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Edited by Dirk Van Gerven
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Cross-Border Mergers in Europe

This discussion of the Cross-border Merger Directive and its implementing legislation in each Member State of the European Union and the European Economic Area provides companies and their advisors with useful insight into the legal framework applicable to, and the tax treatment of, cross-border mergers throughout the European Economic Area. Analysis of the Community rules laid down in the Cross-border Merger Directive and the Community rules on the tax treatment of cross-border mergers is complemented by chapters on the implementing legislation in each Member State, prepared in accordance with a common format and contributed by a practitioner from each state. Annexes contain the Cross-border Merger Directive (Annex I), the Parent–Subsidiary Directive (Annex II) and a list of the implementing legislation in each Member State (Annex III).

DIRK VAN GERVEN is a partner in the Brussels office of NautaDutilh (a leading Benelux law firm) and a member of the Brussels and New York Bars. He has extensive experience in all areas of corporate and financial law, including securities regulation. Dirk is in charge of continuing legal education for the Dutch-speaking Bar Association of Brussels and has published widely in the fields of corporate and financial law. Since 2003, he has also been a member of the supervisory board of Belgium's Banking, Finance and Insurance Commission.

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Preface

The Cross-border Merger Directive is the next logical step in creating a unified European market within which companies based in the European Union will be able to do business across borders without restriction. Indeed, the Cross-border Merger Directive sets out procedural rules to permit and facilitate the merger of companies situated in different Member States of the European Union and the European Economic Area. It is a useful addition to the Third Council Directive (78/855/EEC) of 9 October 1978, which governs mergers of public limited liability companies situated in the same Member State.

The Cross-border Merger Directive defines the consequences of, and the procedure for, a cross-border merger. The main consequence is that all assets and liabilities of the acquired company are transferred by operation of law to the acquiring company. The Directive sets forth procedural rules for three types of mergers, i.e. the absorption of one or more companies into a surviving company, the merger of two of more companies into a newly formed company, and the merger of a wholly owned subsidiary into its parent company, for which a simplified procedure applies. With respect to procedural aspects, the Cross-border Merger Directive refers to a large extent to the Third Council Directive, which sets forth procedural rules for purely domestic mergers, i.e. between companies situated in the same Member State. Since the Third Council Directive has been implemented in all Member States, implementation of the Cross-border Merger Directive has been greatly facilitated.

It will be difficult to carry out a cross-border merger if the tax treatment of the merger is uncertain. In this respect, the Parent–Subsidiary Directive of 23 July 1990 on the common system of taxation applicable to mergers between parent companies and their subsidiaries in different Member States (as amended by Council Directive 2005/19/EC of 17 February 2005) provides for tax neutrality in the event of such a cross-border merger and is therefore a necessary complement to the Cross-border Merger Directive. Unfortunately, the application of this directive is limited to the European Union; in other words, it does not apply to the member countries of the European Economic Area (i.e. Norway, Liechtenstein and Iceland).

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The Cross-border Merger Directive is intended to allow small and medium-sized companies to engage in cross-border cooperation by merging to form a company governed by the national law of a particular Member State (i.e. a national corporate form). In the Community legislature's view, the cross-border merger is an alternative to the formation of a European company (SE), which is intended to be used by larger companies. The latter can merge by first setting up an SE, which by definition is subject to uniform rules throughout the European Economic Area, set forth in a regulation which is directly applicable in all Member States. Of course, the reality is often very different, and practice indicates that several SEs have been formed by small companies that wish to benefit from the SE's European aura, while large companies tend to avoid the SE due to the difficult and lengthy procedures with respect to employee information and participation. A cross-border merger carried out in accordance with the Cross-border Merger Directive need not comply with these procedures if employee participation does not exist in any of the participating companies.

A book providing a comprehensive analysis of the European legal framework on cross-border mergers and the implementing legislation in each Member State of the European Union and the European Economic Area is a useful tool for those seeking to foster cooperation between companies from different Member States. This book will also be helpful to their advisers involved in preparing a cross-border merger. There are two volumes. Part one of the first volume explains the Community rules laid down in the Cross-border Merger Directive and the European tax rules applicable to cross-border mergers. The second part focuses on the implementing legislation of the Cross-border Merger Directive in each Member State. Volume I contains reports from fourteen Member States. The remaining reports will be published in the second volume.

Finally, I would like to thank the contributors to this book, esteemed practitioners from law firms throughout Europe, all of whom are well positioned to discuss the rules applicable in their respective countries. My thanks also go out to those whose names are not mentioned in the reports but whose work was essential to the success of this project, namely Katherine Raab and Bianca Porcelli as well as many others at NautaDutilh.

Dirk Van Gerven
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