
<th>Country</th>
<th>Who carries out the valuation?</th>
<th>How do changes in valuation manifest themselves in capital accountancy?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Management</td>
<td>n/a</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Independent expert</td>
<td>It is recognized as special item—revaluation reserve</td>
</tr>
<tr>
<td>France</td>
<td>Independent expert (it can be an auditor, but not the company’s auditor)</td>
<td>It is recognized as special item “merger share premium” (share premium during mergers)</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Auditor</td>
<td>In compliance with the IFRS</td>
</tr>
<tr>
<td>Hungary</td>
<td>Is not settled</td>
<td>The difference from revaluation neutralises at first retained earnings/unpaid losses from past years, difference from revaluation greater than unpaid losses from past years must be treated like a capital fund</td>
</tr>
<tr>
<td>Norway</td>
<td>Is not settled</td>
<td>Quite randomly. It depends on the decision of the accounting units</td>
</tr>
<tr>
<td>Poland</td>
<td>Expert (if all shareholders do not decide that it is not necessary)</td>
<td>Treated as a special folder—revaluation reserve</td>
</tr>
<tr>
<td>Romania</td>
<td>Independent expert</td>
<td>Treated as a special folder—revaluation reserve</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Independent expert, auditor</td>
<td>Treated as a special folder—revaluation reserve</td>
</tr>
</tbody>
</table>

Note. Source: Authors’ own research.

The provisions of the Directive require that partners of companies participating in the merger should be informed of how the property and liabilities, which are to be taken over by the successor company, are to be

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² There is a change in accounting rules since January 1st, 2012. New aspect of the law is that valuation is a part of accounting at the decisive day and therefore at the date of drawing up meaning balance sheet of the successor company.
evaluated. In other words, these joint merger projects contain information on the valuation of the assets and liabilities to be taken over. With regard to the above, cross-border merger projects should contain the following:

- information on whether the foreign company had the valuation of its equity carried out;
- information on whether the assets and liabilities are given in accounting value or in fair value, and whether they have been amended according to Czech accounting regulations;
- information on the form in which the foreign company’s own capital is given;
- Information on the foreign exchange rate used, and the method of calculating the assets and liabilities in Czech Crowns.

Even from foreign commentaries on cross-border mergers, we can come to the above mentioned conclusions (Knüppel, 2007). If we examine the German legal system, for instance, we can see that the obligation to present information on the valuation of assets and liabilities coming from expiring to successor companies is stated in paragraph 122c of the law on mergers.

The German legal system allows the successor companies to decide by themselves whether to take the accounting units from the meaning companies in accounting values (Buchwertverknupfung), or they have newly valued (Neubewertung). According to Kulenkamp (2009)

The successor company has the possibility to choose up to the time of preparation of the first financial statement, in which acquired assets are recognized. Often, in practice, decisions on the choice of valuation are taken from the future capital structures, future earnings or the orientation of the future division of the company’s own capital. The obligation to give information on the valuation of assets and liabilities taken from merger companies in cross-border merger projects is considered as limiting the successor company’s choice to valuate. (p. 198)

Conclusions

If we have a common market, we should have a common set of rules to enable the realization of cross-border mergers without obstacles. The main principle of common market is to avoid obstacles. However, the reality differs from this statement. Transposition of the Tenth Directive into the national law of the EU member states caused the distortion of the main principle of common market. Transposed Directive did not allow cross-border mergers of companies between different Member States.

One way out of this difficult situation in cross-border mergers, would appear to be the gradual amendment of the current laws and regulations in the EU Member States. This would eliminate the above mentioned disharmonies. The amendment to the current Czech Act on Transformations could serve as an example. Amendment to the Czech Act on Transformations was published in the Act on Transformations No. 355/2011 Coll. A fundamental change was implementation the option of choosing the decisive date, so that it would either precede the preparation of the merger, or be connected with the legal effects of the merger. In practice, the flexibility of such a decisive date would basically allow for two alternatives (Skálová & Mejzlík, 2012):

1. Setting the decisive date in the past, i.e., the possibility of having a “fictitious accounting connection” of the merging companies prior to approval of the merger by the general meetings, or other bodies of the companies (such tradition was established in the Czech Republic in 2001);

2. Setting the decisive date to occur not later than the date of legal effects of the merger, i.e., “actual accounting connection”, only after the cessation of activities of the merging company, as well as signing over the assets to the successor company (such procedure was used in the Czech Republic until 2000). What is the main reason for proposing the flexibility option of the decisive date? The main reason lies in the feasibility of
cross-border mergers of Czech companies with foreign companies in all other EU countries.

If it is possible to determine the decisive date with retroactive effect (i.e., as the date preceding the preparation of the merger project, and the approval thereof), as well as with future effect (i.e., as the date following the preparation of the transformation project), it will thus allow mergers of Czech companies with companies subject to different legal regulation of the decisive date. Where a Czech company intends to merge with a German company, the decisive date must be determined prior to the preparation and approval of the merger project. However, where a Czech company intends to implement a merger with a Polish or Hungarian company, only the date of registration of the merger in the Commercial Register, i.e., the legal effects of the merger will be chosen as the decisive date.

The absence of harmonization of accounting aspects of mergers results in a situation where each state adopts its own “customized” regulation. This would not be wrong if it did not involve cross-border mergers, where mutual compatibility is necessary. As if the inconsistency of the Directive and its slow implementation in the Member States somehow imply that neither the states nor entities need such regulation, and that these are just sporadic transactions and not appropriate instruments for the international movement of capital.

Nevertheless, it could be argued that, what is needed is legislation that will allow and simplify acquisitions between companies established in different countries. It would be expected that it will take several years for the individual states to resolve inconsistencies and problems, to repeatedly amend the legal regulation and to adapt it to their possibilities and internal practices. Therefore, the amended regulations in Slovakia in 2010 and in the Czech Republic in 2011 are in line with this trend. The amendment to the current Czech Act on Transformations brought a positive change into the process of cross-border mergers in Europe.

Summary

The number of realized cross-border mergers in Europe is very low. Despite the fact that the Directive on cross-border mergers of limited liability companies (“Tenth Directive”) was issued in 2005 and the obligation of directive transposition was dated as 2007, the number of mergers has not been increased in last five years. Moreover, the Tenth Directive imposed the obligation on Member States to revise their legal systems in such a way as to facilitate the realization of cross-border mergers between Member States. The stumbling block is in the fact that each state adopts its own “customized” regulation which can hardly bring the harmonization of accounting aspects of mergers.

The article investigates empirical data concerning European cross-border mergers, detailed situation in the Czech Republic and brings criticism of the European Commission’s activity in this field. Using comparative analysis, the article further analyzes conditions in 10 selected European countries in which cross-border mergers are realized. The analysis of conditions brings answers to improve present situation.

Based on empirical data, this study suggests gradual amendment of the current laws and regulations in the EU Member States in order to introduce flexible option as for the decisive date. This would eliminate the above mentioned disharmonies and increase the number of cross-border mergers.

References

OBSTACLES TO EUROPEAN CROSS-BORDER MERGER REALIZATION


