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.
Law Practitioner Series

The Law Practitioner Series offers practical guidance in corporate and commercial law for the practitioner. It offers high-quality comment and analysis rather than simply restating the legislation, providing a critical framework as well as exploring the fundamental concepts which shape the law. Books in the series cover carefully chosen subjects of direct relevance and use to the practitioner.

The series will appeal to experienced specialists in each field, but is also accessible to more junior practitioners looking to develop their understanding of particular fields of practice.

The Consultant Editors and Editorial Board have outstanding expertise in the UK corporate and commercial arena, ensuring academic rigour with a practical approach.

Consultant editors
Charles Allen-Jones, retired senior partner of Linklaters
Mr Justice David Richards, Judge of the High Court of Justice, Chancery Division

Editors
Chris Ashworth – Lovells LLP
Professor Eilis Ferran – University of Cambridge
Judith Hanratty – BP Corporate Lawyer, retired
Keith Hyman – Clifford Chance LLP
Keith Johnston – Addleshaw Goddard LLP
Vanessa Knapp – Freshfields Bruckhaus Deringer LLP
Charles Mayo – Simmons & Simmons
Gary Milner-Moore – Herbert Smith LLP
Andrew Peck – Linklaters LLP
Timothy Polglase – Allen & Overy LLP
Richard Snowden QC – Erskine Chambers
William Underhill – Slaughter & May
Dirk Van Gerven – NautaDutilh
Sandra Walker – Rio Tinto

Books in the series
Stamp Duty Land Tax
Michael Thomas; Consultant Editor David Goy QC

Accounting Principles for Lawyers
Peter Holgate

The European Company: Volume 1
General Editors: Dirk Van Gerven and Paul Storm

The European Company: Volume 2
General Editors: Dirk Van Gerven and Paul Storm

Capital Markets Law and Compliance: The Implications of MiFID
Paul Nelson

Reward Governance for Senior Executives
Edited by Carol Arrowsmith, Rupert McNeil

Prospectus for the Public Offering of Securities in Europe European and National Legislation in the Member States of the European Economic Area Volume 1.
General Editor: Dirk Van Gerven

Prospectus for the Public Offering of Securities in Europe: European and National Legislation in the Member States of the European Economic Area Volume 2.
General Editor: Dirk Van Gerven

Common Legal Framework for Takeover Bids in Europe: Volume 1
General Editor: Dirk Van Gerven

Accounting Principles for Non-Executive Directors
Peter A. Holgate and Elizabeth Buckley

The Law of Charitable Status
Robert Meakin

The Business Case for Corporate Governance
Ken Rushton

Cross-Border Mergers in Europe: Volume 1
Edited by Dirk Van Gerven
Cross-Border Mergers in Europe

VOLUME I

General Editor

DIRK VAN GERVEN
Contents

Contributors page viii
Preface ix
DIRK VAN GERVEN
NautaDutilh

Part I EC rules on cross-border mergers 1
1 Community rules applicable to cross-border mergers 3
DIRK VAN GERVEN
NautaDutilh

2 Employee participation: rights and obligations 29
PHILIPPE FRANÇOIS AND JULIEN HICK
NautaDutilh

3 Tax rules applicable to cross-border mergers 44
JAN WERBROUCK
NautaDutilh

4 Scope and limitations of the Cross-border Merger Directive 54
PAUL STORM
NautaDutilh

Part II Application in each Member State National reports for the EU Member States 79
5 Austria 81
GOTTFRIED GASSNER, ANDREAS HABLE AND HORST LUKANEC
Binder Grösswang Rechtsanwälte
Contents

6 Belgium 104
DIRK VAN GERVEN
NautaDutilh

7 Bulgaria 118
ANELIA TATAROVA, RAINA DIMITROVA AND
YORDAN NAYDENOV
Borislav Boyanov & Co.

8 Cyprus 133
ALEXANDROS TSADIRAS
LLPO Law Firm

9 Czech Republic 147
ADAM JIROUSEK AND JAN LASÁK
Kocián Šolc Balaštík

10 Denmark 169
VAGN THORUP AND JEPPE BUSKOV
Kromann Reumert

11 Estonia 184
AHTO NIRGI AND SVEN PAPP
Raidla Lejins & Norcous

12 Germany 197
ANDREAS WUESTHOFF
SJ Berwin LLP

13 Hungary 209
JACQUES DE SERVIGNY, DR ZSÓFIA FEKETE
AND SZABOLCS ERDŐS
Gide Loyrette Nouel

14 The Netherlands 226
PAUL VAN DER BIJL AND FRITS OLDENBURG
NautaDutilh

15 Poland 257
MICHAIŁ BARŁOWSKI
Wardynski & Partners

16 Slovak Republic 267
MICHÄELA JURKOVÁ
Čechová & Partners
<table>
<thead>
<tr>
<th></th>
<th>United Kingdom</th>
<th>288</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ian Snaith</td>
<td></td>
</tr>
<tr>
<td></td>
<td>University of Leicester and Cobbetts LLP</td>
<td></td>
</tr>
</tbody>
</table>

**Part III Application in the EEA Member States**  
303

<table>
<thead>
<tr>
<th></th>
<th>Norway</th>
<th>305</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Stig Berge and Herman Bonde son</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Thommessen</td>
<td></td>
</tr>
</tbody>
</table>

**Part IV Annexes**  
325

|---|---------------------------------------------------------------------------------------------------------------------------------|-----|

|   | List of national laws implementing the Cross-border Merger Directive | 346 |

**Index**  
349
Contributors

AUSTRIA
Gottfried Gassner
Andreas Hable
Horst Lukanec
Binder Grösswang Rechtsanwälte

BELGIUM
Dirk Van Gerven
Jan Werbrouck
Philippe François
Julien Hick
NautaDutilh

BULGARIA
Anelia Tatarova
Raina Dimitrova
Yordan Naydenov
Borislav Boyanov & Co.

CYPRUS
Alexandros Tsadiras
LLPO Law Firm

CZECH REPUBLIC
Adam Jirousek
Jan Lasák
Kocián Šolc Balaštík

DENMARK
Vagn Thorup
Jeppe Buskov
Kromann Reumert

ESTONIA
Ahto Nirgi

Sven Papp
Raidla Lejins & Norcous

GERMANY
Andreas Wuesthoff
SJ Berwin LLP

HUNGARY
Jacques de Servigny
Zsófia Fekete
Szabolcs Erdős
Gide Loyrette Nouel

THE NETHERLANDS
Paul van der Bijl
Frits Oldenburg
Paul Storm
NautaDutilh

POLAND
Michał Barlowski
Wardynski & Partners

SLOVAK REPUBLIC
Michaela Jurkova
Čechová & Partners

UNITED KINGDOM
Ian Snaith
University of Leicester and Cobbets LLP

NORWAY
Stig Berge, Herman Bondeson
Thommessen
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 or 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).
Preface

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
Brussels, 17 February 2009