Mergers & Acquisitions

Counseling and Choice of Method

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ENGLISH SUMMARY

The salient purpose of the present project is to raise an adviser's awareness of the relevant aspects of European federal legal provisions, which apply to the few chosen elements in the scope of this study. The same awareness is likewise desired from the participants in a takeover transaction facilitated by any of the four main methods of M&A. This study is focusing on the following: merger, division, transfer of business, and majority takeover. Adviser’s insight into interaction between applicable law, factual circumstances, and the courts’ ways of connecting those, based on case law, furnish him or her, and the participants alike with the ability to predict the outcome of an M&A transaction conducted through the method chosen.

The following elements are selected to be analyzed in this study: consideration, succession, taxes and fiscal neutrality, group-related issues, holding-structure issues, employees, stock exchange listing issues, and corporate nationality issues. These elements accompany M&A transactions whereby control over a business or a company, which is the target for acquisition, is transferred in the course of the operation.

M&A transactions are sufficiently defined otherwise, but in case it should be necessary to provide a short and overall definition of an M&A operation, encompassing all the four methods, it would be composed as follows: *An operation by which assets, or assets and financial liabilities combined, are transferred from a physical or legal person to a legal person whereas control over the transported assets and where applicable obligations for the liabilities is transferred.*

Chapter 1 of the study addresses the topic itself and the method applied to analyze the topic. Already at this early stage in the study some essential definitions of the four methods of M&A are presented for the purposes of a) indication of the area of focus and b) clarity in definition of the four methods. Furthermore, this chapter explains why the topic of M&A is relevant to address, and what urges companies to participate in takeover transactions.

Chapter 2 aims to explicate and elucidate an adviser’s *problem* when he or she is given the task to counsel legal entities in regards to choice of M&A method when the implicated parties consider transfer of control over either a business, part of a business, or a company as a whole from the owner to the acquirer.

Chapter 3 focuses on sources of law, which are relevant in the context of this study. European federal legislation comprising European primary law, European secondary law, and European case law are addressed in this chapter in accordance to their relevance with this study's focus: to analyze the four M&A methods in conjunction with some selected elements. National law is included here mainly in order to point out the extended influence of European federal law on the areas of legislation addressed in this study.

Moreover, acknowledging the importance of the Danish legal scholar – Alf Ross' teachings, this chapter includes his findings in respect to verification / falsification of *valid law*, which is analyzed in his prominent work: On Law and Justice / Om ret og retfærdighed. Despite the criticism that his work is facing in the legal literature, here, his findings are regarded to be essential for an adviser and his or her need to be able to predict valid law for the purposes of M&A.

Chapter 4 analyzes and synthesizes the four M&A methods in greater details. The importance of distinguishing between the methods is emphasized. Moreover, the notion that the question on choice of method must not be marginalized is underlined here.

For the purposes of this study, not all elements with relevance to M&A transactions are reviewed. Chapter 5 deals with the selected elements that reflect the focus of this study and are reported in the context of a takeover.

Chapter 6 combines the elements and the methods of M&A. In a non-sequential approach, the elements are analyzed in the scope of each method. I point out aspects that can be considered either benefits or drawbacks for the purposes of choosing a particular method.

In conclusion, chapter 7 discusses the adviser's choice; however, here the focus is aimed at the *solution* to his or her earlier indicated *problem*. The adviser is reminded of the paramount responsibility attached to his or her assignment, the importance of understanding the valid law, and the ability to navigate between national law of the EU member states and European federal law respectively.

Here, the intersection between a) the M&A methods and b) the elements is in focus. The chapter attempts to provide answers as to under what circumstances which method of M&A should be rejected and which method of M&A should be applied for a given transaction.

DANSK RESUME

Afhandlingen analyserer de elementer og hensyn, der bør indgå i rådgiverens bevidsthed ved rådgivning om, hvilken metode der bør vælges af klienten ved M&A, dvs. i hvilket omfang der bør anvendes fusion, spaltning, majoritetsovertagelse eller virksomhedsovertagelse som juridisk instrument til overtagelsen.

Betalingsformen, successionsspørgsmål, beskatning hhv. skatteneutralitet, koncernrelaterede spørgsmål, holdingselskabsrelaterede spørgsmål, medarbejderes retsstilling, særlige hensyn ved børsnoterede selskaber samt nationale tilknytningsspørgsmål er de elementer, der er udvalgt til nærmere analyse i denne undersøgelse. Overvejelse af disse elementer bør ledsage M&A-transaktioner, hvorved kontrol over en virksomhed eller et selskab, som er målet for overtagelse, overdrages ved transaktionen.

Kapitel 1 omhandler emnevalg og -afgrænsning samt, den anvendte metode ved behandlingen af afhandlingens emne. Allerede på dette tidlige tidspunkt i afhandlingen bliver nogle væsentlige definitioner af de fire M&A-metoder præsenteret med henblik på 1) angivelse af fokus for afhandlingens undersøgelse og 2) klarhed omkring definitionen af de fire metoder. Desuden forklares det i dette kapitel, hvorfor M&A-emnet er relevant, og hvad der tilskynder selskaber til at købe og sælge virksomheder og selskaber ved at overdrage eller erhverve kontrol over dem.

Kapitel 2 har til formål at forklare og belyse en rådgivers opgaver og valgmuligheder, når han eller hun får til opgave at rådgive juridiske personer med hensyn til valg af overdragelsesmetode.

Kapitel 3 fokuserer på retskilder, der er relevante for denne afhandling. Eftersom denne afhandling søger at analysere de valgte elementer i forbindelse med de fire hovedovertagelsesmetoder i lyset af fælleseuropæiske regler, er fokus i dette kapitel rettet mod primær EU-ret (Traktaten), sekundær EU-ret (direktiver mv.) samt europæisk retspraksis. National lovgivning er her medtaget først og fremmest for at påpege og illustrere den udvidede indflydelse, som den europæiske 'føderale' lovgivning har på de her behandlede områder. Fremstillingen vedkender sig sin gæld til den danske retslærde Alf Ross (On Law and Justice, Om ret og retfærdighed) og hans verifikation/falsifikation af 'gældende ret' samt hans prognoseteori, som – trods efterfølgende kritik i litteraturen – fremstår som både rammende og essentiel for rådgiveren og dennes behov for at kunne prognosticere ’gældende ret’ på M&A-området.

Kapitel 4 vender tilbage til de fire M&A-metoder, idet disse analyseres nærmere, ligesom vigtigheden af at sondre mellem de forskellige metoder – samt vigtigheden af, at metodevalget ikke på forhånd tages for givet - fremhæves.

Kapitel 5 omhandler de valgte elementer, som bliver nærmere undersøgt i afhandlingen i lyset af europæisk ’føderal’ lovgivning og i forbindelse med de fire overtagelsesmetoder. De udvalgte elementer er inddraget på grund af deres hyppige, for nogles vedkommende endog uundgåelige, forekomst i forbindelse med overdragelsestransaktioner.

Kapitel 6 sammenkobler herefter (A) de fire overdragelsesmetoder med (B) de udvalgte elementer/hensyn. Idet fremstillingen søger at undgå en rent ’skematisk’ fremstillingsform og i stedet betjener sig af en sprogligt flydende gennemgang af spørgsmålene, analyseres elementerne, deres forekomst og deres konsekvens ved hver enkelt af de fire M&A-metoder.

Kapitel 7 vender afslutningsvis tilbage til rådgiverens valg. Nu er søgelyset rettet mod skæringspunkterne mellem (A) metoder og (B) elementer/hensyn, således at kapitlet i vidt omfang fremstår som forsøg på at give svar på, hvornår hvilken metode bør foretrækkes hhv. forkastes til en konkret M&A.

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August 2015

Alex Fomcenco

ABBREVIATIONS

ABL	Aktieavancebeskatningsloven / Danish Capital Gains Tax Act
APA	Asset Purchase Agreement
Art.	Article
BAG	Bundesarbeitsgericht / German Federal Labor Court
Cal.	California
CBCA	Canada Business Corporations Act
Cf.	Compare (Latin: confer)
CFC	Captive Financial Company
CIC	Captive Insurance Company
COM	Communication
Del.	Delaware
DTC	Double Taxation Convention
e.c.	By contrast (Latin: e contrario)
e.g.	For example (Latin: exemplum gratium)
EBLR	European Business Law Review
EC	European Community
ECJ	The Court of Justice of the European Union
ECL	European Company Law
EEA	European Economic Area (EU, Norway, Iceland, and Liechtenstein)

EFTA	European Free Trade Association (Norway, Iceland, Lichtenstein, and Switzerland)
ERT	Europarättslig Tidskrift (Swedish)
et seq.	And the following (Latin: et sequens)
EU	The European Union
ff.	Following pages
FUSL	Fusionsskatteloven / Danish Merger Taxation Act
FVL	Lov om finansiel virksomhed / Danish Financial Business Act
H	Supreme Court judgment or order
i.e.	That is / meaning that (Latin: id est)
IAS	International Accounting Standard
Ibid.	From the same place (Latin: ibidem)
IFRS	International Financial Reporting Standard
Inc.	Incorporated
LL	Ligningsloven / Danish Tax Assessment Act
Ltd.	Limited
N.Y.	New York
OECD	The Organization for Economic Cooperation and Development
para	Paragraph
RPL	Retsplejeloven / Danish Administration of Justice Act
SE	European Company (Latin: Societas Europaea)
Sec.	Section
SEL	Selskabsskatteloven / Danish Companies Tax Act

SL	Selskabsloven / Danish Companies Act
SPA	Share Purchase Agreement
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
TfS	Tidsskrift for Skatter og afgifter (Danish) / Tax and Duties Journal
UfR	Ugeskrift for retsvæsen (Danish) / Weekly law reports
V	High Court decision (Danish) / V signifies “Western Division”
v.	Versus
Vol.	Volume
ZIP	Zeitschrift für Wirtschaftsrecht
Ø	High Court decision (Danish) / Ø signifies “Eastern Division”

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PROLOGUE

“It was well past midnight in Lower Manhattan. In an office suite high above the narrow moonlit streets, a custodian was powering up his vacuum cleaner. Looking up from the roaring machine, he gave the worn handle a sharp tug and moved toward the deserted lobby, heading for the elegant Persian carpet that graced the floor of the walnut-panelled board room. Light spilled into the corridor as he slid the whirring Hoover through the open doorway. Someone was there. A weary but determined young associate sat alone, hunched over the conference table. He was surrounded by dog-eared papers, half-eaten sandwiches, and empty cans of diet soda.

"And what is keeping you here so late tonight?" the custodian asked.

The associate started, but turned back quickly to the jumble of papers at his elbows before grunting out an answer. "It's what keeps everyone on this floor working, obviously," he said. "M & A."

"Ah ..." nodded the custodian, his sights now fixed firmly on a stubborn clump of fluff near the leg of the table. "M and A: Money, and Ambition."[*]

Money and ambition are often associated with M&A. Sometimes even linking them to the very reasons behind acquisition transactions. In spite of M&A operations frequently being accompanied by poor post-acquisition implementation results and subsequently grave losses of all sorts, the transactions without doubt play an important part in corporate life domestically as well as internationally.

[*] Christopher C. Nicholls, Mergers, Acquisitions, and Other Changes of Corporate Control. Toronto: Irwin Law, 2007.

In his letter to shareholders of March 1, 1993 Warren Buffett, the investment guru, said: “I've observed that many acquisition-hungry managers were apparently mesmerized by their childhood reading of the story about the frog-kissing princess. Remembering her success, they pay dearly for the right to kiss corporate toads, expecting wondrous transfigurations. Initially, disappointing results only deepen their desire to round up new toads. ("Fanaticism," said Santyana, "consists of redoubling your effort when you've forgotten your aim.") Ultimately, even the most optimistic manager must face reality. Standing knee-deep in unresponsive toads, he then announces an enormous "restructuring" charge. In this corporate equivalent of a Head Start program, the CEO receives the education but the stockholders pay the tuition.”

This study, however, is not about clarification of the reasons that urge for M&A operations, nor is it about judging the results of the transactions. This study is about synthesizing, on the one hand, the methods of M&A, and, on the other hand, several selected key elements, which any participating party, as well as their respective advisers, must be aware of, prior, throughout, and after the transaction: consideration, succession, taxes and fiscal neutrality, group-related issues, holding-structure issues, employees, stock exchange listing issues, and corporate nationality.

CHAPTER 1. TOPIC AND METHOD

This dissertation is a legal dogmatic thesis, the goal of which is to describe and analyze the current state of law in Europe in regard to some reality-relevant selected topics related to mergers and acquisitions, and the adviser's counsel in this regard.

No attempt is made to establish a new theory or hypothesis or put forward an existing theory or hypothesis as a premise to be maintained or proved.

With a legal pragmatic starting point, I have applied customary legal method when addressing relevant written and applicable sources of law.

When addressing the core questions in the present dissertation I apply the European *federal* legal platform, which finds its origins in the Treaty on European Union,[1] TEU, and the Treaty on the Functioning of the European Union, TFEU. Along with the Treaties this legal platform consists of directives and regulations, and decisions and judgments passed by the European Court of Justice, ECJ, hence, creating precedence in interpretation and application of the common European law applicable throughout the EU and EEA.

Having regard to the topic of the dissertation the focus is aimed and maintained on application and functioning of provisions of European federal corporate law and internationally accepted principles of the law of obligations.

1.1. TOPIC

There, naturally, would not be one absolute answer to the question on what M&A method should be chosen when participants in a business set-up, discussing a possibly approaching acquisition, are presented with the four methods: the method

[1] Cf. TEU art. 1 "The Union shall replace and succeed the European Community." On company law within the framework of the Treaty establishing the European Community see Gert-Jan Vossestein, Modernization of European Company Law and Corporate Governance, Wolters Kluwer, 2010.

of merger, the method of division, the method of business transfer, and the method of majority takeover.

Each one of the four methods respectively represents an equally good alternative in answering the following question: How can company A take control over company B.

Although, it is undoubtedly four very different sets of rules that are attached to the four methods, in the course of a takeover operation the participants are to consider the same milestone-questions, which in the context of the present study are named *the elements.*

The choice of the *correct* method will depend on *i.e.,* the factual circumstances the participants find themselves in, the results they wish to achieve, and how they answer the milestone-questions.

Notwithstanding the similarities that are often observed in numerous scenarios where a question of acquisition actualizes, one must remember that one cannot find two completely identical situations.

Therefore, the adviser’s starting point should always be based upon the general principles of each method.

The good adviser will be able to connect the particularities of the factual circumstances with the intended outcome through a method chosen to proceed by.

Some topical demarcations

In the context of this study only the four main methods of M&A are addressed cf. definitions in the present chapter and in Chapter 4 below. Hence, a transaction whereby a privately owned business is transferred to or acquired by a legal entity falls outside of the scope of this study. Likewise, a transaction whereby a legal entity of one type is converted into a legal entity of a different type falls outside of the scope of this study. Finally, an operation whereby a delimited volume of assets and possibly liabilities are injected by two or more legal entities into a corporate legal framework of another legal entity for the purpose of encompassment of the transferred assets and liabilities falls outside of the scope of this study.

1.2. METHOD

Dogmatic Method – Describes, Analyzes, and Interprets.

The method applied to the works conducted in connection to the composition of the present dissertation is the dogmatic legal method. The main goal under the application of the dogmatic method is to describe, analyze, and interpret some specifically isolated matters under application of valid law hereunder engaging relevant and applicable legal provisions (laws and regulations) and relevant case law.

Application of *valid law*

In his prominent and greatly celebrated *On Law and Justice,*[2] originally published in Danish under the title of *Om ret og retfærdighed,* Alf Ross has worked with the concept of *valid law*.

In his preliminary analysis of the concept, the author considers actions of humans in a societal set-up and what those actions and behaviors are regulated by. "Human social life in a community is not a chaos of mutually isolated individual actions. It acquires the character of community life from the very fact that a large number (not all) of individual actions are relevant and have significance in relation to a set of common conceptions of rules. They constitute a significant whole, bearing the same relation to one another as move and countermove. Here, too, there is mutual interplay, motivated by and acquiring its significance from the common rules of the social "game." And it is the consciousness of these rules which makes it possible to understand and in some measure to predict the course of events."[3] The question is: how is it possible to establish which rules are governing that social game to which we all are participants. Answering this question will lead to the definition of *valid law*. In pursuit of the answer Ross rejects the behaviorist angle as self-limiting to external observations and the subsequent establishment of certain regularities. The contrary direction is appointed: adoption and application of the introspective method.[4] Hence, "the concept of validity … involves two elements. The one refers

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[2] Alf Ross, On Law and Justice, University of California Press, Berkeley & Los Angeles, 1959.

[3] Ibid. p. 14.

[4] Ibid. p. 15.

to the actual effectiveness of the rule which can be established by outside observation. The other refers to the way in which the rule is felt to be motivating, that is, socially binding."[5] We observe here a clear correlation between, on the one hand, the norms that govern actions between individuals (we observe them and acknowledge their existence), and, on the other hand, how these norms become motivating on the societal level, *i.e.,* why do they become widely accepted and followed. Combined together ""valid law" means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed because they are experienced and felt to be socially binding."[6]

The original draft of Ross´ study, as mentioned earlier, was concluded in Danish. Subsequently, it was translated into English under the author's close supervision. I believe that it is no coincidence that the term *valid law* was chosen even though the term *applicable law* at first glance would seem to be more appropriate. I am convinced that under application of the term *valid law* Ross elevates its status above *applicable law.* Applicable law in my understanding, is a set of rules *i.e., ius,* that may fit onto *facto* of a particular situation. However, the applicable law becomes valid law when it is utilized by the courts in accordance to its purpose established by the legislator. This leads to the answer of Ross' question: which rules govern that social game to which we all are participants? It is not merely the rules of applicable law but rather the rules of applicable law, which is being applied.

Relevant legal provisions

Legal provisions (laws and regulations) that are relevant to the topic of mergers and acquisitions, M&A, which I intend to engage in this dissertation must be considered a set of norms that are enacted by the legislator and which combined together constitute coherent body of law.

Relevant case law

The relevant case law that is included in the dissertation serves the purpose of establishment and emphasis on how the law is to be interpreted and applied in real-life situations.

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[5] Alf Ross, On Law and Justice, University of California Press, Berkeley & Los Angeles, 1959, p. 16.

[6] Ibid. p. 18.

Matters of interpretation of European legal provisions were originally intended to be the prerogative of the European Commission. With time, it appeared to be clear that the Commission was not able to expedite the great amounts of questions on interpretation of European legislation that were directed towards the Commission in an acceptable time manner. This led to an acknowledgment that the burden must be shared. Now, the European Court of Justice, ECJ, undertakes this task through its preliminary rulings on interpretation of European federal legislation, hence, offering *inter alia* efficient process and conformity of understanding and application of European provisions throughout the EU and EEA.

The objective of this study

The main objectives, pursued in this dissertation under application of the dogmatic legal method are: a) to describe the available methods of takeover within the federal European corporate framework under reference to the European legislation; b) analyze and synthesize the connection present between European law, the takeover methods offered there-through, and their reflection in corporate reality; c) analytically interpret the presence, interaction, and influence of the legislative provisions, available methods of takeover, and participants' considerations in the choice of an M&A method.

I will attempt to do so based on the views of legal positivism philosophy. "The term "positivism" is ambiguous. It can mean both "what builds on experience" and "what is formally established.""[7] This dissertation will, however, focus on the latter – formally established set of rules.

For the purpose of maintenance of clarity it must be mentioned that the present document is interchangeably referred to as *dissertation, project, study* or *thesis,* however, with no purpose of attaching substantive effect thereto. Moreover, the words *corporation* and *company* are applied interchangeably, however, they, at all times, imply reference to a *limited liability company* the capital of which is divided into shares.

[7] Alf Ross, On Law and Justice, University of California Press, Berkeley & Los Angeles, 1959, p. 100.

1.3. SOME DEFINITIONS

Under application of the method stated right above the dissertation applies the definitions of M&A methods that seem appropriate to introduce already at this point, notwithstanding that they will be addressed in greater detail later in the study. Thus, the definitions of the four methods of M&A provided below should be read and applied in conjunction with the material of Chapter 4: *Methods of M&A.*

1.3.1. MERGER

In European legal conscience, merger implies an operation whereby a company, without going into *liquidation* ceases to exist and transfers *all* its assets and liabilities to another company. In return, the shareholders of the former company as a *consideration* receive shares in the latter company cf. definitions in Directive 2011/35/EU and Directive 2005/56/EC.

The emphasis is aimed at 1) liquidation, 2) all assets and liabilities, and 3) the consideration.

1) Cessation of existence in regular corporate terms would imply liquidation. If a company is declared bankrupt, for example, it will be liquidated and will cease to exist, as soon as its remaining assets are distributed to creditors, debenture holders, shareholders, holders of other securities, etc. However, in the definition of the method of merger the legislator permits cessation of existence without formal liquidation and thereto-attached distribution of assets in accordance to the financial claims creditors (and others) may have against the company in question. Why is that? The answer to this question is closely connected to the next point in respect to all assets and liabilities.

2) For a transaction to be regarded as a merger, it is an essential prerequisite that the ceasing-to-exist company transfers all its assets and liabilities to the acquiring or continuing company. If a company is liquidated, a creditor that did not get his financial claim satisfied prior to liquidation loses his possibility to do so simply because the debtor entity does not exist anymore.

As a main rule,[8] he has no option of redirecting his claim against anybody else (management, shareholders, etc.). This is the core value of the principle of incorporation;[9] a company, due to its acquired legal personality and its capacities is its own person with own rights and obligations. "Legal personality is deemed to exist when property is separated from its owner/s in such manner that it has acquired its own legal capacity, capacity to make contracts and accomplish other legal acts ('contractual capacity'), capacity to be a party in legal proceedings in its own right, and 'procedural capacity'."[10]
When existence of a company is terminated, even though in terms of law of obligations the claims against the company are still valid, they are worthless, as options for their satisfaction ceased to exist together with the debtor entity.
A merger creates a legal dimension whereby claims against the company that ceases to exist do not fall due and can to the same extent and under the same conditions be directed against the acquiring company. This is the essence of succession, which in much greater detail will be addressed later.

3) It is a law-bound requirement that a consideration offered to the shareholders that sell their company, and thereby transfer control over it to the acquiring company, are satisfied by a consideration in shares in the latter company. The relevant directives suggest a 90 % consideration in shares but allow the member states implementing the directives' principles to establish own thresholds for the consideration in shares and the consideration in cash respectively.
Noteworthy is the element of share consideration regardless of its percentage of the consideration as a whole. The buyer must be a legal entity – a share capital company, which issues own shares to form the consideration to the shareholders of the acquired company.

[8] "Piercing the corporate veil" is the exception to the main rule. Further and in greater details on this question Karen Vandekerckhove, Piercing the Corporate Veil, Wolter Kluwer, 2007.

[9] Cf. Salomon v. Salomon & Co., (1897 A.C. 22, (1895-1899) All E.R. Rep. 33.

[10] Erik Werlauff, EU Company Law – Common business law of 28 states, 2nd ed., DJØF Publishing, 2003, p. 1.

A *narrow* definition and a *broad* definition of *merger*

The method of merger has two types of definition: a *narrow* definition and a *broad* definition. [11]

The *narrow definition*, as addressed right above, originates from corporate law. It entails that following the transaction only one of the merger participating companies maintains its existence. A merger can be conducted as either *irregular i.e.,* by absorption of one company by the other, - the continuing company or, alternatively by a *regular* merger where two or more participating companies are combined together into one newly formed company that replaces them all.

The *broad definition*, however, consists of several perspectives that correspond to earlier mentioned legal areas that combined together constitute M&A law.[12]

Colloquially, when people refer to a merger, they apply the broadest possible definition implying that a merger entails a business, a legal entity, or a group of companies taking control over another business, another legal entity, or another group of companies. By a general public, not much thought is offered to legal procedural and legal structural consequences of a merger: Does it imply that a company ceased to exist? Does it imply that a whole new company is incorporated in order to facilitate the transfer? Does it imply that a group of companies is created or liquidated following the operation? etc.

Tax law offers its own definition of the method of merger, which is broader than the corporate law definition. Merger Taxation Directive 2009/133/EC,[13] defining a takeover for tax purposes, comprises *merger* as defined by corporate law, *division* whereby a company on being dissolved without going into liquidation transfers all its assets and liabilities to two or more existing or newly formed companies, *transfer of business*[14] as an operation whereby a company without being dissolved transfers all, or one or more branches of its activity to another company, and

[11] Erik Werlauff, EU Company Law – Common business law of 28 states, 2nd ed., DJØF Publishing, 2003, p. 565 ff.

[12] M&A law is an independently standing discipline, even thought it is governed by loosely related collection of rules and legal principles, laws and provisions, drawn mainly from corporate law, the law on securities, tax law, anti-trust law, and labor law.

[13] The original Merger Taxation Directive 90/434/EEC has been substantially amended several times since its codification. It is now replaced by Directive 2009/133/EC.

[14] Directive 2009/133/EC refers to it as ”transfer of assets”.

majority takeover[15] as an operation whereby a company acquires majority of the voting rights in the target company.

For *anti-trust law* purposes aiming against preclusion of competition within the Community, Merger Regulation – Council Regulation (EC) 139/2004 has been enacted. The regulation introduces the concept of "concentration", which is defined as follows: [my *italics*]

> "1. A concentration shall be deemed to arise where a *change of control on a lasting basis* results from:
>
> (a) the merger of two or more previously independent undertakings or parts of undertakings, or
>
> (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
>
> 2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
>
> (a) ownership or the right to use all or part of the assets of an undertaking;
>
> (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.
>
> 3. Control is acquired by persons or undertakings which:
>
> (a) are holders of the rights or entitled to rights under the contracts concerned; or
>
> (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

[15] Directive 2009/133/EC refers to it as "exchange of shares".

> 4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."[16]

Change of control on a lasting basis seems to be the yardstick applied by the legislator in the provisions of the regulation. And as far as the M&A methods concerned there is always an element of permanent, *i.e.,* on the lasting basis, change of control.

1.3.2. DIVISION

The method of division exists to facilitate split of a company into business units: sections or departments. These sections or departments, each being a business unit, can immediately after the division either be transported into possession of existing corporations, or become independent legal entities; they acquire own legal personality.

In some occasions, at a later point in time these new legal entities are meant to be sold. In some other occasions, they are not meant to be sold at all, but merely obtain legal personality and, hence, arm-length relationship to their owner, *e.g.,* a holding company.

Where the corporate laws facilitate it, a *partial division* can take place. In terms of a complete division the corporation, which is being divided, ceases to exist after transferring all its assets and liabilities to either already existing or newly formed acquiring companies cf. above; in case of partial division, the corporation which is being divided does not transfer all its assets and liabilities and, thus, continues to exist. Hence, it is merely being slenderized.

In European federal law the method of division is facilitated by Directive 82/891/EEC on division of public limited liability companies. The operation of division by acquisition is defined by the directive as follows:

> ""division by acquisition" shall mean the operation whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the

[16] Merger Regulation – Council Regulation (EC) 139/2004 art. 3.

> allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division…”[17]

1.3.3. TRANSFER OF BUSINESS

Transfer of business is one of the four main methods of M&A. Contrary to the methods of division and merger, transfer of business is not regulated by a directive solely designated to that purpose. For corporate purposes, it is governed by the law of obligations and property law. European federal law does not ignore it entirely. Although, it does not address it from a corporate point of view. Merger Taxation Directive 2009/133/EC treats transfer of business as an M&A method on the same footing as the other methods. The directive refers to it as *transfer of assets* and defines it as follows:

> “’transfer of assets’ means an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer."[18]

Transfer of assets, obviously, does not reflect a regular sale of (unrelated) items, but coherently linked assets that together constitute a branch of activity, - the term that the directive defines as follows:

> “’branch of activity’ means all the assets and liabilities of a division of a company which from an organizational point of view constitute an independent business, that is to say an entity capable of functioning by its own means.”[19]

In the transfer of business context the company that transfers a branch of activity is the seller, hence also the receiver of consideration. The purchaser of the branch of activity in question must be a company and not a physical person cf. the directives provision on what consideration may consist of: “securities representing the capital of the company receiving the transfer”.

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[17] Directive 82/891/EEC, art. 2 (1).

[18] Merger Taxation Directive 2009/133/EC art. 2 (d).

[19] Ibid. art. 2 (j).

A similar transfer of a branch of activity was also observed in respect to the method of (partial) division. Notwithstanding this similarity, transfer of business is an entirely different approach. Through transfer of business, the value of the transferred branch of activity is replaced by a consideration of a corresponding value. No reduction of the transferring company occurs, as the seller is the company itself and, hence, also the receiver of the consideration. In regard to division, the sellers are the shareholders. They are the receivers of the consideration. Hence, the branch of activity transferred through the method of division is not replaced by any corresponding values. Thus, the transferring company shrinks to the new reduced volume.

1.3.4. MAJORITY TAKEOVER

The method of majority takeover, like the method of business transfer, is not regulated by a specifically designated directive. Transfer of shares in the course of the method of majority takeover is mainly regulated by the contract between the participating parties with reflections to principles of free movement of capital, which is one of the cornerstones of the single and coherent market within the European community.[20] Moreover, the method involves, including, but not limited to, the law on securities, the law of capital markets, regulations in connection to takeover bids,[21]and tax law.[22]

A definition of the method is sufficiently offered by Merger Taxation Directive 2009/133/EC and reads as follows:

> “’exchange of shares’ means an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company.” [23]

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[20] TFEU art. 63 : ”all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited”.

[21] Directive 2004/25/EC on takeover bids.

[22] Merger Taxation Directive 2009/133/EC.

[23]Ibid. art. 2 (e).

The object of the transfer here is clearly stated in the provision: securities of the target company. However, it does not apply to any random type of share transfer, but transfer of an amount and categories of shares that constitute majority of the voting rights in the hands of the acquirer, hence, attributing him control over the target company. The seller(s) is/are the shareholder(s) in the target. They are also the receivers of the consideration that must consist of shares representing the capital in the acquiring company. Thus, the acquirer cannot be a physical person, but another capital company.

Even though for corporate purposes we call this method *majority takeover,* for fiscal purposes it is referred to as *exchange of shares* that occur between the shareholders of the target company, on the one hand, and the acquiring company on the other hand. Hence, no corporate structural amendments take place neither for the target company nor for the acquiring company.

1.4. RELEVANCE OF M&A

Growth

No matter from what point of view you behold a corporation and it's activities, you cannot avoid noticing that growth and expansion are somehow always in the picture. Size of the corporations does matter. The size of the equity of the corporation matters because it gives bargaining and negotiation gravity when the corporation does business. Moreover, it gives the feeling of security and stability to the shareholders, especially minority shareholders as well as those of them that are not supporters of risk.

The size of the corporation in terms of covering large and perhaps different markets matters because it spreads risk, creates a feeling of stability, and presents itself as a stable and firm anchored business. Larger corporations enjoy benefits over their smaller rivals, because they can achieve economies of greater scale. They can afford investing in development and research and, therefore, possess a continuous advantage of improvement and innovation. They would know the importance of branding and what is even more important, they are in possession of sufficient resources to pursue branding of their products and activities.

In spite of a corporation often being compared to a physical person in regard to what it can do due to its legal personality and the four capacities,[24] there is an undeniable difference in terms of growth. Whereas humans by nature itself are predestined to grow, the situation is different when it comes to corporations. They don't grow because it is inclined by nature; they grow because the management sees the importance of growth and pursue it with the available means.

The need of continuous adjustment and growth is essential to companies' existence and can dramatically be summed up to "grow or die" mindset.

Corporate growth can unfold in two different ways: organic or natural, and through mergers or acquisitions, or with other words M&A. It has no difference whether corporations grow naturally or through M&A: they will enjoy the benefits and advantages of their size and thence resulting influence.

Natural growth entails sometimes slow and gradual process of internal development, where a corporation finds its origins on a lower stair treads and grows larger and stronger as the time goes.

Growth through M&A is an entirely different process with quite different tempo and consequences. It happens faster than the natural growth. It allows companies to expand and find themselves on new, different, and even foreign markets and, hence, acquire new areas of control etc. much faster than if all that should be achieved through organic or natural growth.

Corporate expansions through M&A

Please allow me to mention some common expressions applied to describe corporate expansions through M&A. *Vertical takeover:* a company acquires another company in a production chain or in a supply chain.[25] *Conglomerate takeover:* a company acquires control over another company whose core business activities are

[24] Alex Fomcenco & Erik Werlauff, Business Law, Europe, 2014; also Erik Werlauff, Selskabsret, 9th edition, Karnov Group, 2013.

[25] *DONG's* acquisition of *Naturgas* is a renowned Danish example. 2012 *Boeing* acquisition of *Miro Technologies* in order to enhance logistics support services, or *Boeing's* decision to bring production of the *787 Dreamliner* in-house after costly delays at its suppliers.

different from those of the acquiring company.[26] *Horizontal takeover:* a company acquires another company, which operates on the same market, offers the same products, or otherwise competes with the acquiring company.[27]

It is worthwhile mentioning that considerations on (substantial) growth through M&A must be accompanied by considerations on competition or rather potential restrictions of competition on the market.

Internal market with free movement of goods, persons, services, and capital is the cornerstone of the European Union.[28] Proper functioning of the internal market is conditioned by free and unobstructed competition. Improving the production or distribution of goods, promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit are the central objectives of competition. The importance of this is obvious, and it is also emphasized in the Treaty on the Functioning of the European Union, TFEU.[29] [30]

When a large corporation participates in a takeover, one of the initial questions that must be asked prior to any substantial work that accompanies the process is initiated is: whether the legal entity that will emerge after the takeover[31] can

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[26] As a Danish example for a conglomerate takeover *BIVA's* acquisition of *tæppeland* in 2011 can be mentioned. A renowned international example is a 2014 acquisition of *Beats Music and Beats Electronics*, which makes the popular *Beats* headphones, speakers, and audio software by *Apple.*

[27] 2008 acquisition of *ILVA* by *IDdesign* can serve as example from the Danish M&A market. In 2014 *Burger King* announced acquisition of *Tim Hortons* in $12.5-billion deal.

[28] TFEU art. 26

[29] TFEU art. 101 prohibits cooperation between enterprises that may affect trade between the member states imposing prevention, restriction, or distortion of competition within the common market. This includes cartels, secret agreements on for example price-fixing, market sharing etc.

TFEU art. 102 addresses abuse of a dominant position within the internal market of the European Community.

[30] Alex Fomcenco & Erik Werlauff, Business Law, Europe, Werlauff Publishing, 2014.

[31] Questions on potential prevention, restriction, or distortion of competition do not arise only in the wake of a takeover, but also in matters of cooperation between companies within a corporate framework of a joint-venture or a Special Purpose Vehicle, SPV. See Alex Fomcenco, "The Special Purpose Vehicle: A 'Micro Merger' or Merely a Way of Cooperation?" European Company Law, February 2013, volume 10, issue 1; and Karsten Engsig Sørensen, "Joint Ventures: struktur og regulering", DJØF, 2006.

potentially impose restrictions on competition.[32] Obviously, the size of the corporation and market share thresholds imposed by the legislation[33] must be observed; in the same manner, timing and existence of other substantially large competitors on the market whose presence can contribute to balanced competition are important to remember.

For example, in the beginning of 2015 a US$ 6.3 billion agreement was reached between America's two largest retailers of office equipment *Staples* and *Office Depot*, with Staples being the buyer. This was not the first attempt to amalgamate these two corporations. They tried to merge already in 1997, but the transaction never materialized due to US anti-trust regulations executed by Federal Trade Commission, FTC. Some might say, that with market presence of Walmart, Amazon, Target, etc. today the competition in the industry increased and the fear that an amalgamated *Staples* and *Office Depot* corporation would hamper or impede competition subsided. But at the end of the day the decision to either permit the merger or not lays in the hands of the Federal Trade Commission. And if the decision will be in the negative, all the work that the corporations in question had invested into the project preparing for the merger will go to waste.

1.5. LEGAL BACKGROUND OF TAKEOVER TRANSACTIONS

Neither in common law legal system, nor in civil law legal system one can find a complete *Act* that regulates the process of methods of acquisition, M&A, and at the same time addresses the numerous *other* questions and issues that are not process-related but yet arise from a situation where company A merges with company B, or where company C acquires company D.

These *other* questions can be triggered by corporate planning considerations, financial reflections and regards, and also a wide array of legal requirements that

[32] In continental Europe this area of law is referred to as Competition Law, whereas in North America the term ”anti-trust law” is applied. The term ”anti-trust” appear confusing, but it follows its historic origins and stems from 19th century, where “monopoly” and “trust” had almost identical meaning.

[33] TFEU art 101 & 102; Council regulation 139/2004/EC on concentration between enterprises (Merger Control Regulation); Commission Consolidated Jurisdictional Notice 2008/C 95/01, which purpose is to contribute to understanding of the principles, approaches, and aims of the regulation 139/2004/EC.

arise from M&A-relevant laws and provisions[34]. These legal requirements concern questions on taxation, protection of minority shareholders, protection of rights of employees, prevention of monopoly establishments *i.e.*, the so-called anti-competition or anti-trust laws. Emergence of some legal requirements and provisions can even be promoted by nationalists who wary about the waning domestic control over key industries of a country[35] etc.

This, however, does not imply that M&A law is not an independently standing discipline, even though it is governed by loosely related collection of rules and legal principles, laws and provisions, drawn mainly from corporate law, the law on securities, tax law, anti-trust provisions, and labor law.

It rests on the shoulders of the participating parties and their advisors to comply with the existing relevant provisions and requirements.

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[34] Volkswagen case, C-112/05, where German legislation based restrictions were found incompatible with Community law and, thus, illegal. The judgment differentiates between on the one hand takeover shields established due to legislation on the matter and on the other hand takeover shields that are established in the statute of the company on the basis of an agreement between the shareholders. The latter are not considered to be in violation of Community law as they are private agreements that easily can be amended.

Lawfulness of safeguards against takeover under company law in great detail is dealt with by Erik Werlauff in ”Safeguards against Takeover after Volkswagen - On the Lawfulness of such Safeguards under Company Law after the European Court's Decision in "Volkswagen", European Business Law Review (EBLR) volume 20, issue 1, 2009, p. 101 ff.

In Commission against Greece case, C-244/11 the ECJ ruled, that a condition imposed by Greek legislation, that in connection to acquisition of more than 20 % of voting rights in a Greek company, that conducts business within Greek national infrastructure, a prior permission thereto must be obtained from Greek authorities, is in violation with Community law.

[35] In 2013 the $15.1 billion takeover of Canadian oil and gas company *Nexen Inc.* based in Calgary, Alberta by Chinese state-owned entity *CNOOC Ltd* met opposition and triggered heavy debate on whether it is alright that foreign corporations are permitted to acquire control over companies that conduct business in one of the country’s key industries – the oil industry.

In 2014 19 % of shares in the Danish state-owned *Dong* were sold to *Goldman Sachs* – the American investment bank, and triggered unprecedented political consequences, especially for one (Socialistisk Folkeparti, SF) of the three political parties that constituted the government of Denmark at that time resulting in the party’s exit from the government and led it to the edge of dissolution.

The choice of method is entirely free. In common law terms one would say: the courts have made it clear, and in civil law terms one would say: there are no legal provisions that restrict corporations to certain choice of method. No matter whether the question is governed by the laws of common law system or civil law system, there are certain provisions that have to be followed and complied with, regardless which method is chosen. It is important to emphasize, that the provisions to follow will vary depending on the method chosen by the involved parties.

1.6. FRIENDLY VERSUS HOSTILE TAKEOVER

The vast majority of takeovers around the world are negotiated deals.

Both parties - the acquiring company and the company being acquired, are active and willing in their participation in the negotiating process preceding the conclusion of a takeover. These deals are referred to as friendly takeovers or friendly transactions.

It happens sometimes that a company A attempts to take control over a company B against wishes of the management of the company B by acquiring company's securities from its shareholders. These procedures are referred to as hostile takeovers or hostile transactions.

Hence, the definition of a friendly and a hostile transaction respectively is closely connected to the role of the management of the company being acquired in the negotiation process.

The question arises then: which M&A method can be conducted as a friendly takeover and which as a hostile takeover.

There are four main[36] methods of M&A *i.e., merger*: where two or more corporations amalgamate into one; *division*: where a corporation is divided into business units, which subsequently are transferred to several buying companies; *transfer of assets*: where some or even all of company's assets *e.g.* a department, a

[36] Besides the main transactions as merger, division, majority takeover, and transfer of business, corporate law operates with two other form of M&A transactions: conversion of a private owned business into a corporation in exchange for shares in that newly formed corporation, and conversion of one form of corporate entity into another form of corporate entity cf. Erik Werlauff in Selskabsskatteret 2014/15, Karnov Group, (16th ed., 2014).

production line or a store are sold to a buyer; and *majority takeover*: where shares of a company representing the majority of the voting rights in the company in question are acquired by another corporation.

When it comes to *merger* where company A merges with company B and B ceases to exist whereas company A is the continuing company (irregular merger), or when two companies melt together into one single continuing company (regular merger) a transaction of this art can only take place as a result of a negotiated agreement between the parties involved, *i.e.*, a friendly transaction. This would involve negotiations with the management of the company being acquired, who also initially is the receiver of the bidder's offer to merge. The management is therefore the negotiating party.

The same principle applies to the method of *division*. The management of the corporation being divided is the receiver of the bidder's offer and is the negotiating party. The acquisition by method of division can therefore be conducted by friendly transaction.

In regards to *transfer of business* method, a part of the target corporation's business is the *asset* being sold. As mentioned above, such transfer can involve an asset like a store, a production line, a research department, or any other part of a business that is operated by the selling corporation. Taking over a business does not imply change of control over the selling corporation, but solely change in the ownership of the assets in question, which belong to the selling corporation. This transaction can be conducted only by friendly takeover as a result of negotiations with management of the selling corporation.

Majority takeover implies purchasing shares of a corporation to which the majority of the voting rights in the corporation in question are attached. Possession of the majority of the voting rights equals control over the company. In this regard it is irrelevant whether the purchaser already holds stock in the target company and purchases a number of shares that will secure him the majority of the voting rights, or he has no stock holdings in the target corporation prior to the transaction. The number of shares acquired through majority takeover is also irrelevant.

Proceeding with this method can include negotiations with the management, which will constitute a friendly takeover if they result in conclusion of a purchase agreement. However, the bidder's offer to purchase the corporation's shares can be made directly to the shareholders in spite of the management's choice of supporting or opposing the bid that is made. If the deal goes through and the purchaser acquires shares that comprise the majority of the voting rights notwithstanding the management's lack of approval, it can be referred to as hostile takeover.

Majority takeover seems, therefore, to be the only method of M&A's four main methods that can be conducted through both friendly and hostile takeover. One can of course reason that purchasing shares that constitute majority of the voting rights in the target corporation result in taking control over the company in question and, hence, pursue the goals that acquirer than has. The goal could, for example, be a merger with another company owned by the purchaser. Following this thinking path one can argue that this might constitute an indirect possibility of conducting merger by way of hostile transaction.

From the legislative point of view there is no significant difference whether the takeover is conducted by way of friendly or hostile transaction. The legal provisions that apply to the chosen method are the same and have to be complied with. Some additional legislative requirements exist in connection to takeover bids on shares of listed companies and protection of rights of minority shareholders. These requirements, however, do not constitute a different state of law, nor do they create a different legal environment.

From the managerial point of view, however, the situation is observed quite differently. If the transaction is of hostile nature, the management of the corporation being taken over is severed from active participation in the process. Negotiations concerning acquisition of shares that are in possession of shareholders are conducted directly with the shareholders. The price and form of the consideration, as well as possible conditions for the transaction are negotiated and agreed upon without management's involvement.

1.7. M&A INCENTIVES

The focus of this dissertation is aimed on the legal aspects of takeovers. However, some incentives that may motivate an M&A transaction must be mentioned, albeit briefly.

Synergies

Pursue of synergies is often one of the leading incentives behind M&A. Synergy is about utilizing cross-leveraging capabilities[37]. If the acquiring company for example

[37] The essence of cross-leveraging capabilities is found in ability to multiply the outcome of one's effort without a corresponding increase in the consumption of resources.

is selling some products to its customers and feels that it can also sell its products to already existing customers of another business, it pursues business synergy, when it now attempts to acquire that other business.

Production synergies can potentially be achieved if two companies combine their business through a merger hence, utilizing the production capacities that they independently do not benefit from.[38]

Administrative synergies – most often in combination with other potential synergies - can often be aimed for by participating entities. Two or more sets of administration that are engaged in similar issues in different companies through amalgamation are combined into one single administration, often consisting of the strongest and most efficient employees.[39]

Research and Development, R&D

In corporate environments there is a widespread belief that M&A has a direct positive effect on participants' research and development, R&D, when corporations merge and combine their strength towards better R&D performance. However, mixed research findings that appear in academic literature on this matter urge for exercise of caution before jumping to possibly misguided conclusions.[40]

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[38] See "The Special Purpose Vehicle: A 'Micro Merger' or Merely a Way of Cooperation?" by Alex Fomcenco in European Company Law, February 2013, volume 10, issue 1.

[39] The matter of cultural differences must be observed not only in regards to the management but in regard to employees on all levels of organization; 1998 *Daimler-Benz* merger with *Chrysler* is one of the renown examples of how differences in culture of the merging organizations can result in the failure of the deal.

[40] See "The impact of M&A on the R&D process" in Research Policy, Volume 34, Issue 2, Pages 195-220 by Bruno Cassiman, Massimo G. Colombo, Paola Garrone, Reinhilde Veugelers and also "M&A and R&D: Asymmetric Effects on acquirers and targets?" in Research Policy, Volume 43, Issue 7, Pages 1264-1273 by Florian Szücs.

Snip Shares

Snip shares[41] is not an academic term, however, it would seem inappropriate not to mention it in this context. In its simplicity the term implies acquisition of shares the price of which is so low that it *almost* does not make sense not to acquire them.

Sometimes a company can come across an option of acquiring control over another - in M&A optics - potentially interesting company by acquiring majority of the voting rights through purchase of its cheap stock.

Shares that are traded both on the regulated market and outside of it can be purchased for quite different prices in accordance to their market value. Notwithstanding that purchase of *snip shares* often regards purchase of shares of non-listed companies, it can also be regarded to shares of listed companies.

If the market price, *i.e.*, stock exchange value, for a company's shares is less than its Net Asset Value, NAV,[42] by purchasing the cheap stock the buyer acquires assets the value of which exceeds the price paid.

The ratio of the acquirer's stock on the regulated market and its net asset value is *as good as cash* and can be utilized as the method of payment when acquiring the stock of the target. In these terms the acquirer can be said to acquire snip shares *for free,* as the acquirer, which in an M&A transaction must be a legal person, uses the high market value of its shares against the low market value of the target's shares.

And the question is: why is the stock being sold cheap? The immediate answer is the obvious one: there is something wrong with the company in question. But the illness of the company can be multi-sided; it can be fundamentally ill, but it can also be afflicted by poor management that simply is unable to lead the company towards its prosperity and hence, its results are subsequently poor. The acquirer should ask himself whether he would be able to nourish the company back to its feet and profit of its unutilized potential. Or is there anything else in the target company that represents a value for the acquirer that he would be able to utilize by for instance, after acquiring control over the target, let one or more of its subsidiaries or businesses to merge with it and hence, consolidate the value of the two or more enterprises.

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[41] In Danish: røverkøb.

[42] Net Asset Value is ”an accounting term similar in meaning to book value and net worth” cf. Steven H. Gifis, Law Dictionary, Barron's, 2010.

Tax

Jean Colbert (1665) who was the Minister of Finance to Louis XIV of France once said:

> "The art of taxation is so to pluck the goose that the maximum number of feathers is obtained with the minimum amount of hissing." Hence, it is no wonder that when the tax collector being the ruthless goose-plucker and the goose - the corporation being plucked, it will do all in its (legal) powers to avoid the plucking.[43]

The most often emerged tax-related reason behind mergers and acquisitions is the possibility of combination of earning taxable income of one participating company with tax losses of another participating company in order to achieve deduction of the losses of the latter company against the income of the former company.[44] [45]

However, it needs not to be direct losses. It might also be possibilities of depreciation for tax reasons that have not yet fully been applied by the party, which is taken over. For example, the target company owns a number of factory buildings, and has not yet had the possibility of depreciating them fully for tax purposes. The purchaser achieves, as a bonus on top of the substance of the target, also the possibility of becoming "tax free" for a period of time. It could also be intellectual property such as patents and trademarks that contain not-yet-exploited tax depreciations.

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[43] Vern Krishna, Income Tax Law. 2nd ed. Toronto: Irwin Law, 2012.

[44] The legislation imposes various requirements that must be complied with before corporations can conduct the mentioned deduction of losses against taxable income cf. FUSL § 8.

An option of tax-neutrality of an M&A transaction, however, has a direct impact on carry-forward accumulated by the parties to the transaction; Tax-neutral transactions will almost invariably destroy any carry-forward possibility for both parties, whereas taxable transactions can contain bonuses.

[45] This is also observed in other jurisdictions than European; for example in Canada, for the purposes of amalgamation, and assuming that the various requirements under the Income Tax Act are complied with, "one common tax reason is to combine a corporation earning taxable income with one that has tax losses, so as to permit the losses to be deducted against the income", cf. VanDuzer, J. Anthony, "The Law of Partnerships and Corporations", 3rd ed. Toronto [Ont.]: Irwin Law, 2009, p. 313.

A reason of tax savings, however, seems to be too vague to stand as a sole stimulus for a merger with or an acquisition of another business. However, the question of tax savings should be a part of considerations leading up to a merger or an acquisition. To do otherwise would be irrational.

Competitive Advantage

Escalation of corporate competitive advantage is often linked to increase in market share, which can be achieved through non-organic growth *i.e.*, through mergers and acquisitions.

The question, that will not be subject to detailed discussion here, but which inevitably arises in connection to growth of competitive advantage through M&A regards the quality of post-transactional integration. If the cultures of the organizations of the merging companies are fundamentally different and incompatible or if composition of management of the continuing company is not functioning optimally it will have a direct effect on the quality of integration of the transaction. If integration fails or if the process is lengthy and painful it will adversely affect the desired growth of competitive advantage.

Organizational turmoil can potentially weaken and destabilize the post-deal corporation to such a degree that it will become target of acquisition by other competitors that may take advantage of the present organizational vulnerability of the company in question.

Therefore, it is crucially important to have a well thought-through post-deal integration plan in place prior to conclusion of the transaction.[46]

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[46] The entire American logistic system was adversely affected by a dramatic post-deal integration failure of *Union Pacific, UP*, acquisition of *Southern Pacific Transportation, SPT,* in a US$ 5.4 billion in 1996; Many and probably the wrong employees were laid off, and what turned to be even more serious is that the computer systems the companies used were incompatible and failed to communicate in sync with each other. On the topic see John E., Kwoka Jr, and Lawrence J. White, "Manifest Destiny? The Union Pacific and Southern Pacific Railroad Merger", New York University, Center for Law and Business (1996).

Risk Management

Risk management[47] in this context is closely related to the principle of separation of a legal entity from its owners, - the shareholders,[48] and limitation of their liability, *i.e.*, immunity against personal liability for corporate obligations.

The just-mentioned immunity against personal liability of shareholders, physical persons and other participating corporations alike, for corporate obligations is an essential element of corporateness. In fact, limitation of liability or immunity is one of the principal objectives of incorporation. This immunity is, however, not absolute and it is often contested in pursuit of the metaphorical "lifting the veil" – in British corporate terms, or "piercing the veil" – in American corporate terms,[49] which implies redirection of claims against the corporation originating from

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[47] Risk management addressed here must not be confused with risk management that is dealt with through due diligence. See for example Jeffery S. Perry, Thomas J. Herd, "Reducing M&A risk through improved due diligence", Strategy & Leadership, Vol. 32 Issue: 2, pp. 12 – 19 or Duncan Angwin, "Mergers and acquisitions across European borders: National perspectives on preacquisition due diligence and the use of professional advisers", Journal of World Business, Volume 36, Issue 1, Pages 32-57.

[48] As national law example see Danish Companies Act, SL § 1 (2) and § 5, 1) and 2).

One of the leading cases from common law on this matter is Salomon v. Salomon & Co., (1897 A.C. 22, (1895-1899) All E.R. Rep. 33.

[49] Erik Werlauff, Selskabsmasken, GAD, Copenhagen, 1991.

From Danish case law on piercing the corporate veil see the illustrious UfR 1997.1642 H also in TfS 1997.780 H, Midfyns Festival. The core of this case was a claim that tax authorities had against a limited liability company, which was closely connected with activities of another limited liability company, whereas both of them were owned and controlled by a single shareholder. Due to case-special circumstances, lack of clear separation of the companies' accounts, and the risk spread approach, the Court found that the creditor's claim can be aimed against the second company, but not against the deceased owner's widow.

Erik Werlauff in UfR 2012B.203 ff., Medhæftende majoritetsejer, is addressing the issue analyzing the situations where a majority owner (a parent company or a natural person) may exceptionally become liable for one or more of the company's obligations. A distinction is made between liability based on: a) provisions of law, b) pledge, c) close collaboration to such a degree that the related parties are considered to be one economic unit, d) complicity, e) disloyalty in relation to existing claims, f) piecing the corporate veil.

Also UfR 1997.1642H commented by Børge Dahl & Jørgen Nørgaard in UfR 2000B.399 ff.

liabilities of the same towards it's owners – the shareholders, which can be either natural persons or other corporation(s).

The general rule that applies here, albeit with exceptions,[50] is that corporateness, inclusive all the attributes that it comprises due to legislation that facilitates and regulates it, must be respected and not disregarded, which piercing the veil entails. Even a single controlling shareholder, a physical person and a corporation alike, can enjoy limited liability provided that the corporation complies with requirements of relevant legislation and it is "not formed to evade an existing obligation or a statute, or to cheat or to defraud".[51]

"In the famous case of *Salomon v. Salomon & Co., [1897] A.C. 22*, Salomon in 1892 had incorporated his business, conveying his assets to the new company in return for one hundred £100 debentures (English floating-charge type) and 20,001 shares (the other six shares being allotted to his wife and five children to satisfy the then English law requirement of at least seven associates). When the company failed in 1893, the general creditors contended *arguendo*[52] no entity, that such incorporation to escape personal liability was fraudulent, and, *arguendo* entity, that the company was an agent or trustee for Salomon. The House of Lords upheld the principal shareholder's right to become a secured corporate creditor and thereby not only escape personal liability to, but as such creditor acquire priority over, unsecured creditors. The fact that Salomon had incorporated for the purpose of achieving limited liability was deemed immaterial on the ground that it was legitimate and permissible objective of incorporation."[53]

Obviously, incorporation with the purpose of achieving positive outcome of risk management through limitation of liability is a legally accepted reason, as long as it is not simultaneously accompanied by pursuit of "unjust or undesirable consequences inconsistent with the purpose of the concept"[54].

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[50] "Corporateness will not be recognized to produce unjust or undesirable consequences inconsistent with the purpose of the concept" cf. Harry G. Henn & John R. Alexander in Laws of Corporations, 3 rd. ed., West Publishing Co., 1983 p. 344.

[51] Harry G. Henn & John R. Alexander in Laws of Corporations, 3 rd. ed., West Publishing Co., 1983.

[52] Latin: hypothetically.

[53] Harry G. Henn & John R. Alexander in Laws of Corporations, 3 rd. ed., West Publishing Co., 1983. p. 352, footnote 3.

[54] Ibid. p. 344.

The question arises on whether there are limits to risk management actions driven by desire of liability limitation?

Metaphorically speaking, not putting all the eggs in the same basket is a sound approach for risk management. And for this purpose, it is not only *financial* risk management, but also just as much *legal* risk management.

Spreading your risk contributes to chances of minimizing potential losses. But would it be considered an acceptable approach if each egg is placed in a separate basket, hence, achieving ultimate form of risk limitation?

These questions were addressed in *Robinson v. Chase Maintenance Corp.*[55] A parent company, who only had one physical-person-shareholder, was the owner of 51 subsidiary companies, each consisting of two cabs. The idea of this corporate set-up was in spreading of risk and ultimate limitation of liability for the parent company. Equity of each of the 51 subsidiaries was kept at the required minimum; as well as compulsory insurance requirements were observed, albeit, at its minimum level. Suppose a cab belonging to one of the subsidiaries was involved in an accident and in case the equity and insurance would not prove to be sufficient to cover the liability, this would not affect the rest of the corporate structure as that particular company could be declared bankrupt and subsequently liquidated. The ruling Court did not consider this risk management approach to be acceptable and permitted piercing of the veil, hence, redirecting liability claim against the parent company, but not its shareholder. Thus, the judgment points out that risk management through limitation of liability, albeit, being subject to individual case-relevant assessment, can have limitations, and putting each egg in its own basket does not necessarily guarantee the pursued outcome of the approach.

Corporate structural planning conducted through M&A can ensure the desired risk management; the risk that potentially can be imposed by undertakings, due to the nature of the business conducted, onto the parent[56] company. This is often observed

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[55] Robinson v. Chase Maintenance Corp. (1959, 20 Misc 2nd 90, 190 NYS2d 773).

[56] Not merely a parent company can be affected by ramifications that follow the piercing of corporate veil, but also another ”sister” company, cf. TfS 1997.780 H, Midfyns Festival, where the veil separating the two ”sister”-companies owned by the same sole shareholder was pierced; however, not the veil separating the company and its shareholder.

From TfS 1997.780 H, Midfyns Festival, a parallel emphasizing the same trail of legal thought, disregarding differences in common law and continental law respectively, can be drawn to Robinson v. Chase Maintenance Corp. (1959, 20 Misc 2nd 90, 190 NYS2d 773), where the veil separating the subsidiary and the parent company was pierced, but not the veil separating the company and its human shareholder.

through corporate restructuring within a group but it is also used to facilitate cooperation between companies through establishment of joint ventures, JV, and special purpose vehicles, SPV.[57]

Another example for group inter-structural risk management, which is worthwhile mentioning, is incorporation of a so-called *captive insurance company, CIC.* The very purpose of a captive insurance company's existence is to provide insurance, as its name suggests, through risk-mitigation to the whole group, which the company in question belongs to. It could be a necessity to incorporate a CIC within a group if attempts to find an outside insurance company to insure particular business activities fail; this is probably only rarely the reason. But it can also be a matter of financial convenience, *i.e.*, when the premiums paid to the CIC are lower than what is paid to an *outside* insurance company hence, resulting in savings, which often can be quite substantial; or even when the CIC is able to offer better coverage for lower premiums. Because the CIC is not merely an ordinary group-company but obtains a license as an insurance company, and when it enters into insurance policies, those contracts are not just insurance but (cheaper) reinsurance contracts.

The Others

The spectrum of reasons behind M&A is wide and span from a simple *I want* to a much more complicated *I must.* No attempt will be made to mention as many of them as possible. However, some of *the others* are worthwhile naming.

The others here are reasons of private equity firms and other financial buyers. They are in the business of purchasing companies and not in the business of manufacturing goods and providing services.

Private-equity funds raise money from investors and use those funds to acquire corporations. They purchase not because they want to run the business but because they want to sell it again and capitalize on the gains. Sometimes, prior to a sale, they would implement some value enhancing improvements. Other times they would simply sell when an acceptable offer presents itself.

It is observed that companies while in possession of financial buyers can be subject to the exercise of "private benefits of control", *i.e.*, asset stripping[58] by their new owners. This implies that cash might be extracted out of the companies through

[57] Alex Fomcenco, "The Special Purpose Vehicle: A 'Micro Merger' or Merely a Way of Cooperation?" European Company Law, February 2013, volume 10, issue 1.

[58] In Danish: selskabstømning.

payment of high dividends and/or other professional expenses as salaries or bonuses to the management, etc.

For example, the matter of asset stripping of Danish stock exchange listed companies was highly debated especially in the late 1990's. The legislation preventing asset stripping in connection to a takeover, however, was not enacted before 2004. After being subjected to a number of amendments since its enactment the set of rules, as it stands today, imposes a qualifying period of twelve months before distribution of target company's funds to the acquirer can occur. This qualifying period can, however, be avoided if the acquirer, in the bid document, clearly indicates his intentions for funds' distribution after the takeover.[59]

But also recent case law shows that the matter is highly relevant. This discussion is closely connected to the issues of self-financing, whereas the company is sold to a buyer that uses the company's own equity to finance the purchase. But also asset stripping that consequently prevents creditors and tax authorities from satisfying their claims against the company plays a central role.[60]

[59] The Danish Companies Act § 184.

[60] See for example TfS 1997.110 H (UfR 1997.364 H), and comments by Erik Werlauff in TfS 1997, 114 and Bernhard Gomard in R&R 1997 no. 3 p. 9 ff., where a seller of a profit generating company was found liable for the losses that tax authorities suffered as a consequence of asset stripping.

See also UfR 2000.365/2H (TfS 1999.897 H), where not just the seller of a profit generating company, but also seller's lawyer, his accountant, and his bank were all found liable for the losses that tax authorities suffered as a consequence of asset stripping.

Also Erik Werlauff "Medhæftende majoritetsejer" Ugeskrift for Retsvaesen, vol 2012, nr. 21, s. 203-211 that *inter alia* addresses the matter of liability of majority owner for disloyal actions in relation to third parties' possibilities to satisfy their claims against the company in question.

CHAPTER 2. ADVISER'S CHOICE – *THE PROBLEM*

An adviser's role and his input in corporate undertakings in general, and in connection to M&A in particular, must never be marginalized or underestimated. An adequate advice based on *inter alia* solid legal knowledge can contribute to desired corporate development and subsequently to profit maximization for the shareholders, which in itself can be the purpose of the existence of the company in question.[61]

On the contrary, an inadequate advice can lead to undesirable consequences for the company in question, as for example loss of profit, but also to unfortunate consequences for the adviser himself in the form of liability. It is irrelevant whether an independent adviser is commissioned to support a transaction with his expertise or, the owner of the company himself undertakes the role of an adviser.

Please, allow me to present a couple of examples indicating a positive and an adverse effect of an adequate and inadequate advice respectively.

When *Berkshire Hathaway Inc*. through one of its subsidiaries - *National Indemnity Ltd.* acquired *Lloyd's* insurance obligations by acquiring its insurance portfolio in 2006/2007, the deal might at first glance was short of reason: *Lloyd* was almost brought down into insolvency by the amount and extent of the insurance claims. *Berkshire Hathaway's* originator Warren Buffett and his advisers have correctly

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[61] Contemporary development in the way of corporate conscience and thinking paths, in respect to the role of profit maximization, is discussed by Alex Fomcenco in "Rise of a New Corporate Vehicle: Public Benefit Corporation" (2014) European Company Law, vol. 11, issue 6, p. 276–280. The abstract of the article states: "So-called Public Benefit Corporations do not bring any revolutionary amendments to the way the traditional corporations are. But they represent a shift in the way our corporate mind and mentality is evolving. Despite the deficiencies in legislation, it must be acknowledged that this new corporate vehicle indicates that for some corporations public benefit objectives become more important than profits."

calculated that despite acquiring a company in distress the acquisition's results will at the end generate profit.[62]

On the contrary, in *UfR 1985.664 V* where an appeal was brought before the court of law for a second circuit, the case was about license payments that the licensor was deprived of by his licensee. The licensee, a limited liability company A, obtained a license to sell the licensor-designed chairs and, in connection with each sale, to pay the licensor agreed upon license payments. Due to corporate distress the licensee company A decided to restructure the business and, in connection with that, to incorporate a subsidiary B. The subsidiary was meant to undertake the sales of the chairs in question. The company A transferred its stock of chairs to B without informing the licensor thereof. In the first circuit, a lower court found that the transfer from A to B is to be considered a sale that triggers license payments to the licensor. The appeal court came to the same conclusion and found the majority holder and the director of company A liable for the losses suffered by the licensor. The adviser's adequate counsel indicating that transfer from A to B must be considered a sale, notwithstanding that the transaction took place within a group of companies, failed to materialize.

An adviser's counsel must be clear, substantial, and useful. It must have a reflection in the corporate, in the financial, and in the legal reality. It is unsatisfactory when an advice given does not contribute to the pursuit of intended outcome but constitutes inapplicable and sometime uncertainty-constructing elements.[63]

An adviser finding himself in an environment where a takeover is "in the air" bears a task of providing correct and thorough advice to the parties in a complex corporate and legal set-up. He is ought to uncover and analyze all the relevant information. And when combining his findings with the relevant valid law he is ought to offer an advice in respect to which M&A method the parties can or should proceed with.

A good starting point could be in identifying the intended outcome of the proposed takeover that the parties have in mind. Without a proper indication of the end result both the adviser and the participants are at risk of "wandering in the desert". But

[62] In his 2006 and 2007 letters to the shareholders, in a Warren Buffett straightforward manner, he initially explains the reasons behind the takeover and subsequently the immediate positive results of it. The letters can be found at www.berkshirehathaway.com.

[63] See Alex Fomcenco, "Material Adverse Effect Clause–Proper Legal Work or Contribution to False Sense of Security?." European Business Law Review no. 5 (2014): 747-758, on the role of material adverse effect clauses in M&A contracts. On matters of auditor's liability see Lise Kolding Foged-Ladefoged & Erik Werlauff in "Limitation of Auditors' Liability" (2014) European Company Law, vol. 11, issue 6, p. 271–275.

even this step might require adviser’s assistance in the process of identification of the target, as it could occur that the parties are not completely and sufficiently firm in their itemization and visioning of the outcome.

Consideration of interests of various stakeholders is essential in the work of an adviser. A takeover often, especially when it engages larger companies, involves three-fold perspectives: the perspective of the owners, the perspective of the management, and perspective of other stakeholders: creditors, employees, local community, etc.

When the intended outcome is firmly established considerations on to what extent and how different M&A methods can lead to that outcome can begin. Albeit, the methods are considered to be alternative approaches that lead to the same end-result, which is change of control, the set of rules that govern the methods and the implications that the methods impose on the various stakeholders are, without doubt, different. At this stage the substantial legal work can begin, hence, involving consideration of legal particularities of the methods and legal and financial implications and subsequently consequences that will follow.

An essential question arises: How does the adviser know that when a) these particular conditions are present, and b) when this particular desired outcome is established, and c) that regard is being had to specific perspectives of the stakeholders, then a particular method of M&A should be appointed as best suited to facilitate the transition from the present stage A to the intended outcome B? How does the adviser know what to expect when a particular M&A method is chosen?

The Theory of Prediction[64]

Alf Ross,[65] a highly respected lawyer and legal philosopher, worked with these questions of predictability of legal outcome identifying and uncovering the connection between legal theory and legal practice. Through his extensive work, he originated *The Theory of Prediction*, which deals with our question on what is to expect. In a nutshell, he puts it as follows:

$$A = D$$

whereas A being an assertion, and D being the valid law. *Valid law*, in Ross’ theory, is the correspondence of the system of norms *i.e.*, the law with the social

[64] Danish: prognoseteori.

[65] Alf Ross, PH.D. (Uppsala), JUR.D. (Copenhagen), JUR.D. (Oslo) 1899-1979.

reality, *i.e.*, application of the law by the courts. In this respect, the difference between applicable law, on the one hand, and valid law, on the other hand, must be borne in mind cf. Chapter 1 *Topic and Method* above.

Ross applies an expected judgment passed by a court as a common denominator for all future judgments when certain conditions are fulfilled. In this respect he states that "a prediction to the effect that if an action in which the conditioning facts given in the section[66] are considered to exist is brought before the courts of this state[67], and if in the meantime there have been no alterations in the circumstances which form the basis of A, the directive to the judge contained in the section will form an integral part of the reasoning underlying the judgment."[68]

With his example on section 62 of the Uniform Negotiable Instruments Act Ross is putting emphasis on the mere fact that the provision is to be regarded as valid law in the state that enacted it when the courts of that state enforce the provision when the conditions laid down in it are fulfilled; the judge must "order the drawee to pay the bill which he has accepted but failed to pay on the day it fell due."[69] In other words, when an adviser considers the facts of his circumstances, on behalf of his clients, and combines them with provisions of law, he should be able to predict the outcome of his undertakings. Why? Because he knows that if the matter is to be presented in the Court of law, the judge is directed, by the very same provisions, to rule upon the matter in accordance with these provisions. The adviser, on his end, is applying the same provisions as a yardstick for his predictions.

Furthermore, Ross links assertions in respect to valid law with future social happenings, which again is linked to legal politics, thus, emphasizing the connection and reciprocal influence between these elements, which by itself imposes a certain element of uncertainty. He concludes: "Assertions concerning valid law are according to their real content a prediction of future social happenings. The latter are fundamentally indeterminate and do not permit of being unambiguously predicted. Every prediction is at the same time a real factor liable to

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[66] The author uses section 62 in the Uniform Negotiable Instruments Act as an example to valid law cf. Alf Ross, On Law and Justice, University of California Press, Berkeley & Los Angeles, 1959, p. 39 ff.

[67] A certain state in which the section of a legal act cf. footnote 66 is applicable.

[68] Alf Ross, On Law and Justice, University of California Press, Berkeley & Los Angeles, 1959, p. 42.

[69] Ibid. p. 40.

influence the course of events and to that extent a political act. Fundamentally, therefore, the cognitive study of law cannot be separated from legal politics.”[70]

Returning to the expected judgment as a common denominator, hence, emphasizing importance and precedence of the established practice of the courts based on application of legal provisions Ross states: “In the face of an established practice of the courts theory must capitulate, just as in the case of a new statutory law. It is merely empty words if legal writers insist on upholding a rule as “valid law,” admitting that practice “wrongly” follows a different rule.”[71] With this statement Ross paints, without minimizing the importance of any, a hierarchic order of elements of a) practice of the courts, b) new statutory law, and c) theory, whereas practice of the courts is placed at the top.

Adviser’s *problem* of choice of method must, therefore, be solved under inclusion of not only the earlier-mentioned considerations of shareholders’ and other stakeholders’ interests in the pursuit of the intended outcome of a takeover, but to a high degree also predictions on process-related legal implications and the legal outcome of the transaction. In order for these predictions to be correct, knowledge about *current valid law* and the manner of the courts’ execution of provisions of applicable law must be known to the adviser.

[70] Alf Ross, On Law and Justice, University of California Press, Berkeley & Los Angeles, 1959, p. 49.

[71] Ibid. p. 50.

CHAPTER 3. SOURCES OF LAW

The section on sources of law synthesizes the legal platform that bears the topic of the present dissertation.

Das Ding an sich, das Ding für mich[72] is a reflection of Immanuel Kant's[73] philosophy, where the *thing-in-itself* exists outside of the human ability of objective comprehension and constitutes the absolute reality. The *thing-for-me, - das Ding für mich*, however, reflects our own subjective but yet relevant comprehension of reality, in light of own need under particular circumstances. Therefore, following principles in this approach and addressing the matter of sources of law I choose to involve the sources that I consider to be best suitable and relevant in the treatment of the topic of the dissertation.

When investigating and analyzing a topic from a legal perspective in a rule-of-law jurisdiction one cannot avoid involving legal sources that contribute to deliberations, considerations, and subsequently conclusions.

The core of the topic addressed in the present dissertation appears to be on the junction where different areas of European legislation intersect creating a web of sources of law that must be drawn into academic reflection and analysis.

European legislation in the form of directives and regulations that are enacted having regard to the Treaties[74] constitute the main legal basis for this dissertation due to its *federal* European character.

Sources of relevant Danish national law will be mentioned, albeit to a limited extent. National legislation is directly applicable to daily matters and issues that arise in the functioning of corporate entities. When appropriate and necessary references thereto will be made.

Case law, especially that, which is created by preliminary rulings and judgments of the European Court of Justice, ECJ is essentially important as it contributes to the

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[72] *Das Ding an sich, das Ding für mich* – thing-in-itself, thing-for-me (German).

[73] Immanuel Kant (1724-1804) was a German philosopher whose work profoundly influences modern philosophy to this day.

[74] The Treaty on European Union, TEU and The Treaty on the Functioning of the European Union, TFEU.

comprehension of purpose and objectives set out by the European legislator. National case law is equally important as it contributes to consistency and uniformity in the application of national law, which in respect to corporate law is often a reflection of European legislation. However, since national legislation in the context of the dissertation is only given a secondary priority, I will refer to national case law correspondently.

On matters of law of obligations, which among others is an important component of M&A-law, *UNIDROIT Principles*[75] must be considered relevant. Although, the Principles is not a legal act enacted by the legislature of a state, it is considered *soft-law* due to its frequent application by parties to a contract, which hence becomes law governing the contract and the reciprocal obligations between the parties. Should a contract or part of a contract that is governed by *UNIDROIT Principles* trigger a legal dispute between parties to that contract, a court of law that is to decide on the issue must apply the Principles as governing law of the contract, even though the court of law is, as a starting point, bound to judge on the basis of *hard*-law, *i.e.*, enacted legislation passed by the legislator.

Such a *common denominator* source of soft law can be very useful and advantageous as a supplement to, or as a substitute for, traditional comparative reviews.

In the USA, for example, company law is a prerogative of the individual State legislature and, albeit often referred to as the US company law, it consists of 50 different company law acts. Hence, the US company law *per se* does not exist, as the US federal law does not have a federal company law act. Nonetheless, if one desires to study the US company law, or the US corporate law, as it is referred to in

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[75] "The UNIDROIT explains about itself: "The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organization with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds." cf. Alex Fomcenco & Erik Werlauff, Business Law, Europe (1st ed., 2014), p. 50-51, footnote 41.

American legal terminology, countless books, articles, studies, etc., are available.[76] This can be explained by the constant pursuit for conformity of company law in the United States, in spite of it encompassing 50 different jurisdictions.

The powerful American Bar Association, ABA, defines its mission as: "To serve equally of our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[77] Besides many initiatives and projects that the organization is involved in, in pursuit of its mission, it produces model laws, *i.e.*, practical recommendations for creation of new or amendment of already existing provisions of *inter alia* corporate law. Although these model laws do not have any binding powers, they serve as suggestions and/or "common denominators" to possible future legislative implementation by the legislatures of the various States of the USA, which turn these model laws into hard law, hence, creating uniformity of law across jurisdictions.[78]

The same approach is observed in Canada. Contrary to the USA, Canada in accordance to its federal Constitution[79] has 14 different corporate statutes: one for

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[76] See for example Harry G. Henn & John R. Alexander, Laws of Corporations, 3 rd. ed., West Publishing Co., 1983, where the authors address the most central aspects of corporate existence and corporate transactions, from the uniform perspective of the US corporate law, and where appropriate including comparative review of the existing differences in the various corporate legislations.

Also: The Anatomy of Corporate Law: A Comparative and Functional Approach, by Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda and Edward Rock, Oxford University Press, 2009. When addressing US corporate law the authors bounce back and forth between the overall perspective of US corporate law and details and particularities of laws of individual state jurisdictions.

Also: Stephen M. Bainbridge, Corporate Law. 2nd ed. New York, N.Y. : [St. Paul, Minn.]: Foundation Press, 2009, and Stephen M. Bainbridge, Mergers and Acquisitions. 2nd ed. New York, N.Y. : [St. Paul, Minn.]: Foundation Press, 2009.

[77] http://www.americanbar.org/about_the_aba/aba-mission-goals.html

[78] See for example Alex Fomcenco, "Rise of a New Corporate Vehicle: Public Benefit Corporation" (2014) European Company Law, vol. 11, issue 6, p. 276–280, where the author *inter alia* points out the influence of a model law in amendments of corporate statutes of many US states in the process of facilitation of incorporation of a Public Benefit Corporation, as a new corporate vehicle.

[79] Patrick J. Monahan and Byron Shaw, Constitutional Law, 4th Edition. Toronto, Ontario: Irwin Law, 2013.

each province and territory and one federal corporate statute. If one desires to study Canadian corporate law a vast amount of written material is available. The majority of it encompasses the federal corporate law as well as provincial corporate law thus, dealing with the *mainstream* approach, which is detectable across the jurisdictions and at the same time illuminating the differences present.[80]

Also in Canada the legislative bodies look to each other and to Federation of Law Societies of Canada, which is the Canadian counterpart of American Bar Association, for inspiration and support in the legislative process,[81] pursuing the purpose of conformity in legislation across jurisdictions.

In connection to matters of *groups of companies*, IAS 27[82] is mentioned as a source of law. The International Financial Reporting Standards, IFRS, Foundation[83] created it; it is not a law simply because of its origins, – it is not created by a legislator. But how can a set of provisions that is not legislation be applied as a source of law? This is possible because a national Parliament – as the case is in Denmark, elevates it to the level of law, and allows it *inter alia* to form a definition of groups of companies in national legislation.

[80] See Christopher C. Nicholls, Mergers, Acquisitions, and Other Changes of Corporate Control. Toronto: Irwin Law, 2012 and Christopher C. Nicholls, Corporate Law. Toronto: Emond Montgomery, 2005.

Also: Poonam Puri, Cases, Materials and Notes On Partnerships and Canadian Business Corporations. 5th ed. Toronto: Carswell, 2011.

Also: Bruce Welling, Leonard Ian Rotman, and Lionel D Smith. Canadian Corporate Law: Cases, Notes & Materials. 4th ed. Toronto: LexisNexis, 2010.

Also: J. Anthony VanDuzer, The Law of Partnerships and Corporations. 3rd ed. Toronto [Ont.]: Irwin Law, 2009.

Also: Jennifer E. Babe, Sale of a Business. 9th ed. Markham, Ont.: LexisNexis, 2012.

[81] See Alex Fomcenco, ”Rise of a New Corporate Vehicle: Public Benefit Corporation” (2014) European Company Law, vol. 11, issue 6, p. 276–280, where the author draws attention to similarities of corporate statutes in different Canadian jurisdictions, which implement provisions on incorporation and functioning of Public Benefit Corporate vehicle.

[82] International Accounting Standards.

[83] IFRS Foundation states about itself: ” IFRS Foundation is an independent, not-for-profit organisation working in the public interest. Our primary mission is to develop a single set of high quality, understandable, enforceable and globally accepted International Financial Reporting Standards (IFRS) based upon clearly articulated principles.” Cf. www.ifrs.org

In the following the relevant European legislation, case law, and national Danish legislation will be addressed.

3.1. EUROPEAN LAW

This dissertation is meant to address M&A-related issues from a federal European point of view. Therefore, federal European legislation is applied as a main source of law in the treatment of the topic of the dissertation.

The federal European legislation with relevance to company law, which I refer to here, applies to all member states of the European Union. Furthermore, these provisions apply to Norway, Lichtenstein, and Iceland - members of the European Free Trade Association, EFTA, which have joined the European Economic Area, EEA. Switzerland, which also is a party to EFTA, stands, however, outside of the EEA.[84]

3.1.1. PRIMARY EU LAW

Primary European Union law is comprised by the two Treaties: the Treaty on European Union, TEU, and the Treaty on the Functioning of the European Union, TFEU. Whereas the TEU establishes the European Union, the TFEU concerns the matters of the functioning of the Union and secures *inter alia* all the basic freedoms

[84] European Corporate Law, 1st ed., 1995, 2nd ed., 2009, and upcoming 3rd ed., 2015, Edited by Adriaan F. M. Dorresteijn, Tiago Monteiro, Christoph Teichmann, Erik Werlauff, paints a picture of the development of the European corporate law throughout the Community in the relevant time span, with consideration of existing national diversity of company law in various jurisdictions. Also Erik Werlauff, "Common European Company Law", European Business Law Review, EBLR, 1998, p. 169 et seq, p. 210 et seq, p. 274 et seq.

that exist due to a general prohibition of discrimination[85] based on nationality,[86] which are cornerstones of the EU: free movement of goods, services, persons, and capital.[87]

Whereas the right of establishment for individuals is secured by TFEU art. 49, the right of establishment of legal persons[88] is secured by TFEU art. 54.

The right of establishment for individuals includes *inter alia* the right to pursue employment activities, as well as self-employment, and management of legal entities on the territory of any other member state than the member state of origins in the same way and under the same conditions as it is permitted to the nationals of the host member state.

The right of establishment for companies includes *inter alia* the right to set-up agencies, branches, and/or subsidiaries in any other member state than the member state of origins and thereby to conduct business activities on the same footing as nationals of the host member state.[89]

The Treaty on the Functioning of the European Union, TFEU, equips companies with quadruple corporate freedoms. These freedoms are as follows:

1. The right awarded to companies to establish themselves anywhere on the territory on the European Union, EU and/or European Economic Area, EEA.

[85] The scope of prohibition against discrimination also includes prohibition against restrictions on national and international enterprises alike. In ECJ ruling in case C-55/94, Reinhard Gebhard, the Court states:" where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".

[86] TFEU art. 18

[87] TFEU art. 26.

[88] Non-profit-making legal entities are excluded from the scope of TFEU art. 54.

[89] Alex Fomcenco & Erik Werlauff, Business Law, Europe, Werlauff Publishing, (1st ed., 2014), also Erik Werlauff, EU Company Law, 2nd ed., DJØF Publishing, 2003.

2. The right awarded to owners of companies to conduct business anywhere on the territory on the European Union, EU and/or European Economic Area, EEA through a company established/registered in any state that is part of the European Union, EU and/or European Economic Area, EEA.

3. The right awarded to companies to freely choose the corporate legal framework to encompass cross-border establishment.

4. The right to enjoy the same rights as the host member states' national equivalent entities enjoy.[90]

3.1.2. SECONDARY EU LAW

Establishing and ensuring the functioning of the internal market is one of the cornerstones of the European Union[91] and, in order to reach these objectives "The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market"[92]. In pursuit of these objectives and based on the mentioned provisions the European legislator is given the authority to adopt legal provisions: *directives and regulations*, which in respect to company law have resulted in a wide array of legal acts, which subsequently,

[90] Erik Werlauff, "Common European Company Law", European Business Law Review, EBLR, 1998, p. 169 et seq, p. 210 et seq, p. 274 et seq. Also Erik Werlauff, "EC Company Law", DJØF, 1993 and Opinion of Advocate General in Centros Case C-212/97.

[91] Cf. TFEU art. 26.

[92] Cf. TFEU art. 114.

where appropriate, must be implemented in national legislations of the member states.[93]

The following is a brief review of EU[94] Company Law Directives[95] with inseparable relevance to the topic of the dissertation.

Third Council Directive - Directive 78/855/EEC – *Domestic mergers.*

The purpose of this directive is to harmonize the national laws of the member states of the European Union on question of mergers of limited liability companies that are incorporated within the same member state *i.e.*, domestic mergers (*e.g.* merger between two Danish companies, or merger between to Spanish companies).

Adopting this provisions the European legislator aims to ensure certainty in the law of the member states as regards relations between the companies concerned, between them and third parties, and between the members of the companies. It provides for the coordination of information and protection of the interests of shareholders and creditors. It does not, however, provide for the protection of employees’ rights in case of domestic mergers. This matter is regulated in a separate directive - Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

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[93] ”Community law cannot be relied on for abusive or fraudulent ends. Consequently, Community law does not preclude the application by national courts of a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States. In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it.” cf. C-367/96, Alexandros Kefalas.

[94] EU Company Law Directives apply also in Norway, Iceland, and Lichtenstein, - the three contries comprising European Economic Area, EEA.

[95] Alex Fomcenco & Erik Werlauff, Business Law, Europe, Werlauff Publishing, 2014.

Sixth Council Directive - Directive 82/891/EEC – *Divisions.*

The directive that regulates provisions in regard to domestic mergers – the third company law directive 78/855/EEC - in its original proposal also covered *division* operations. The rationale behind this is that divisions are basically effectuated along the same principles as mergers. The core of the method of division is to transfer parts of the company being divided to several other receiving companies. In case of a merger, it is about a transfer from one or more company/companies to another single company, either already existing company or newly, for that specific purpose, formed company.[96]

Since the adopted directive ended up only covering mergers, a flaw in the legislation emerged, thus, composing a potential risk of circumvention of the guarantees and principles that must also apply to divisions, as these procedures are closely related.

Also, the protection of the interests of the shareholders and third parties is one of the central issues addressed in the directive. Companies interact across borders within the European community and, this obviously demands adoption of procedures that will approximate the laws of the member states not only to protect creditors and shareholders but also to promote these business operations, thus, eliminating obstacles the companies might face due to differences in the respective national legislations.

In short, one can describe the main purpose of this directive as follows: coordination of national laws, avoidance of circumvention, protection of rights, disclosure of information, and certainty in the law.

This directive operates with three different types of divisions: division by acquisition, division by formation of a new company or new companies, and division by combination of these two methods.

The directive deals with pure national transactions, *i.e.*, divisions where the company that is being divided and the receiving companies are situated in the same member state. Although, there is no directive that enacts cross-border divisions, it is

[96] Adriaan F. M. Dorresteijn, Tiago Monteiro, Christoph Teichmann, Erik Werlauff, European Corporate Law, Kluwer Law International, 2nd ed., 2009, p. 71.

presumed[97] that TFEU provisions on freedom of establishment and freedom of movement of capital provide rights thereto.[98] Denmark is one of the member states that have enacted an option of cross-border divisions in their national company law.[99]

The member states are not required to facilitate a legal framework for this type of transaction. However, if the transaction is permitted in the national law, the

[97] This presumption is based on ECJ' judgment in Sevic case C-411/03, where the Court found that:" Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State." Cf. summary of the case.

Although the issue at hand in this particular case was a cross-border merger, prior to enactment of the 10th Company Law Directive 2005/56/EC on cross-border mergers, the argumentation behind the ruling of the Court is based on the TFEU's principles on freedom of establishment: "Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC" cf. sec 19.

Furthermore, it was argued that implementation of harmonized rules facilitating a certain transaction, a cross-border merger here, cannot function as a prerequisite for application of rights provided by the Treaty. Cf. section 26.

Moreover, the Opinion of Advocate General in this case draws attention to the freedom of movement of capital, which is also relevant to include in the deliberations. Cf. sec. 6 of the Opinion. The Opinion states that it is observed that if the Court rules based on assessment of restrictions on freedom of establishment, the Court does not additionally considers restrictions of freedom of movement of capital, as it is also observed in this case. Advocate General concludes that if " the matter were assessed from the point of view of the freedom of movement of capital, my conclusion would be that the contested national measure constitutes an unlawful restriction on that freedom" cf. sec 75.

[98] Thomas Roenfeldt & Erik Werlauff in "Merger as a method of establishment: on cross-border mergers, transfer of domicile and divisions directly applicable under the EC Treaty's freedom of establishment", European Company Law, 2006, vol. 3, issue 3, p. 125 ff.

[99] SL § 291 et seq.

particularities of the law must correspond with the principles and the provisions of the directive cf. art. 26 (1).

Tenth Council Directive - Directive 2005/56/EC – *Cross-border mergers.*

This directive was initially proposed and subsequently adopted because of the need of smooth cooperation and consolidation between companies with limited liability from different member states. The directive facilitates the method of cross-border merger of limited liability companies and aims at the elimination of difficulties that companies may encounter in the process of cross-border mergers. Again, in order to facilitate smooth functioning of the internal market approximation of the national law on this important matter is necessary.

Provisions of the national law, which govern companies that are incorporated under that law must not restrict freedom of establishment, nor freedom of movement of capital. Cross-border merger directive ensures that.[100]

3.2. CASE LAW

In order to properly understand functioning of a legal system, one must understand the role that case law plays. This, obviously, does not apply only to common-law[101]

[100] The question on merger as a method of establishment is closely analyzed by Thomas Roenfeldt & Erik Werlauff in "Merger as a method of establishment: on cross-border mergers, transfer of domicile and divisions directly applicable under the EC Treaty's freedom of establishment", European Company Law, 2006, vol. 3, issue 3, p. 125 ff.

[101] The common law legal system rests on the law mostly created by judges through case-by-case rulings provided over centuries. These rulings determine the meaning of principles of law and the application of the legal statutes enacted by lawmakers. Lawmakers on the other hand often enact laws that incorporate decisions of the courts in order to refine the legal principles of the system. The legislation and case law are therefore closely intertwined in a common law legal system.

jurisdictions such as the USA, the UK or partially Canada,[102] but indisputably also to the jurisdictions that belong to the European continental legal system.[103]

When considering the importance of case law regards must be had to the earlier stated discussion on *valid law* and the role of the courts of law, which originates from deliberations by Alf Ross. In his views, the role of the courts interpreting and enforcing the provisions of the system of norms, we often refer to as law, which is a reflection of legal politics, result in the social reality *i.e.*, application of law by the courts. Ross grants substantial importance to the practice of the courts, without disregard that the practice can change as a result of shift in legal politics, which subsequently can result in new statutory system of norms – the law. Moreover, in his *Theory of Prediction*, Alf Ross turns to the role of a judgment passed by a court of law in a case under application of a set a rules concluding, that a similar judgment must be passed in a case with similar circumstances and under application of the same set of rules. Thus, he applies an expected judgment passed by a court as a common denominator for all future judgments when certain conditions are fulfilled.

Harmonization program[104] of European company law is pursued through enactment of directives, which require implementation, and regulations, which as the main rule do not require implementation[105] and enter into force throughout the community in their original drafts. The role and purpose of case law especially that, which is created by the European Court of Justice, ECJ, is in filling out the gaps and eliminating missing conformity in national laws of the member states that are subject to harmonization. [106]

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[102] Quebec, the only province of the 10 provinces and three territories that Canada consists of, is ruled under civil law legal system. This system, as well as the European continental legal system, is codified by laws and regulations given by lawmakers. The judges rule under application of these legal acts and only refer to case law as a secondary source of law in order to maintain *inter alia* consistency in application of the law.

[103] John Maxcy Zane, The Story of Law, Liberty Fund, Inc., 1998 originally published by Ives Washburn, Inc., 1927, New York, offers a comprehensive guide to understanding the origins of *inter alia* common law and European continental law and the role of case law in both legal systems.

[104] European Corporate Law, 1st ed., 1995, 2nd ed., 2009, and upcoming 3rd ed., 2015, Edited by Adriaan F. M. Dorresteijn, Tiago Monteiro, Christoph Teichmann, Erik Werlauff.

[105] Erik Werlauff, 'When can or should a regulation be implemented?' Europarättslig Tidskrift, ERT, vol. 2012, nr. 4, s. 654-661.

[106] Erik Werlauff, ”Principles of European Company Law”, European Company Law Volume 7 (2010), issue 5 pp. 183-186.

Hence, this dissertation dealing with matters of company law that is subject to harmonization will be incomplete without referrals to case law, especially case law from the European Court of Justice, ECJ, which in accordance to the Treaties can rule on actions brought by a member state, an institution or a natural or legal person and can give preliminary rulings, at the request of courts or tribunals of the member states, on the interpretation of Union law or the validity of acts adopted by the institutions.[107]

3.3. NATIONAL LAW

As mentioned earlier, this dissertation is a federal European study with emphasis on federal European legislation. Nonetheless, some referrals are made to national law, particularly Danish national law, when it is required to emphasize a point. I find it, therefore, appropriate to dedicate this section to a brief review of some Danish national legal acts that are referred to in this dissertation.

Company law of Denmark, as it also is the matter in respect to other national company laws of the member states, which consists of a number of legal acts, is thoroughly harmonized in accordance with the company law directives addressed earlier[108]. The same can *partially* be said about national legislation on taxation as only a few certain areas of corporate tax law are influenced by European legislation.[109] Whereas corporate tax law, in general, is subject to national

[107] Cf. TEU art. 19 (3).

[108] See the respective footnotes for the Danish legal acts addressed right below.

[109] Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states. This directive has been substantially amended several times and in the interests of clarity recast and at the present time enacted as Council Directive 2011/96/EU.

Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises 90/436/EEC.

Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different member states.

regulation, taxation of M&A transactions[110] is to a certain degree regulated by European lawmaker.

The following Danish legal acts are of relevance to the subject of this dissertation. It is, therefore, convenient and appropriate to mention them here, in the section on sources of law. Concurrently, I would like to emphasize the extent of European federal legislation's influence on the national law.

3.3.1. NATIONAL COMPANIES LAW

The Danish Companies Act (Selskabsloven, SL)

The first Danish Companies Act was enacted in 1917 and, regulating only public limited companies, had its primary focus on the company's relationships with third parties *i.e.*, the public, by ensuring disclosure of information. Whereas the company's internal organization and functioning was subject to significant freedom.[111]

The current Danish Companies Act is the main and the most extensive and substantial source of Danish corporate law. It comprises 375 paragraphs and addresses all the main issues with relation to incorporation and functioning of public and private limited liability companies alike.

The current act was enacted in 2015 and bears the official name of *Lovbekendtgørelse 2015-04-28 nr. 610 om aktie- og anpartsselskaber.*

> Note: The following text is not meant to be read or analyzed in close detail. It is included here merely to serve the purpose of illustrating and underlining the point of to what extent an originally national legal act is influenced by, and how it now reflects, European federal legislation. The Danish Companies Act is not alone in this respect; all EU member states' national corporate legislations are under the same influence, thus,

[110] Council Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, partial divisions, transfer of assets and exchange of shares concerning companies of different member states. This directive has been substantially amended several times and in the interests of clarity and rationality Directive 2009/133/EC has been codified.

[111] Erik Werlauff, Selskabsret, Karnov Group, (9th ed., 2013).

they are subject to harmonization with the purpose of reflection of common federal European corporate legal values.

”Loven indeholder bestemmelser, der gennemfører dele af Rådets direktiv 1968/151/EØF af 9. marts 1968, for så vidt angår offentlighed vedrørende visse selskabsformer, (EF-Tidende 1968 nr. L 065, side 8), som ændret senest ved Europa-Parlamentets og Rådets direktiv 2003/58/EF af 15. juli 2003, (EF-Tidende 2003 nr. L 221, side 13), dele af Rådets direktiv 1977/91/EØF af 13. december 1976, for så vidt angår stiftelsen af aktieselskabet samt bevarelsen af og ændringer i dets kapital (EF-Tidende 1977 nr. L 26, side 1) som ændret senest ved Europa-Parlamentets og Rådets direktiv 2006/68/EF af 6. september 2006 (EU- Tidende 2006 nr. L 264, side 32), dele af Rådets direktiv 1978/660/EØF af 25. juli 1978 om årsregnskaberne for visse selskabsformer, (EF-Tidende 1978 nr. L 222, side 11), som ændret senest ved Europa-Parlamentets og Rådets direktiv 2003/51/EF af 18. juni 2003, (EF-Tidende 2003 nr. L 178, side 16), dele af Rådets direktiv 1978/855/EØF af 9. oktober 1978 om fusioner af aktieselskaber, (EF-Tidende 1978 nr. L 295, side 36), dele af Rådets direktiv 1982/891/EØF af 17. december 1982 om spaltning af aktieselskaber, (EF-Tidende 1982 nr. L 378, side 47), dele af Rådets direktiv 1983/349/EØF af 13. juni 1983 om konsoliderede regnskaber, (EF-Tidende 1983 nr. L 193, side 1), som ændret senest ved Europa-Parlamentets og Rådets direktiv 2003/51/EF af 18. juni 2003, (EF-Tidende 2003 nr. L 178, side 16), dele af Rådets direktiv 1984/253/EØF af 10. april 1984 om autorisation af personer, der skal foretage lovpligtig revision af regnskaber, (EF-Tidende 1984 nr. L 126, side 20), dele af Rådets direktiv 1988/627/EØF af 12. december 1988 om offentliggørelse af oplysninger ved erhvervelse og afhændelse af en betydelig andel i et børsnoteret selskab, (EF-Tidende 1988 nr. L 348, side 62), dele af Rådets direktiv 1989/666/EØF af 21. december 1989 om offentlighed vedrørende filialer oprettet i en medlemsstat af visse former for selskaber henhørende under en anden stats retsregler, (EF-Tidende 1989 nr. L 395, side 36), dele af Rådets direktiv 1989/667/EØF af 21. december 1989 på selskabsrettens område om enkeltmandsselskaber med begrænset ansvar, (EF-Tidende 1989 nr. L 395, side 40), dele af Europa-Parlamentets og Rådets direktiv 2004/25/EF af 21. april 2004 om overtagelsestilbud, (EU-Tidende 2004 nr. L 142, side 12), dele af Europa-Parlamentets og Rådets direktiv 2005/56/EF af 26. oktober 2005 (EU-Tidende 2005 nr. L 310, side 1) om grænseoverskridende fusioner af selskaber med begrænset ansvar, dele af Europa-Parlamentets og Rådets direktiv 2007/36/EF af 11. juli 2007 (EU-Tidende 2007 nr. L 184, side 17) om udøvelse af visse aktionærrettigheder i børsnoterede selskaber, dele af Europa-Parlamentets og Rådets direktiv 2007/63/EF af 13. november 2007, (EU-Tidende 2007 nr. L 300, side 48) om ændring af Rådets direktiv 78/855/EØF og 82/891/EØF for så vidt angår kravet om udarbejdelse ved en uafhængig sagkyndig af en beretning i forbindelse med en fusion eller spaltning af aktieselskaber og dele af Europa-Parlamentets og Rådets direktiv 2009/109/EF af 16. september 2009 (EU-Tidende 2009 nr. L 259, side 14) om ændring af Rådets direktiv 77/91/EØF, 78/855/EØF og

82/891/EØF samt direktiv 2005/56/EF for så vidt angår rapporterings- og dokumentationskrav i forbindelse med fusioner og spaltninger." cf. Karnov.

3.3.2. NATIONAL CORPORATE TAX LAW

The Danish Corporate Tax Act (Selskabsskatteloven, SEL)

The first Danish Corporate Tax Act was enacted in 1960 and addressed the matters of taxation of income of public and private limited companies alike. Prior to the enactment of the act in 1960 companies were taxed on the same footing as physical persons.

The current Danish Corporate Tax Act is the main source of law on corporate taxation in Denmark. But the act does not stand alone. Through its § 8[112] it activates a web of various national tax-related legal acts if they, in accordance to their contents, are applicable to companies that fall under the scope of the Danish Corporate Tax Act.

The current act was enacted in 2015 and bears the official name of *Lovbekendtgørelse 2015-01-09 nr. 149 om indkomstbeskatning af aktieselskaber m.v.*

> Note: Also here I would like to underline the influence of federal European legislation on the area of law that traditionally is reserved to national regulation. Although, national corporate tax law is not harmonized to the same great extent as corporate law, the presence of federal aspect cannot go unnoticed. Yet again, the Danish corporate tax law is not an example of an isolated case. It is rather an example of some steps towards harmonization of national corporate tax legislation that all member states' corporate tax laws are subject to.

"Loven indeholder bestemmelser, der gennemfører dele af Rådets direktiv 2009/133/EF af 19. oktober 2009 om en fælles beskatningsordning ved fusion, spaltning, partiel spaltning, tilførsel af aktiver og ombytning af aktier vedrørende selskaber i forskellige medlemsstater og ved flytning af et SE's eller SCE's vedtægtsmæssige hjemsted mellem medlemsstater, EU-Tidende 2009, nr. L 310,

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[112] "Den skattepligtige indkomst opgøres efter skattelovgivningens almindelige regler, for så vidt de efter deres indhold er anvendelige på de i denne lov omhandlede selskaber og foreninger mv."

side 34, Rådets direktiv 2011/96/EU af 30. november 2011 om en fælles beskatningsordning for moder- og datterselskaber fra forskellige medlemsstater, EU-Tidende 2011, nr. L 345, side 8, Rådets direktiv 2003/49/EF af 3. juni 2003 om en fælles ordning for beskatning af renter og royalties, der betales mellem associerede selskaber i forskellige medlemsstater, EU-Tidende 2003, nr. L 157, side 49". Cf. Karnov.

Merger Tax Act, Fusionsskatteloven, FUSL[113]

The current act was enacted in 2012 and bears the official name of *Lovbekendtgørelse 2012-11-14 nr. 1120 om fusion, spaltning og tilførsel af aktiver m.v.*

The original Merger Tax Act was enacted in 1967[114] and dealt solely with horizontal mergers. It was replaced by an amended act in 1975 with a number of amendments, which subsequently resulted in the current act 2012-11-14 nr. 1120.

Notwithstanding its colloquial name expressively mentioning merger taxation *i.e.*, amalgamation of two or more legal entities, the acts deals as well with taxation of divisions, and taxation of transfer of business method, and offers *inter alia* an option of tax-neutrality of the transactions.

Capital Gains Tax Act, Aktieavancebeskatningsloven, ABL

The current act was enacted in 2015 and bears the official name of *Lovbekendtgørelse 2015-01-17 nr. 92 om den skattemæssige behandling af gevinst og tab ved afståelse af aktier m.v.* It is not the first Danish act dealing with taxation on capital gains. It merely implements the latest amendments to the main act adopted in 2005.

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[113]Loven indeholder bestemmelser der gennemfører de ændringer af skattelovgivningen, som var nødvendige for at efterkomme EF's fusionsdirektiv, Rådets direktiv 90/434 (now directive 2009/133/EC) og moder- datterselskabsdirektivet Rådets direktiv 90/435 (now directive 2011/96/EU). Cf. Karnov.

[114] The act from 1967 is not officially revoked as it still is significant in respect to authorizations issued before January 1, 1976 when the new 1976-act came into force.

The act is an expression of national Danish tax law, but it, likewise, takes European provisions into account, *e.g.*, ABL § 4 A, in respect to transfer of subsidiary shares cf. Directive 2011/96/EU or ABL § 36 in respect to majority takeover method.

The reason why it is included in the present dissertation is grounded on its importance in connection to the taxation of companies[115] and their shareholders[116] based on obtained profits on the sale of shares and dividend gains.

Transfer of shares representing capital of public and private limited liability companies alike, which also in a context of an M&A transaction is – as a starting point, a taxable event. Whereas Fusionskatteloven, FUSL is tailored to address merger, division, and transfer of business, Aktieavancebeskatningsloven, ABL deals with majority takeover method – exchange of shares method, as tax law refers to it, offering tax-neutrality for the transaction[117].

[115] Cf. ABL § 6.

[116] Cf. ABL § 7.

[117] Cf. ABL § 36.

CHAPTER 4. METHODS OF M&A

4.1. THE IMPORTANCE OF DISTINGUISHING BETWEEN THE FOUR METHODS OF TAKEOVER

The essence of a takeover is simple. A takeover aims for a result, which is a change of control; in other words, company A takes control over company B. In connection to M&A, the ancient saying *Mille viae ducunt homines per saecula Romam*, better known as *all roads lead to Rome* is quite accurate. In spite of the method chosen, the desired end result remains the same: acquisition of control.

The question must be asked whether this change of control can be impeded by events of external origins? And the answer to the question is in the affirmative, - yes. In spite of corporate options for change of control that exist for the purposes of M&A, it can be impeded by change-of-control clauses, the very purpose of which is either to obstruct change of control or to activate certain legal mechanisms that would facilitate negotiations among implicated parties within the framework of their potentially new reality. These change-of-control clauses belong to the legal area of the law of obligations. Yet in this context this area of law is elevated to be an integrated component of M&A-law, which includes corporate law, the law on securities, tax law, and anti-trust law.

Throughout the developed corporate legal systems around the world, four main methods of takeover are identified. Although various terms are applied to describe the methods, their essence and purpose remain the same. In Europe, we call them merger, division, majority takeover, and transfer of business or business purchase.

In spite of pursuing the same result of the acquisition of control over the target business or company, the methods utilized are undoubtedly very different. Different approaches and procedures characterize the respective methods. Different legal provisions come into play, and, therefore, also different requirements that the participants must observe become actualized.

A relevant question to ask is: *Who are the participants to a takeover?* They have to be identified in regard to each method. We are dealing with, on the one hand, a buyer and, on the other hand, a seller. However, the person(s) behind each role vary depending on the method of M&A chosen.

When a corporation is *merged* into another existing or newly formed corporation, it ceases to exist as an independent legal entity. Hence, the owners of that corporation transfer all contents of their corporation into possession of the new owner(s). They are the vendors of their corporation, and they are the receivers of the purchase price: most commonly in the form of shares in the continuing corporation.

The same principle applies to the method of *division* of companies. The shareholders of the corporation being divided transfer parts of their corporation into possession of the acquirers: either existing or newly formed corporations. The vendors – the shareholders, are the receivers of the purchase price. Here again, the purchase price most commonly consists of shares in the recipient corporations.

In the case of *business transfer* method, the roles are slightly different. The purchaser can either be a physical person or another business or a corporation, but the vendor is not the shareholders, but the corporation itself that sells out of its core. The seller is the receiver of the purchase price, which in this occasion is likely to consist of money or other assets rather than shares.

And when we consider the *majority takeover* method, we realize that the vendor is/are the shareholder(s) that sell their shares and, thus, transfer the influence and control over the corporation in question to the purchaser that must be another corporation.

Another important question to be asked is: *What is the object of purchase?* What does the vendor have to sell and the buyer to purchase in order to achieve the above-mentioned control? Identifying the object of purchase is crucial to correct choice of approach, as we would rather avoid the situation where the buyer purchases a “pig in a poke”, not only in regard to the quality of what is purchased, but here especially whether the acquired constitutes and provides the desired control.

Through application of the methods of M&A the buyer can purchase the whole corporation, a part of it, or merely shares that represent the capital of the target corporation. Hence, the acquirer can achieve control over the target corporation as a whole, specific part or parts of it, or mere shares that represent its capital (partially or completely).

It is essential to differentiate between on the one hand a corporation – a shell, and, on the other hand, a business – the core within the shell. The core, which can consist of several businesses, is a fuzzy term, and can, therefore, include a number of things. It can include, but not limited to, assets like real estate, tangible assets, intangible resources, employees, contractual relationships, partnerships, etc. But it can also include all types of liabilities and obligations.

The core is the business that is engaged in financial activities for profit, and the corporation is the legal framework within which one business or several businesses can exist and function.

Regardless, whether the buyer purchases a business or a corporation that owns that business, the object of the purchase remains the same. The buyer is essentially interested in the activities and assets of the core, - the business, which is to be found within the framework of the corporation. Without that business of interest a corporate framework – a company, is not worth much more than its formal registration and capital. Therefore, one can say that a business can be purchased either directly *i.e.*, through purchase of assets or indirectly *i.e.*, through purchase of shares.

It is also interesting to observe that we are addressing four different M&A methods, however, we only apply two words to describe them: mergers and acquisitions; or even one word: takeovers. This is because the methods of share purchase (majority takeover), the method of division, and the method of transfer of business are essentially methods of acquisition. The method of merger is slightly different. However, even in case of merger it is essentially about acquiring control.

Analysis of the four methods of M&A provided below should be read and applied in conjunction with the definitions provided in Chapter 1: *Topic and Method*.

An overall definition of an M&A operation

M&A transactions are sufficiently defined otherwise, but in case it should be necessary to provide a short and overall definition of an M&A operation, encompassing all the four methods, it would be composed as follows: *An operation by which assets, or assets and financial liabilities combined, are transferred from a physical or legal person to a legal person whereas control over the transported assets and where applicable obligations for the liabilities is transferred.*

4.2. MERGER

The method of merger, through which two or more previously independent legal entities melt together into one single company, has several structural styles due to variety of corporate and structural circumstances: regular merger, irregular merger, vertical merger within a group, and reverse vertical merger within a group.

Different jurisdictions apply different terms to describe *merger*.[118] Albeit, in many cases it is merely a matter of linguistic variety, some conceptual legal differences can be detected.

For example, corporations registered under Canada Business Corporations Act, CBCA, *i.e.*, federal corporations are permitted to amalgamate under federal jurisdiction;[119] two or more amalgamating corporations amalgamate and continue as one amalgamated corporation. The effect of amalgamation is expressed in CBCA sec. 186 and it is convenient to quote here:

> "a) …
>
> (b) the property of each amalgamating corporation continues to be the property of the amalgamated corporation;
>
> (c) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation;
>
> (d) an existing cause of action, claim or liability to prosecution is unaffected;
>
> (e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation;
>
> (f) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation; and
>
> (g) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation."

[118] For example, Canada Business Corporations Act, CBCA, R.S., 1985, c. C-44, continuously apply the term "amalgamation". See sec. 181 facilitating amalgamation under CBCA: "Two or more corporations, including holding and subsidiary corporations, may amalgamate and continue as one corporation".

[119] Cf. Canada Business Corporations Act, CBCA, R.S., 1985, c. C-44, sec. 181.

"The effect of an amalgamation has been described as a fusion of two corporations, or as two streams flowing together. The old amalgamating corporations do not cease to exist but continue in the amalgamated corporation."[120] [121]

A coherent definition of merger widely applied throughout the jurisdictions within the European Union[122] explains that a company can be wound up or cease to exist, without being liquidated, by transferring all its assets and liabilities (at once and as a complete package, so to speak) to another company. In return, the stockholders of the company that ceases to exist receive their consideration.[123]

Through a *regular* merger, where two or more companies amalgamate into a newly formed corporation, created with the purpose to comprise the merging corporations, we observe exchange of control over and between the corporations involved.[124]

Through an *irregular* merger, where one or more corporations are merged into an already existing corporation, which after the merger will stand as the continuing corporation, we observe acquisition of control over the corporation(s) dissolved by the continuing corporation.[125]

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[120] VanDuzer, J. Anthony, The Law of Partnerships and Corporations. 3rd ed. Toronto [Ont.]: Irwin Law, 2009, p. 314.

[121] R. v. Black & Decker Mfg. Ltd., [1975] 1 S.C.R. 411 – 421 offers valuable deliberations on the matter of effect of amalgamation, hereunder cessation of existence of amalgamating corporations in light of wording of the Act (Canada Corporations Act, R.S.C. 1970, c. C-32) allowing amalgamation of corporations.

[122] Corporate laws of the EU member states are widely harmonized as a result of the harmonization program resting upon the Company Law Directives, which has promotion and maintenance of the internal market as its primary goal.

[123] SL § 236 on domestic mergers & SL § 271 on cross-border mergers, which states that capital legal entities that fall under the scope of SL can participate in cross-border mergers with other capital legal entities incorporated under the laws of EU/EEA. SL § 271 does not expressively differentiate between regular and irregular mergers as SL § 236 does. There seems to be no reason for that either, since the provisions on cross-border mergers - with the exception of some specific cross-border aspects - are basically the same as those applicable to domestic mergers.

[124] Directive 2011/35/EU Art. 4 (1), Directive 2005/56/EC Art. 2 (2)(b), and Directive 2009/133/EC Art. 2 (a)(ii).

[125] Directive 2011/35/EU Art. 3 (1), Directive 2005/56/EC Art. 2 (2)(a), and Directive 2009/133/EC Art. 2 (a)(i).

A *horizontal* merger within a group is the term applied to define an amalgamation between two or more associated corporations which have the same parent company. A horizontal merger can be regular and irregular cf. right above.

A *vertical* merger within a group encompasses a situation where a parent company merges with its subsidiary, where the parent company is the continuing company and the subsidiary is the company that ceases to exist.

A *reverse vertical* merger within a group implies a merger between a parent company and its subsidiary, where the subsidiary is the continuing company and the parent company ceases to exist after being merged into the subsidiary. The method is also applied for the purposes of a cross-border relocation of a public or private limited liability company. The so-called "suction-cup method"[126] implies a reverse vertical merger involving a parent company and its subsidiary, whereas the subsidiary is the acquiring company. This matter is addressed in greater detail under the section *Corporate Nationality.*

In terms of corporate law the definitions and differences of the vertical and reverse vertical merger within a group undoubtedly play a role,[127] albeit limited. In terms of corporate tax law, these definitions are more substantial.[128]

The corporate provisions on mergers do not address an option of tax-neutrality either. This approach is a part of corporate tax law. Corporate tax law considers the operation of merger to be a sale. As a starting point, this implies that the vendors – the stockholders, must be taxed on their profit gains in connection to the sale. The option of a tax-neutral merger transaction, being part of corporate tax law, is enacted by provisions of Merger Taxation Directive 2009/133/EC.[129] In the Danish national law, for example, regulation of tax-neutral mergers is to be found in Fusionsskatteloven, FUSL, chapter 1.

Finally, European legislation endows the method of merger with two types of definition: a narrow definition, on the one hand, and a broad definition on the other hand. The former is found in the Third Company Law Directive 2011/35/EU and in the Tenth Company Law Directive 2005/56/EC. These directives exclusively deal with the method of amalgamation of two or more previously independent entities

[126] The method is closely addressed by Erik Werlauff in "Relocating a Company within the EU" European Company Law, 2008, Vol. 5, Issue 3, pp. 136–139.

[127] Alex Fomcenco & Erik Werlauff, Business Law, Werlauff Publishing, Europe, 2014.

[128] Erik Werlauff, Selskabsret, Karnov Group, 9th edition, 2013.

[129] The original Merger Taxation Directive 90/434/EEC has been substantially amended several times since its codification. It is now replaced by Directive 2009/133/EC.

into one legal entity. The broad definition of merger is found in Merger Taxation Directive 2009/133/EC. This directive broadens the definition of merger by dealing with all four methods of M&A at once. "Merger" here covers all the methods that imply acquisition of control, which occur without liquidation of participating legal entities.

4.3. DIVISION

The federal European definition of division stems from 6th company law directive 82/891/EEC. In accordance to the directive the method of division is an operation whereby a company being divided, without going into *liquidation*, transfers *all* its assets and liabilities to the recipient companies. In exchange as *consideration*, the shareholders in the company being divided are allocated shares in the receiving companies.

Originally, provisions of Directive 82/891/EEC were meant to be an integrated part of Directive 78/855/EEC on domestic mergers that we now refer to as Directive 2011/35/EU.[130] [131]

The issues on liquidation, succession, and consideration in respect to mergers mentioned under the section 1.3.1 above apply also to divisions. *Cessation* of the company being divided does not preclude its creditors from satisfying their claims by directing them against the acquiring companies due to the latter companies' *succession* into all the rights and obligations of the former company. In respect to *consideration* given to the shareholders of the divided company, the same requirements as in the case of the method of merger are observed.

This does not surprise. In fact, it is actually expected, due to similarities between these two methods, which also explains the legislator's original intentions of letting both methods to be governed by the same directive.

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[130] Alex Fomcenco & Erik Werlauff, The Textbook, Werlauff Publishing, 2014, p. 131.

[131] "The rationale behind this is that divisions are basically effectuated along with the same principles as mergers. The core of a division is a transfer from one company to several others. In case of a merger it is about transfer from one or more company/companies to another single company, either already existing company or newly for that specific purpose formed company" cf. Alex Fomcenco & Erik Werlauff, Business Law, Europe, Werlauff Publishing, 2014, p. 210.

Whereas in the case of *merger* a company is merged into the continuing company, in the case of *division* the company is divided into parts (branches of activity) and subsequently merged into the acquiring companies. The main difference that separates these two methods is that through merger the target remains whole and as such is absorbed by the continuing company, whereas through division the target is split prior to absorption by the acquiring companies.

A noteworthy feature that differentiates the method of division from the method of merger is that after the merger is conducted the target company ceases to exist, whereas it does not have to cease to exist after division, if the division is *partial*.[132] A target company can be divided into several branches of activity that subsequently are merged into the acquiring companies, yet leaving one or several activities within the legal framework of the divided company.[133] But this is not mandatory, and it is possible to leave the target empty, by dividing it into branches of activity and let them merge into their respective continuing companies. However, this approach is quite unlikely in practice.

Another noteworthy feature of the method of division is that it can be conducted by a company dividing itself without (yet) being a target of another company; for example, as an intermediate step in a restructuring strategy. Conversely, for a merger to take place there must be a continuing company with an ambition to amalgamate with the target company.

When this is said, it must be noted, that by dividing itself into branches of activity, for example, with intention of subsequent sale, these branches of activity are not transferred into legal limbo or in abeyance but into possession of other companies. These companies, however, remain under the divided company's domain as its subsidiaries. This process is not merely of academic interest, but it is useful and applicable in corporate restructuring strategies and/or in the process of maturing of assets for subsequent sale.

This was observed when a Danish limited liability company *Novo Nordisk A/S* was split through application of the method of division into two listed companies each encompassing its own area of business; the one has focus aimed at medicinal production, whereas the other has focus aimed at enzyme production.

Another example is the 1999/2000 division of the German conglomerate group *Mannesmann* into two independent companies; the one encompassing electronics

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[132] Partial division is not mandatory in accordance to Directive 82/891/EEC but can be permitted by the member states cf. Art. 25.

[133] A company is considered to be a shell, whereas the business within it is the core.

business and the other encompassing construction and other thereto related business activities.

4.4. TRANSFER OF BUSINESS

In corporate law terms, conduction of business presupposes incorporation – creation of a legal personality – *persona ficta,*[134] a corporate framework within which the business activities can be conducted.

Often referrals to corporate law and business law take place indiscriminately, but there is a difference between them in spite of these areas of law being closely connected.

Activities of a sole trader are subject to particularities of business law; his business does not require incorporation. It can function without a separate legal framework. And, if this same business, being the *core*, is inserted into a corporate *shell*, it is now expanding to being subject to particularities of corporate law as well.[135]

When transfer of business is chosen as a method of takeover, the acquirer acquires control over one or a number of assets. It is in this regard of no importance whether the assets are tangible or intangible, or a combination of the above. But in order to constitute a takeover in corporate terms, these assets must together constitute a business. This prerequisite differentiates transfer of business as an M&A method from a regular sale of (unrelated or loosely related) items.

Council Directive 2001/23/EC on safeguarding of employees' rights in the event of transfer provides with a definition of business transfer in art. 1: " a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary".

Distinguishing between transfer of business as a method of acquisition on the one hand, and a transfer of assets, on the other hand, was quite relevant in, for example, case *C-13/95, Ayse Süzen*, where the European Court of Justice concluded (and thus consolidated the provisions of the directive) that business transfer emerges where

[134] Erik Werlauff, Selskabsret, Karnov Group, 2013, p. 44.

[135] Alex Fomcenco & Erik Werlauff, Business Law, Europe, Werlauff Publishing, 2014, p. 178 et seq.

one undertaking transfers significant tangible or intangible assets comprising a business unit to another undertaking.

Hence, transfer of business as a method of M&A implies change of control over assets that together constitute a business, - an economic unit that is engaged in financial activities for profit, without this economic unit having own corporate legal personality.

4.5. MAJORITY TAKEOVER

Acquisition of shares representing the majority of the voting rights in a target corporation is another method through which control over the target corporation can be acquired.

A limited liability company, public and private alike, the capital of which is divided into shares, is owned by physical and legal persons through their ownership of the shares of the company in question. The control over the company is, thus, in the hands of the one(s) that own(s) the shares to which the majority of the voting rights is linked. It can be a single person, but also a number of stockholders that execute their powers as one unit that is bound together by a shareholder agreement. Acquiring the majority of the voting rights implies acquiring control.

Acquisition of shares can take place through either friendly takeover or a hostile takeover.

Notwithstanding the term *friendly takeover*, which is to a certain degree misleading, as a hostile takeover must also be friendly in the relationship between the buyer and the vendor, the essence of the expression here refers to the role of the supreme governing body of the target corporation e.g., the management. In particular, whether the supreme governing body takes part in negotiations and whether it recommends the stockholders to sell their shares to the bidder.

From the buyer's point of view, a friendly takeover is to prefer, as his bid is, hence, equipped with the supreme governing body's *stamp of approval* and it also reduces the risk of emergence of competing bids. This is, however, the truth with modifications. Being aware of investors' interest in acquiring the target, the corporation itself might be interested in reaching out to other potentially interested buyers on the market. Doing so, the target company gets a chance to create a momentum of competition and - with some good luck - raise the price bar.

Hostile takeover is observed in a situation where a public takeover bid is issued without prior (successful) negotiations with the supreme governing body of the target company or, where attempts to purchase majority of shares in a corporation is opposed by its supreme governing body. Hence, there are no material negotiations, as one of the parties, either the supreme governing body of the target corporation or even the potential acquirer refuses to negotiate.

The expression of "hostile takeover" can be somewhat deceptive. The hostile element in the process is aimed at the target corporation's supreme governing body and not towards the corporation, nor towards its stockholders. In addition to that, as it is mentioned earlier, the shareholders of the target company are the vendors and, thus, the party to the transaction. The supreme governing body's role here is *limited* to issuance of either a recommendation or a warning. Hence, the stockholders are "in the driver's seat".[136]

[136] Alex Fomcenco & Erik Werlauff, Business Law, Europe, Werlauff Publishing, 2014, p. 280.

CHAPTER 5. ELEMENTS

In connection with a corporate takeover, many questions emerge on both sides of the table of negotiations. Some of those questions are highly relevant and, therefore, must be addressed in great detail, some other questions would not require thorough investigation, perhaps, due to their irrelevance to the method that the parties consider to apply or the method that is already chosen.

This thesis - for obvious reasons - cannot mention all considerations and questions that parties may have during the pre-takeover negotiations. It is, however, possible to isolate some essential issues – elements, that play a vital role in the method-choosing process. These elements are addressed in the following.

5.1. CONSIDERATION: WHAT CAN IT CONSIST OF?

When a shareholder sells his shares his reason is often driven by financial speculation in the price of the shares. He may want to sell them because there is a financial gain in prospect. He may also want to sell because the value of the shares are dropping and he does not want to lose more if the prices for the shares in question are on the downward path.

Regardless of the shareholder's motives to sell he is most likely interested in receiving cash as consideration.

When it comes to M&A, the situation changes and we no longer refer to it as a sale when shares or assets are transferred and consideration is received.

Let us have a look on the definitions to the takeover methods offered by the legislation with the emphasis on consideration.

In case of a *merger*, regular and irregular alike, the dissolving company without going into liquidation transfers all its assets and liabilities to the continuing company. The shareholders of the company that ceases to exist receive shares representing the capital of the continuing company. That is their *consideration* for the company that they just transferred. Their shares in the company that is dissolved are *exchanged* with shares of the equivalent monetary value in the continuing company. The old shares are eliminated and replaced with new shares. The shareholders of the dissolved company are now shareholders of the continuing company. Directive 2005/56/EC on cross-border mergers does not mention *exchange* of shares or what happens to the shares of the dissolving company. It is of less importance in this set-up. The important aspect is that the continuing company issues shares to its new shareholders as consideration for the company they have transferred.

The same is observed in Directive 82/891/EEC on *divisions* where art. 2 reads: "after being wound up without going into liquidation a company transfers … all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division".

There is no individually standing directive on *majority takeovers* as it is the case with mergers and divisions however, Merger Taxation Directive 2009/133/EC[137] aiming towards creation of common system of taxation applicable to different methods of takeover within the European community offers a clear definition of this method and the role of consideration. Article 2 (e) reads as follows: "'exchange of shares' means an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, in the absence of a nominal value, of the accounting par value of the securities issued in exchange".

As indicated in the title itself, the core of this transaction is the exchange of shares. The acquirer's consideration to the transferring shareholders consists of shares that in terms of monetary value are equivalent to the monetary value of the shares that they transfer.

Transfer of business, as a method of M&A, is not governed by a thereto designated *act* that defines the method and regulates its process. Here as well, Directive 2009/133/EC comes useful. Transfer of business, which by the directive is referred to as *transfer of assets* in art. 2 (d) is defined as follows: "'transfer of assets' means an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer".

[137] The original Merger Taxation Directive 90/434/EEC has been substantially amended several times since its codification and is now replaced with Directive 2009/133/EC.

It appears that constitution of consideration plays a central role in the determination of whether the transaction in question is qualified to be considered a takeover or not.

Another relevant question that is inseparably important to consider is *who is the receiver* of the consideration. The answer to this question depends on the context of the particular method of takeover. In any method the receiver of consideration is the transferor; the shareholders take the role of transferor in merger, division, and majority takeover methods; they are the ones that transfer the company that they possess and in return receive the consideration. In transfer of business method, the vendor is the transferor company itself that sells out of its core and hence, also is the receiver of consideration.

On the other hand, the following question emerges: *who is the purchaser and hence the payer* of the consideration. The answer to this question does not depend on the method of takeover, as it is the case in the question above; regardless of the method, the purchaser must be a legal entity, which is able to offer consideration consisting of its own shares.

5.2. SUCCESSION IN CIVIL LAW PERSPECTIVE

Succession implies entering into somebody else' place in respect to that individual's rights and obligations. That individual can be a physical person or a corporation; in the context of this dissertation the focus is aimed at corporate succession.

Outside of legal corporate set-up, succession is often linked to the process of inheriting a title or a throne, whereas the successor enters into his predecessor's position and governs the office with the same authority that his predecessor did.

In corporate terms, and particularly in respect to takeovers, succession implies that a legal entity – a transferee - enters into the rights and obligations of another legal entity. Simultaneously, the latter is redeemed from the obligations that are transferred, as they now rest on the shoulders of the transferee. Moreover, the transferor is no longer entitled to the transferred rights; they now belong to the transferee.

Succession itself is characterized by consisting of two elements: *rights* - that are desired and welcomed, on the one hand, and *obligations* - that might be wished avoided, on the other hand. These two elements can, but do not always, accompany each other when transferred. Obligations, when certain conditions are fulfilled cf. the discussion below, can be transferred from one party to another without simultaneously involving the transfer of rights. Rights, which as the main rule are freely transferable, can be transferred from one party to another without simultaneously involving transfer of obligations unless, such rights are so closely connected or attached to obligations in question that they cannot be separated and must be transferred together. For example, some contracts can consist of numerous reciprocal motions. Each motion establishes its own separate set of rights and obligations for the participating parties, - yet within the framework of the same contract. We call these contracts for ongoing or running contracts. Rights arising from a contract of this character can usually not be separated and divided into smaller segments.

However, the mere right to a consideration that originates from a reciprocal contract can often be separated and transferred independently. The other party to the contract can, under certain circumstances,[138] refuse to honor the transfer based on account of his own contractual interests cf. right below.

Transfer of rights vs. transfer of obligations

It is a widely accepted principle within the area of the law of obligations that rights can freely be transferred from one party to another without prior consent from the debtor. On the other hand, transfer of obligations is preconditioned by prior acquisition of consent from the creditor; and naturally the new debtor's willingness to assume the original debtor's obligations towards his creditor. These principles, which are found in the various national laws of obligations, are also clearly reflected and resembled in the *UNIDROIT Principles* of International Commercial Contracts – a common denominator for many countries' law.[139]

> "An obligation to pay money or render other performance may be transferred from one person ('the original debtor') to another person (the 'new debtor') either

[138] In accordance to principles on "right of neglect" or a right to ignore, (Danish: Negligeringsretten) cf. Danish Administration of Justice Act § 511, sec. 3. (Retsplejeloven, RPL). Lennart Lynge Andersen & Erik Werlauff, Kreditretten, Karnov Group, 2014, p. 307 ff.

[139] Erik Werlauff, International Contracts: the UNIDROIT Principles as an alternative to clauses on governing law, Ex Tuto Publishing, 2013.

> a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or
>
> b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation."[140]
>
> "The transfer of an obligation by an agreement between the original obligor and the new obligor requires the consent of the obligee."[141]

Under observance of principles of the law of obligations, please allow me to elaborate on the matters of change of creditor and change of debtor respectively.

Change of creditor vs. change of debtor

As mentioned above, the main rule is that a right, in contrast to an obligation, is freely transferable, *i.e.*, change of creditor does not require debtor's consent. This covers both scenarios *i.e.*, a) where, on the one hand, the transfer of a right occurs on the basis of the owner's free will, and b) where, on the other hand, the owner's free will to the transfer may be lacking.

In regards to a), the transfer of a right by the owner can occur in the form of a *gift* or a *grant*, in a context of a *sale*, or in a context of a *testament*. The list is not exhaustive. In regards to b), the transfer of a right is facilitated in the course of a *compulsory sale*, *bankruptcy*, or *compulsory inheritance.*[142]

It is obvious that the owner of a right can, based on his free will, decide to proceed with options listed in a), as well as he can decide to abstain from these actions. On the contrary, the owner cannot self-impose restrictions on the transfer of his rights in the course of the circumstances listed in b). It could be convenient for him if that option was available to him, but it would contravene the state of the law of obligations. When this is said, it must be mentioned that some exceptions apply. These exceptions are based on social considerations, considerations in respect to interests of the contractual counterparty, and considerations of public interest.

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[140] UNIDROIT Principles art. 9.2.1.

[141] Ibid. Art. 9.2.3.

[142] Compulsory inheritance implies inheritance due to applicable relevant legislation on descent and distribution, and it does not depend on the will of the owner, typically a parent, as opposed to inheritance due to a testament.

In respect to social considerations: garnishment of wages, pension, alimony, maintenance payments, insurance compensations, etc., are regulated by specific provisions of relevant law and will not be dealt with further in the context of the present study.[143]

Debtor's right to disregard change of creditor

In regard to considerations in respect to interests of the contractual counterparty, the following situation must be taken into account:

A and B are parties to a reciprocal contract; whereas A is the money creditor and the debtor in kind, and B is the money debtor and the creditor in kind. Suppose that A, *prior to the fulfillment* of his debt in kind, transfers his money claim against B to C, who is not a party to the contract. B might now have a valid reason to fear that A may either lack the will or the ability to fulfill his obligation in kind. As a starting point A's transfer of his right to C is legally correct, however, under consideration of his own contractual rights, B can be permitted to partially or completely disregard the transfer from A to C.[144] B's options of action are the following: a) renegotiations with A, b) to pay partially or in full to A, or c) disregard the transfer from A to C completely.[145]

But if A already has fulfilled his obligations in kind, B, as money debtor, is unconditionally obliged to perform his obligation under respect of the transfer, *i.e.*, to pay to C.

In respect to considerations of public interest, limitations on a transport of rights are observed in connection to Value Added Tax, VAT, and tax repayments from tax authorities.[146]

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[143] See Erik Werlauff, Skyldforhold: Obligationsrettens Grundbegreber, Jurist- og Økonomforbundets Forlag, 2011, where the author reviews details and particularities of national Danish legal provisions that address the issue in question.

[144] Danish: Negligeringsretten, cf. Erik Werlauff, Skyldforhold: Obligationsrettens Grundbegreber, Jurist- og Økonomforbundets Forlag, 2011, and Lennart Lynge Andersen & Erik Werlauff, Kreditretten, Karnov Group, 2014, p. 307 ff.

[145] Danish Administration of Justice Act § 511, sec. 3. (Retsplejeloven, RPL).

[146] Cf. Erik Werlauff, Skyldforhold: Obligationsrettens Grundbegreber, Jurist- og Økonomforbundets Forlag, 2011, p. 167.

Creditor's consent to change of debtor

The main rule in respect to a change of debtor is that it requires creditor's consent. A debtor cannot transfer his obligation in money or other performance to a new debtor with binding legal effect on the creditor if the creditor did not give his consent to the transfer or does not accept this transfer. In other words, A can make an agreement with B whereas B assumes A's obligation towards C however, C is not obliged to respect this agreement. Otherwise, the agreement between A and B would create obligations for C, who is not a party to that agreement. This would be contrary to the principles of the law of obligations. Hence, change of debtor is possible if either: a) the creditor expresses his consent to the transfer, or b) change of debtor is statutory by virtue of law.

In regards to a) creditor C's consent to change of debtor is required, as an agreement between his original debtor A and new debtor B cannot create rights and certainly not obligations for C who is not party to that agreement. A creditor can grant his accept: *explicitly*, *i.e.*, by responding to a debtor's inquiry of creditor's accept; *tacitly*, *i.e.*, by acting in a certain fashion; or grant a prior consent to change of debtor.

In regards to b) it is the law that under certain circumstances compels a creditor to accept the change of debtor without his consent *i.e.*, so-called law-bound change of debtor cf. right below.

Mandatory accept of change of debtor

Corporate succession for M&A purposes is a reflection of a desire to the enabling transfer of rights and obligations *without* prior consent from the creditor in respect to the latter. This can only be done through enactment of legislation that make these transactions possible, given they are contrary to principles of the law of obligations, cf. the discussion above. Directives 2011/35/EU on domestic mergers, 2005/56/EC on cross-border mergers, and 82/891/EEC on divisions enact law-bound succession of rights and obligations without prior obtained creditor consent.[147] This law-bound change of debtor is, for the sake of protection of debtor's rights, accompanied by law-bound requirements on adequate safeguards *e.g.*, expert opinion and assessment.

[147] Directive 2011/35/EU art. 3 & 4; Directive 2005/56/EC art. 2 (2), and Directive 82/891/EEC art. 2.

If principles of the law of obligations is the starting point, and the law-bound succession approach (in respect to change of debtor) is an exception to that starting point, the question arises then on whether there exists *an exception to the exception* that brings us back to the conditions of the starting point? The answer to this question is in the affirmative: yes. The law-bound mandatory condition on succession in accordance to the provisions of the directives cf. above, can be overruled by contractual agreements between the original creditor and debtor. A clause in the contract that is to regulate this aspect is often called *change-of-control clause.* The purpose of such a clause is to impede mandatory accept of change of debtor resulting from a takeover. Hence, the parties agree, that if the debtor will, at some point in the future, become subject to a takeover, his creditor will not have to accept the new debtor. A takeover of the target company, which is the debtor in the contractual context, will, for the agreement in question, constitute either termination of the contract or *re*negotiations of the contractual particularities.

There are two types of law-bound succession: *universal* succession, which entails transfer of all rights and obligations from the predecessor to the successor, and *partial* succession, which entails transfer of some specific rights and obligations from the predecessor to the successor. Under observance of the options of avoidance of the law-bound succession stated above, please allow me to introduce the concept of universal and partial succession respectively in greater detail.

5.2.1. WHEN DOES CORPORATE *UNIVERSAL* SUCCESSION TAKE PLACE?

Universal succession implies a transfer of *all* rights and obligations from the transferor company to the transferee company. *All* here means *all.* The successor company takes its predecessor place in all respects; it can now fully execute the rights previously belonging to its predecessor as its own rights, and the creditors and other claim holders alike having an unsatisfied claim against the predecessor company can now forward all their claims against the successor.

Universal succession occurs in regard to M&A due to its enactment by the legislator.[148] If a transaction falls under the scope of an M&A method where the question on succession is relevant *i.e.*, *merger*, and *division*, succession is mandatory, unless it has been modified or conditioned by a contract cf. above.

[148] Directive 2011/35/EU art. 3 & 4; Directive 2005/56/EC art. 2 (2), and Directive 82/891/EEC art. 2.

Although, there are no legal provisions on succession in respect to *majority takeover* method, the principle of universal succession applies also here. Under application of majority takeover, as an M&A method, no changes to the legal personality of the target take place and, hence, no change of debtor takes place either. However, this acquisition of shares and, thus, control over target can be prevented by a contract between the target and its creditor(s) in accordance to which a cooperation can be terminated, financial obligations can fall due, etc.[149] The target company's contractual relationships with third parties can constitute such an extensive value for the potential acquirer that losing those contractual benefits in the course of the takeover can lead to the demise of the acquirer's initial interest in the target.

The same approach is observed in North American jurisdictions of the United States and Canada. The U.S. corporate laws, like the laws of the EU, apply the term *merger* when referring to two or more corporations melting together into one continuing corporation. In Canada, the term *amalgamation* is applied. Notwithstanding the linguistic differences, for legal purposes both concepts imply a statutory means of combining two or more corporations. Under the U.S. laws, a merger implies a cessation of existence of one or more merging companies and continuation of one either newly formed or a previously existing company. We recognize it in the European approach as well. Under Canadian law, however, both merger participating parties survive and continue their existence in the amalgamated company, which after the amalgamation encompasses all the assets and liabilities of the previously independent companies. "It is also very efficient from a commercial perspective as assets and liabilities are usually not considered to be transferred or assumed".[150] This means that for the purposes of the law of obligations no requirements on creditor consent in connection to change of debtor is required, exactly as it is the case in European M&A legislation.

5.2.2. WHEN DOES CORPORATE *PARTIAL* SUCCESSION FOR M&A PURPOSES TAKE PLACE?

As the term suggests partial succession implies succession in certain respects and no succession in other respects. Hence, if the issue in question is subject to succession, the succession will be full, meaning that all rights and obligations

[149] Erik Werlauff, Skyldforhold: Obligationsrettens Grundbegreber, Jurist- og Økonomforbundets Forlag, 2011, p. 179.

[150] M&A Activity in Canada: A Legal Overview, Stikeman Elliot LLP, 2015, C12, p. 67.

relating to that particular issue will be transferred. The same principle applies to the issues that are not subject to succession; none of the rights and obligations relating to that issue will be transferred.

Partial succession is particularly relevant in connection to employee related rights and obligations under the application of *transfer of business* method. When a business unit, which has employed personnel, is being transferred to another company, (the transferee company and the transferor company can belong to the same group of companies),[151] the transferee company fully succeeds into the transferor company's place in respect to its *employees;*[152] all thereto attached rights and obligations. When the term partial succession is being applied here, it is to indicate that not all rights and obligations of the transferor company are being transferred however, those that are being transferred, - are being transferred in full.

The matter is governed by the provisions of Directive 2001/23/EC.[153] Even though the directive encompasses the treatment of employees also under application of merger and division methods, in respect to these methods, obligations towards employees are covered by the scope of universal succession.

Particularities of transfer of business method is governed mainly by the law of obligations and property law. In accordance to these change of debtor, as addressed above, requires creditor's consent. The debtor in money, in this context, is the employer that has contractual obligations towards his employees. The new employer that emerges as the new debtor, in accordance to the provisions of the directive, succeeds into his predecessor's position: rights and obligations of the employment relationships must continue unchanged. This seems like a positive socio-economic approach. The directive, however, does not address the question on whether the employees are obliged to continue their employment under the new employer, or they have the right to oppose the transfer of the employment.[154] This question was brought before the European Court of Justice, ECJ, in case *C-132/91, Grigorios Katsikas*. The Court ruled, that an employee cannot be forced to work for an employer that he or she did not choose, as this would constitute a breach of an

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[151] C-234/98, Amalgamated Construction.

[152] These provisions (Directive 2001/23/EC) relate to safeguarding of employees' rights only. No parallel application of these rules must occur in regard to other corporate relationships of the company with its partners.

[153] Directive 2001/23/EC on approximation of the laws of the member states relating to the safeguarding of employee's' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[154] Lone L. Hansen, Medarbejdernes retsstilling ved grænseoverskridende overtagelse og fusion, Jurist- og Økonomiforbundets Forlag, 2010, p. 163.

employee's fundamental rights. "Such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen."[155]

This leads to the conclusion that the new employer who succeeds in his predecessor's place must respect the existing employment relations in regard to salary and details of the employment obligations. The employees, however, are not obliged to respect the succession and can subsequently object to the transfer of their employment, hence, losing the protection that the directive secures. Thus, mandatory partial succession in accordance to the directive is not absolute.

Mandatory partial succession takes place also under transfer of *insurance portfolio* from one insurance company to another.[156] Such a transfer implies a change of debtor *i.e.*, the insurance company in respect to the policyholders *i.e.,* the insurance creditors. In accordance to the legislation this transfer, and subsequently law-bound change of debtor, is possible without consent from the creditors, - the policyholders, provided some conditions are fulfilled: The transfer must be approved by the competent authority,[157] public announcements to that regard must be made in the National Gazette[158] and in another nationwide journal, all the policyholders must be informed thereof by personally addressed letters. All these measures are, for obvious reasons, constructed with the purpose of protection of creditors' rights.

As an international example of a change of debtor in connection to a transfer of insurance portfolio, a 2006/2007 acquisition of *Lloyd's* insurance obligations by *National Indemnity Ltd.*, a *Berkshire Hathaway Inc.* subsidiary, can be mentioned. An insurance portfolio of 34.000 names with recourse claims against *Lloyd* was transferred. It would virtually be impossible to obtain consent to change of debtor from each and every one of them. The transfer was approved by the High Court of Justice in Britain under application of national laws facilitating the transfer without creditors' consent.[159]

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[155] Case C-132/91, Grigorios Katsikas, paragraph 32.

[156] In Denmark such transfer is governed by Lovbekendtgørelse 2015-02-18 nr. 182 om finansiel virksomhed, FVL, § 204.

[157] Financial Services Authority, FSA; Danish: Finanstilsynet.

[158] Danish: Statstidende.

[159] Erik Werlauff, Skyldforhold: Obligationsrettens Grundbegreber, Jurist- og Økonomforbundets Forlag, 2011, p. 182 – 183.

5.3. TAXES, FISCAL NEUTRALITY, AND SUCCESSION FOR FISCAL PURPOSES

Imposition of taxes is a national state prerogative. In Denmark as a rule-of-law state, for example, this prerogative is established by § 43 in Grundloven – the Constitution. The states impose taxes on financial gains obtained in connection to sales of goods and services. The same principle applies if the object of sale is stock representing the capital of a company.

If a shareholder decides to sell the shares that are in his possession his gains will be subject to taxation by 27 % or 42 %[160] on his financial gains. If the price he obtains is lower than the price he paid for the same shares there is obviously no gains to tax as he actually loses money on his transaction.

If the same shareholder has sold some shares, of the same share category,[161] with profit and some other shares with a loss, his losses can be deducted from his gains for tax purposes.[162]

An individual who sells his business is also subject to tax on his gains based on for example goodwill, property profits, recovered depreciations etc.

If a company sells shares the transaction today (2015) is taxable with 23 % (22 % as of 2016) on financial gains. This percentage was 25 % before the year of 2013.

[160] In accordance to Danish law dividend related profits are subject to 27 % tax up to the progression threshold, which is DKK 49.200 (2014) and in 2013 was DKK 48.300. Dividend related profits above this threshold are subject to 42 % tax. If you are married, your threshold is doubled cf. Personskatteloven, PSL § 4 a og § 8 a.

[161] ”Share category” in this respect implies purpose of purchase, length of ownership, etc.

[162] Different types (categories) of shares can trigger an option of tax credit related to losses on the basis of share sale. The European federal provisions do not, however, address this issue, and leave it be a national legislators’ prerogative. The dissertation will not address this matter further.

Starting point

The above-mentioned relates to transactions outside of the scope of M&A. But in light of taxation, M&A transactions are not considered to be different and as a starting point are taxable events.

If a company is selling its business, its profits stemming from goodwill, property profits, recovered depreciations etc. are subject to 23 % tax,[163] which was 25 % before the year of 2014.

In the event of a *merger* the acquired company undergoes amendments to its corporate structure; it ceases to exist. In spite of that the company in corporate terms is not considered liquidated, however, in corporate tax terms it is, and liquidation is a taxable event. Its activities, profits, recovered depreciation sums etc. must be taxed up till the date of liquidation.

Also the company's shareholders must be taxed on the basis of the transfer of their shares, as if it was a regular sale, regardless of their received consideration consisting of shares in the continuing company, cash, or a combination thereof.

The same applies to the method of *division*, complete and partial alike. In fiscal terms, this transaction is considered as liquidation with subsequent taxation of both the company and the shareholders.

In regard to the *sale of business* method, which in reality is a sale of tangible and intangible assets that together constitute an economic unit - a business, in corporate tax terms it is a taxable event.

Transfer of shares in pursue of *majority takeover* is in corporate tax terms also a taxable event equivalent to regular sale of shares, even though the consideration is not in cash but in shares of equivalent value *i.e.*, exchange of shares.

Exceptions

Corporate tax law provides, however, exceptions to the starting point stated above. Some interesting aspects are at play when transactions that take place fall under definitions of the four methods of M&A.

[163] Valid as of 2015. The corporate tax percentage in Denmark in 2016 lowers to 22 %.

In Denmark, these exceptions are enacted by fusionsskatteloven, FUSL, in respect to the methods of merger, division, and transfer of business; and aktieavancebeskatningsloven, ABL, in respect to the method of majority takeover. The provisions emanate from Merger Taxation Directive 2009/133/EC, which *inter alia* offers definitions to the four methods. These definitions are found in article 2 and are as follows:

> “(a) ‘merger’ means an operation whereby:
>
> (i) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities representing the capital of that other company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities;
>
> (ii) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, in exchange for the issue to their shareholders of securities representing the capital of that new company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities;
>
> (iii) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital;
>
> (b) ‘division’ means an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more existing or new companies, in exchange for the pro rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;
>
> (c) ‘partial division’ means an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;

> (d) 'transfer of assets' means an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;
>
> (e) 'exchange of shares' means an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;"

The purpose of the directive is to establish a common tax system within the Community in order to avoid imposition of taxes in connection with mergers, divisions, transfer of assets, and exchange of shares. When the above-mentioned requirements to qualify as an M&A method are met, the transaction in question may avoid imposition of tax. FUSL chapter 1 deals with mergers, FUSL § 15 a-b deals with divisions, FUSL § 15 c-d deals with transfer of assets, and ABL § 36 deals with exchange of shares.

This avoidance of immediate imposition of tax does not define the transaction as a tax-free transaction, but rather as a tax-neutral transaction, which I address right below. Even though the taxes are not imposed on the current transaction they are still "lurking" in the background. The "lurking" tax is also known as the *latent tax burden*, *i.e.*, not yet realized tax burden; the parties are aware of its existence but also that it is not effectuated unless an effectuation-triggering event has occurred.

What qualifies for tax-neutrality?

When reading the definitions stated above the emphasis, which is heavily focused on the constitution of consideration cannot go unnoticed. The consideration is required to be in shares of the continuing or the acquiring company. This is due to the underlying aspect of fiscal succession and fiscal continuation, which are prerequisites to recognition of an operation as an M&A transaction.

If, for example, a business unit is transferred from one company to another company and the former receives only cash as consideration[164] the transaction will not fall under the scope of the definition of transfer of assets method provided by Directive 2009/133/EC and will, thus, not enjoy the benefits that the directive offers. The transaction will be considered a regular sale with thereto-attached tax consequences for the seller that fall due latest at the time of transfer.

If shares, to which the majority of the voting rights in a company are attached, are purchased from shareholders who are satisfied by consideration in cash only, it is no longer a majority takeover in M&A terminology but rather a regular sale of shares. And as a consequence of this approach the selling shareholders will be taxed for the profits obtained.

Another requirement imposed on the buyer by the directive is that the buyer must be a legal person. His consideration to the shareholders of the acquired or transferring company must consist of own, either already existing or newly issued shares.

Hence, in order to qualify for tax-neutrality under these provisions the requirements imposed on the consideration and thereto-attached fiscal succession and fiscal continuation must be complied with.

In accordance to the directive cash payment must not exceed 10 % of the nominal value of the shares transferred as part of the consideration. It must be borne in mind that this directive is a minimum directive, meaning that the member states implementing its provisions are entitled to enact less strict requirements than those provided by the directive. That is the path chosen by Denmark, the laws of which do not impose restrictions on the percentage of cash as part of the consideration in an M&A transaction. In the context of a merger or a division if merely one shareholder receives one share as part of consideration the transaction is considered an M&A transaction and is subsequently entitled to be conducted tax-neutrally, but only to the extent that fiscal continuation on the basis of fiscal succession covers.[165]

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[164] National jurisdictions of the member state are awarded with powers to adopt own thresholds in respect to how much cash is permitted in the consideration without falling out of the scope of definition of the relevant M&A transaction.

[165] Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 538 – 539.

5.3.1. SUCCESSION AND CONTINUATION – FISCAL TERMS

The concept of succession is a double-sided medal. On the one side, succession is defined in corporate terms – as concerns the above-mentioned in the section on succession in civil law perspective, and, on the other side, succession is defined in corporate tax terms or fiscal terms. The core of succession remains, however, the same – party A enters into party B's fiscal rights and obligations *i.e.*, fiscal continuation, whereas the third party C is the tax authority.

For the transferor, this means that in spite of the transfer, the shares or assets transferred are not considered sold but in tax terms merely replaced with other shares of the equivalent monetary value. This transaction is tax-neutral due to succession and continuation. However, the subsequent sale of the received shares as the consideration in a tax-neutral transaction will trigger imposition of tax unless they, yet again, are utilized as a consideration in a tax-neutral transaction with thereto-attached succession and continuation.

For the buyer, which must be a legal person who offers a consideration consisting of own shares, in order for succession to be relevant to discuss, this implies that for tax purposes the received shares or assets are considered to be acquired at the same time, for the same price, and for the same purpose, as the seller had acquired them for. In light of taxation, the takeover transaction becomes transparent and thus triggers no imposition of tax. This means that when in the future the buyer decides to sell the received shares or assets, he will be taxed, and the taxes will be calculated based on the profits obtained in the period of ownership by both the original seller and the buyer.

To sum up: in our legal imagination we fictitiously conclude that no transfer had taken place, and the original owner is still the present owner. This allows the system of tax-neutrality to function, as it does not imply tax losses for the state; although, a regularly taxable event is permitted to avoid immediate taxation, tax-neutrality and fiscal continuation must go hand-in-hand.

Consequences of fiscal-neutrality for carry-forward for M&A purposes

An option of fiscal neutrality in connection to M&A transactions is secured by Directive 90/434/EEC, which is replaced by Directive 2009/133/EC. The directive does not regulate the member states' course of actions in regard to carry-forward apart from stating in its article 13 section 2 that "to the extent that a company transferring its registered office within the territory of a Member State would be allowed to carry forward or carry back losses which had not been exhausted for tax purposes, that Member State shall allow the permanent establishment, situated within its territory, of the SE or of the SCE transferring its registered office, to take over those losses of the SE or SCE which have not been exhausted for tax purposes, provided that the loss carry forward or carry back would have been available in comparable circumstances to a company which continued to have its registered office or which continued to be tax resident in that Member State." It is, therefore, necessary to have a look on national law provisions; here the Danish national provisions in Fusionsskatteloven, FUSL, which implements the provisions of the directive.

Tax considerations would rarely stand alone as a driving force behind a takeover, but they should most definitely be included in the list of various aspects to consider prior to making a decision on which method of takeover the participants will utilize.

Tax-neutrality cf. above is not mandatory and can be achieved through acceptance granted by tax authorities. A taxable transaction is an existing option for the parties as well. Hence, the participants are given a choice. Although tax-neutrality may, at a first glance, seem to be the most beneficial approach, under closer investigation it may prove to be the opposite. The parties to a takeover under some situational conditions may be more interested in proceeding with an immediately taxable transaction. It must be borne in mind that once a transaction is chosen to be either tax-neutral or immediately taxable, the parties are not granted an option to change their mind if they realize that the opposite option is more convenient cf. TfS 2012.800 Ø.

In tax terms, a company's fiscal capacity stretches over a longer period of time than a single calendar year. That is being emphasized through *inter alia* carry-forward regulations. Even though a corporation is required to submit financial rapports on the yearly basis its fiscal capacity must be seen in a wider time perspective. Hence, financial losses in one year can be deducted against financial gains in the following year.

In respect to the method of *merger* this issue intensifies as *both* merger-participating companies, the company that ceases to exist and the continuing company alike, lose their existing carry-forward if the transaction is conducted tax neutrally.[166] If the companies do not wish to lose the accumulated carry-forward they are ought to either: a) postpone the merger; b) use the losses against profits; or c) consider an immediately taxable transaction.

[166] Cf. Fusionsskatteloven, FUSL § 8 (6).

On the contrary, if the transaction is conducted as immediately taxable, the continuing company maintains its carry-forward, cf. LL § 15,[167] and the company that ceases to exist is entitled to use its accumulated carry-forward prior to completion of the transaction.

For example, for the purposes of a *cross-border merger* a Danish continuing company can maintain its carry-forward if in accordance to the Danish national legislation the transaction is conducted as immediately taxable, in spite of the same transaction, under the legislation of the jurisdictions of the other participating companies, which cease to exist, the transaction is conducted as tax-neutral cf. TfS 2009.1140 SR.[168]

The rule enacted by FUSL § 8 (6), which prescribes that *both* merger-participating companies lose their existing carry-forward if the transaction is conducted tax neutrally has an exception: if a parent company merges with its subsidiary, when the companies are jointly taxed, the parent company is permitted to maintain its carry-forward, even if the subsidiary it merges with is not owned directly, but through another subsidiary in the same group of companies, cf. TfS 2005.94 LR.

Also in respect to the method of *division* all the participating companies, the company being divided and the receiving company(ies) alike, lose their accumulated carry-forward if the transaction is conducted tax neutrally, cf. FUSL § 15 b (1) & (2), FUSL § 8 (6), and LL § 15.

A *transfer of business* as an M&A method is regulated by FUSL § 15 c-d, providing an option of tax neutrality for the transaction. The provisions are accompanied by a reference to FUSL § 8 (6), which implies the loss of accumulated carry-forward if the transaction is conducted as tax-neutral.[169]

As a consequence of a *majority takeover* method control over the target company is being transferred to the acquirer through a transfer of the majority of the voting rights in the former. No amendments to corporate structure take place and the accumulated carry-forward that the companies might have, as a starting point, is not affected by the transaction. However, those jurisdictions that consider a possible trade with accumulated carry-forward losses repugnant can impose legislative restrictions on utilization of the carry-forward as a result of majority takeover of the target that possess those losses. The restrictions can consist of *e.g.*, placing

[167] Ligningsloven; Danish Tax Assesment Act.

[168] Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 526.

[169] Ibid., p. 569.

utilization of the losses on hold for a period of time or even annulation of the carry-forward concerned.

5.3.2. IS CORPORATE AND FISCAL SUCCESSION COORDINATED IN THEIR APPLICATION?

Notwithstanding the concept of succession being a two-sided medal, as mentioned above, application of corporate and fiscal succession respectively is not coherent, and areas of their application are not always coinciding.

Corporate succession

Corporate succession is mandatory and as a starting point cannot be waived or avoided in respect to *merger* and *division* methods. It is law-bound but not absolute, as exceptions to the rule occur, as discussed in the section on civil succession earlier.

In regard to *majority takeover,* where no amendments or changes to the corporate structure of the involved corporations take place, corporate succession is often omitted from the discussion. Although corporate succession in traditional understanding of the term does not occur, the acquirer of the majority of the voting rights, by application of majority takeover method, acquires control over the target corporation without assuming the target's liabilities. Under application of merger and division methods assumption of control is accompanied by assumption of liabilities, but not in regard to majority takeover. In the case of the latter, the acquirer is positioned even better, in comparison to the other methods, because he is not assuming any liabilities of the target.

The discussion, however, does not end here. The options of impediment of what could be the purpose of the transaction for the parties involved can stem from either a) a *change-of-control clause*, where a creditor ensures that in case the debtor company gets a new owner by the means of the majority takeover, his contract will become subject to termination, renegotiations, etc., or b) due to interpretation of *specific legislation* where under material analysis of the case in question a supervising authority or a court of law finds that change of owner has material implications for creditors or stakeholders.

From the US case law an example of *Baxter Pharm. v. ESI Lederle*, 1999 WL 160148 at 5 (Del. Ch. 1999) should be mentioned. In this case proceedings were brought before the Court of law investigating whether the acquisition of shares of the target company violated the anti-assignment provision, which in Europe is known as change-of-debtor clause. The Court came to the conclusion that violation of the clause did not occur as the debtor remained the same.

In case *SQL Solutions, Inc. v. Oracle Corp*., 1991 WL 626458 (N.D. Cal. Dec. 18, 1991) the Court came to the conclusion that in accordance to California law a reverse triangular merger, which means that the target company is being acquired by a subsidiary of the actual acquirer, whereas the target company is the continuing company, the transfer implies a change of debtor and, thus, is in violation of change-of-debtor clause, which in the US corporate terminology is referred to as anti-assignment clause. The conclusion of the Court is consolidated by the opinion in accordance to which deliberations, on whether change of debtor follows change of ownership of the legal entity in question, must be accompanied by investigation on whether that change affects the interests of the parties protected by the non-assignability of the contract.

To the completely opposite conclusion came the Delaware Court of Chancery in *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, C.A. No. 5589-VCP, 2013 WL 911118 (Del. Ch. Feb. 22, 2013, rev. Mar. 8, 2013), where the Court held that neither by operation of law nor otherwise can a reverse triangular merger result in violation of anti-assignment clauses of the continuing company.

In UfR 1982.87 H[170] The Supreme Court of Denmark found that albeit, under some circumstances an employee can terminate his employment with the company, which is subject to majority takeover, in this particular case the termination was unjustifiable under the present circumstances. This judgment is passed with a dissenting opinion.

In UfR 1966.145 H[171] the object of the case was a sale of a parcel by a municipality to a limited liability company A. The transaction was conditioned by a clause in accordance to which a subsequent sale of the parcel to a third party can take place only after an offer to the municipality was made to acquire the parcel for the same price as it was originally sold for. The sole owner of the company A transferred all the shares in the company to a third party, which through majority takeover acquired control over the parcel in question. The Supreme Court of Denmark ruled

[170] UfR 1982.87 H, Forudsætningerne for driftsleders ansættelsesaftale ikke bristet ved aktieoverdragelse.

[171] UfR 1966.145 H, Kommunes forkøbsret til grund, solgt til selskab under stiftelse, forsøgt omgået gennem aktiesalg. Kommunen havde krav på den herved opnåede fortjeneste.

that the profit gained through the sale of the company A is to be paid to the municipality as compensation, thus, concluding that transfer of control over the company implied transfer of the parcel itself.

In UfR 1969.25 H,[172] in accordance to the mortgage documents relating to real estate that belongs to a limited liability company any change of ownership of the real estate activated special mortgage payment. The Supreme Court of Denmark ruled that notwithstanding that, through majority takeover, a change of ownership of the company occurred, claim in favor for activation of special mortgage payment in accordance to the mortgage documents cannot be accepted. This judgment is passed with a dissenting opinion.

Concerning the method of *business transfer* corporate succession, with the exception of matters in relation to employees, is not statutory, *i.e.,* it is not law-bound. The involved parties can, however, create reciprocal contractual obligations enacting succession between them. These agreements, however, do not constitute any form of compulsory change of debtor, as it is the case with the law-bound change of debtor in merger and division methods.

Fiscal succession

Fiscal succession, on the other hand, is not mandatory. It is a conditioned option offered by the legislation. The parties can choose it if the transaction qualifies for it in accordance with relevant legislation.

Hence, a *merger or a division* can take place under application of mandatory corporate succession where at the same time no fiscal succession occurs either because the transaction fails to comply with requirements imposed by the legislation or because the parties opt out.

Inversely, a *transfer of business,* provided it complies with legislative requirements, can be conducted with fiscal succession by the acquirer. Corporate succession in this set-up, with the exception of the employee matters, will not follow automatically, but will depend on agreements made with creditors and other relevant parties in regard to their acceptance of the new debtor entering into obligations of the previous debtor. In case the negotiations, in attempt to conclude

[172] UfR 1969.25 H, Salg af samtlige aktier og vedtægtsændring i selskab, som havde pantsat ejendom, medførte ikke pligt til at betale ejerskifteafdrag. The judgment is commented in UfR 1969B.128.

agreements, will turn unsuccessful no corporate succession will take place and possible fiscal succession will stand alone.

Corporate succession in *majority takeover* method, as mentioned above, is often omitted from the academic debate given that no amendments of corporate structure occur. In relationship to its creditors the target corporation remains the debtor, and naturally responsible for own obligations. The acquirer of the majority of the voting shares in the target corporation does not enter into any legal relationship with the target's creditors by virtue of share exchange.[173] Fiscal succession and thereto-attached fiscal continuation, on the other hand, is closely attached to this method. For fiscal purposes, the acquirer of the shares succeeds in the seller's position in respect to *e.g.*, length and purpose of ownership of the shares in question.

5.4. GROUP-RELATED ISSUES

Entity law vs. enterprise law

The first European companies that were incorporated in the beginning of the 17th century, namely the Dutch East India Company, in respect to many aspects shared common similarities with contemporary capital limited liability companies.[174] When potential participants where invited to invest in those companies, a clear aim for participation was defined as being closely connected to the business activity; a company of that type would normally comprise of a ship, a destination, and a specifically defined objective of the voyage. A company and an enterprise were almost identical terms. In Dutch East India Companies, the assembly of participants had only limited influence on the enterprise they were sponsoring through their participation. However, in English and French companies of this sort the influence of the participants were much greater thus, placing the responsibility for the company and its enterprise in the hands of the owners.[175]

When, at that time, one thought of the question of limitation of liability, one did not think as much about the shareholders' liability for the company's debt. Rather, one was thinking of the individual shareholder's individual creditors: could they legally

[173] Regards must be had to the examples from case law mentioned above where majority takeover is considered to imply change of debtor or violation of other contractual obligations.

[174] Erik Werlauff, Generalforsamling og beslutning, FSRs Forlag, 1983, p. 26 ff.

[175] H.O. Jensen, UfR 1944 p. 240 ff.

confront the assets of the newly formed company; or were those assets now converted into shares so that the only thing the individual creditors could confront, was their debtor's shares in the new company.

Even though the case *C-106/89, Marleasing,* serves most often as an example for how a national court hearing a case which falls within a scope of a directive is required to interpret its national law in the light of the wording and the purpose of that directive, the factual circumstances of this case are about individual shareholder's individual creditor and his ability to aim his claims against the assets of the newly formed company (where the debtor is a shareholder) or *merely* settle for the option of aiming claims against the shares in that company owned by his debtor. *Marleasing SA*, being that creditor, contested its debtor's, *Barviesa SA*, participation in establishing *La Comercial SA*, to which *Barviesa SA* contributed own assets and in return received shares in *La Comercial SA. Marleasing SA* sought nullification of *La Comercial SA* claiming that the company did not have any specific cause or purpose. The Court ruled against plaintiff's claim, which in reality of the circumstances, for *Marleasing SA,* meant that its claims against its debtor could not be satisfied in the assets of the company the debtor is shareholder in.

Through time, this way of corporate thinking has been under development, forming into a new way of seeing a company and an enterprise as two different things. "The purposes of a company would no longer necessarily be confined to a certain activity with particular shareholder focus but often merely a broadly defined object."[176]

Hence, we are observing a shift from *entity law* to *enterprise law* way of thinking. "*Entity law*, understood as the rules concerning the individual legal person, and *enterprise law*, understood as the rules concerning the enterprise, irrespective of its affiliation with plurality of legal persons."[177]

Additionally, the aspect of ownership of a company through possession of shares has developed. Whereas originally a company was designed to be owned by physical persons it is now common and accepted that a company is owned by another company. But a company can also be owned by several companies (participating companies), and one company (parent company) can own several companies (subsidiaries). This presents a potentially complicated web of (closely) connected legal entities with intertwined enterprises.

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[176] Erik Werlauff, EU Company Law – Common business law of 28 states, 2nd ed., DJØF Publishing, 2003, p. 189.

[177] Erik Werlauff, "Group and Community – the European Court's Development of an Independent Community Law Concept of the Group and its Significance for National Company Law", European Company Law, vol. 4, issue 5, 2007.

The reason why *closely*, right above, is indicated in brackets is because the close link between companies for corporate purposes is not a mandatory prerequisite for existence of a group of companies with similar business activities, nor a conglomerate encompassing companies with unrelated activities.

Berkshire Hathaway, a widely ramified conglomerate, created by the legendary Warren Buffett for 50 years ago, controls a great number of various companies. The largest companies of the conglomerate operate independently, with an extremely high degree of autonomy to the respective CEOs. The conglomerate has a very small headquarters with a chairman, a financial director, and the staff needed to take care of auditing matters, risk management, and internal controls. The conglomerate does not focus on exploiting synergies that might be possible within the group, but rather focusing on the independent corporate governance and financial success. *Berkshire Hathaway* is constantly looking for new prospects to acquire. In the corporate philosophy of this highly successful conglomerate it is not the connection, present or potential alike, between the companies belonging to the group or the targets-in-sight that is of overriding importance, it is rather the healthy state of the company in form of its management and capital discipline.

In respect to M&A, the methods are often used by groups of companies for internally restructuring purposes, but also externally, where *e.g.*, two or more companies belonging to different groups are involved in an M&A transaction. For example, in 2002 when *Siemens Group* sold a number of businesses to *Kohlberg Kravis Roberts & Co* in a transaction worth of €1.69 billion the deal included more than 100 companies in over 30 different jurisdictions. It appears, therefore, appropriate to consider M&A methods from a group of companies' point of view, and to look into the existing definitions of a group.

A few definitions of a group

For *accounting purposes*, Community law demands that when several enterprises are deemed *closely connected* they must be treated collectively. This approach was undertaken through 7th Company Law Directive 83/349/EEC that after being substantially amended is comprised into a common Directive 2013/34/EU that includes previously 4th Company Law Directive on annual accounts, and 8th Company Law Directive on statutory audits.[178] "Consolidated financial statements

[178] Alex Fomcenco & Erik Werlauff, The Textbook, Werlauff Publishing, 2014, p. 377.

should present the activities of a parent undertaking and its subsidiaries as a single economic entity (a group)."[179]

The definition provided by International Accounting Standard, IAS 27 indicates, that "a *group* is a parent company and all its subsidiaries." Moreover, the standard provides the following definitions: "A *parent* is an entity that has one or more subsidiaries. A *subsidiary* is an entity, including an unincorporated entity such as a partnership that is controlled by another entity (known as the parent). *Control* is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities."[180]

For *anti-trust law purposes* in Community law, Council Regulation 139/2004 (Merger Regulation) deals with lasting change of control through merger or acquisition, where *control* is "constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking."[181]

For *corporate purposes*, the federal European legislation does not offer a definition of a group of companies. Albeit, work on enacting a directive on groups was initiated by a proposal from the Commission, it has since been abandoned. Corporate definition and regulation of groups of companies are, hence, the responsibility of each member state through its national, not harmonized for this purposes, legislation.

The Danish national corporate law definition can be used as an example here:

> "6. A group consists of a parent and one or more subsidiaries. No enterprise may have more than one direct parent. If more than one company meets one or more of the criteria set out in section 7, only the company exerting the de facto decisive influence on the financial and operational decisions of the enterprise will be deemed to be the parent.
>
> 7. Decisive influence means the power to control a subsidiary's financial and operational decisions. …."[182]

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[179] Directive 2013/34/EU paragraph 31.

[180] IAS 27, paragraph 4

[181] Council Regulation 139/2004 (Merger Regulation) art. 3.

[182] The Danish Companies Act, sec. 6 & 7.

Considering the above-given definitions that originate from various areas of law and with conspicuous varieties that serve the purpose of being tailored to the relevant area of law, one can conclude, albeit cautiously, that a group exists where control is being exercised by one company over one or more other companies that are (closely) connected.

The European federal group-legislation

If it looks like a duck, if it walks like a duck, if it quacks like a duck – it *is* a duck. The same approach of determination of what defines a group seems to be used in law.

European legislator is holding back in respect to providing legislation on groups. The Commission had proposed a draft to a directive[183] that would regulate the question on groups. The draft was an attempt to create a uniform set of rules that would regulate this important subject of company law within the European Community. It is interesting to note that Germany and Portugal[184] are the only member states of the European Union that have a coherent law on groups. Other member states are settled with sporadic and not always clear nor coherent rules in their respective national company legislations.

From the very beginning, the draft of the directive that would regulate issues of groups met substantial criticism. In spite of heavy debates amongst academics, on the present day we still do not have any clear regulation of groups provided by the European legislator, and the above-mentioned directive can rightfully be considered as stranded.

However, the above-mentioned metaphorical expression involving a duck and the missing group law on the Community level are not the only resources that are available.

In accordance to the Treaty on the Functioning of the European Union, TFEU, articles 49 and 54 on freedom of establishment, a company is endowed with a right to choose the method of own establishment: through an agency, through a branch, or through a subsidiary. Following the ban on discrimination on the basis of nationality, in accordance to the Treaty, a company has a right to establish and

[183] The 9th Company Law Directive.

[184] On Portuguese group law see José Engrácia Antunes, “The Law of Corporate Groups in Portugal”, Institute for Law and Finance, Johann Wolfgang Goethe-Universität, Working Paper Series no. 84, May, 2008.

manage its agency, branch, or subsidiary on the same terms and under the same conditions that are laid down by the law for the country of establishment's own nationals, cf. art. 49 and 54 TFEU.

Moreover, "an interesting aspect of the lack of regulation of group law is that the European Court is actually developing group law, albeit in isolated but quite central areas."[185] "The Court is prepared, under certain circumstances, to ignore the formal fact that the group consists of a number of separate companies, … insofar as the companies act as one company although theoretically comprising several legal entities."[186] Furthermore, Erik Werlauff consolidates this statement with the following cases:

Case *C-389/92, Ballast Nedam Groep,* where for the purpose of EU tendering rules, "when a parent company makes a bid for a public contract which involves documenting its expertise and experience within the relevant area, the parent company may also include the resources which the parent company lacks, but which one or more of its subsidiaries possesses."

Case *C-176/98, Holst Italia SpA (Ruhrwasser),* "where the newly formed German company Ruhrwasser AG did not itself have the resources, but referred to the resources placed in one of the six public-law bodies which had founded the company, i.e. resources at the level of 'parent company'."

In case *C-73/95-P, Parker,* "it was found that when the actions of subsidiaries are wholly 'controlled' by the parent company, they and the parent company constitute one economic unit within the meaning of the competition rules."

In case *C-222/94, The Commission v. United Kingdom,* the Court, for the purposes of European broadcasting directive[187], deems the broadcasting group to be domiciled and thus, governed by the law of the member state in which the center of its activities is located. Nevertheless the broadcasting services are divided into domains of several other companies incorporated in different states, the Court considers them to be branches of the company, which encompasses the center of the group's activities.

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[185] Erik Werlauff, "Group and Community – the European Court's Development of an Independent Community Law Concept of the Group and its Significance for National Company Law", European Company Law, vol. 4, issue 5, 2007.

[186] Ibid.

[187] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

"Why is it that European corporate tax law is always ahead of European company law? The important Directive on merger taxation, 90/434, was light years ahead of both the SE Regulation 2157/2001 and the CBM Directive 2005/56 on cross-border mergers – and no one has even thought of regulating cross-border division in European company law (apart from what can be concluded from *Sevic*, C/411-03)."[188] This hypothetical question remains unanswered.

The question is, whether M&A can be applied in order to create, restructure, or liquidate a vertical-structured group where a parent company is equipped with *de jure* and/or *de facto* control cf. right below, over its subsidiary(ies).

Definition of a *Group* in National Law

Group law, similar to M&A law, is a discipline of law that consists of a number of various legal acts. Common European definition of a group does not yet exist, and in order to contribute with an example of a specific applicable definition of a group I have to resort to national law, in particular to Danish law.

The Danish Companies Act, Selskabsloven,[189] in § 6, which earlier is cited in English, offers a definition of a group that is heavily inspired by (and in case needed, must be interpreted in accordance with) the definition given by International Accounting Standard Board in IAS 27. In the original Danish version it reads as follows:

> "Et moderselskab udgør sammen med en eller flere dattervirksomheder en koncern. En virksomhed kan kun have ét direkte moderselskab. Hvis flere selskaber opfylder et eller flere af kriterierne i § 7, er det alene det selskab, som faktisk udøver den bestemmende indflydelse over virksomhedens økonomiske og driftsmæssige beslutninger, der anses for at være moderselskab."

Hence, there is no clear definition of a parent company, and no clear definition of a subsidiary. However, the section directs our attention to § 7, which deals with matters of *decisive influence*. Decisive influence, when utilized, is applied as a yardstick to establish whether there is a parent – subsidiary link between the affiliated companies, or not. The last sentence of § 6 rightfully suggests that more than one company can satisfy the criteria of having decisive influence cf. § 7 over another company. § 7 reads as follows:

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[188] Erik Werlauff, One Stop Group Law Shop, European Company Law vol. 9, issue 1, 2012.

[189] Lovbekendtgørelse 2011-04-11 nr. 322 om aktie- og anpartsselskaber.

"Sec. 1

Bestemmende indflydelse er beføjelsen til at styre en dattervirksomheds økonomiske og driftsmæssige beslutninger.

Sec. 2

Bestemmende indflydelse i forhold til en dattervirksomhed foreligger, når moderselskabet direkte eller indirekte gennem en dattervirksomhed ejer mere end halvdelen af stemmerettighederne i en virksomhed, medmindre det i særlige tilfælde klart kan påvises, at et sådant ejerforhold ikke udgør bestemmende indflydelse.

Sec. 3.

Ejer et moderselskab ikke mere end halvdelen af stemmerettighederne i en virksomhed, foreligger der bestemmende indflydelse, hvis moderselskabet har

1) råderet over mere end halvdelen af stemmerettighederne i kraft af en aftale med andre investorer,

2) beføjelse til at styre de finansielle og driftsmæssige forhold i en virksomhed i henhold til en vedtægt eller aftale,

3) beføjelse til at udpege eller afsætte flertallet af medlemmerne i det øverste ledelsesorgan og dette organ besidder den bestemmende indflydelse på virksomheden eller

4) råderet over det faktiske flertal af stemmerne på generalforsamlingen eller i et tilsvarende organ og derved besidder den faktiske bestemmende indflydelse over virksomheden.

Sec. 4

Eksistensen og virkningen af potentielle stemmerettigheder, herunder tegningsretter og købsoptioner på kapitalandele, som aktuelt kan udnyttes eller konverteres, skal tages i betragtning ved vurderingen af, om et selskab har bestemmende indflydelse.

Sec. 5

Ved opgørelsen af stemmerettigheder i en dattervirksomhed ses der bort fra stemmerettigheder, som knytter sig til kapitalandele, der besiddes af dattervirksomheden selv eller dens dattervirksomheder."

Hence, being entitled to decisive influence cf. § 7 and act upon it *i.e.,* exercise it, are two different things. Having an option of decisive influence does not automatically constitute actual control.[190]

In accordance with § 6 cf. above, in corporate terms a subsidiary can only have one parent company that exercises decisive influence over its financial and business activities. This, however, does not impose limitations on the number of parent companies in corporate fiscal terms. In this respect, a company can have several parent companies, which through possession of more than 10 % of the equity of the subsidiary in question are entitled to tax-free dividends cf. SEL § 13, sec. 1, nr. 2.

5.4.1. CAN A GROUP OF COMPANIES BE CREATED THROUGH M&A METHODS?

An already existing group of companies can expand or a new group of companies can be created through the acquisition of already existing companies.

The method of *merger* can be applied to consolidate the corporate and the financial strengths of companies belonging to a group, but it will not expand the corporate structure of the group. By way of regular merger two or more companies cease to exist as they merge into one newly formed continuing company; by way of irregular merger one already existing company absorbs one or several companies, which cease to exist. As a result of either regular or irregular merger, the number of companies in the group decreases hence, contracting the group.

Also the method of *division*, by the so-called drop-down approach, where the company being divided transfers part of its business activities to its subsidiary, which is formed with the purpose of being the recipient company, can be applied for group creating purposes.

Acquisition of business and majority takeover are the methods of M&A that are suitable for the creation of a group.

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[190] In respects to vertical groups (parent company – subsidiary), a substantially detailed analysis of the matters of *de jure* control & *de facto* control respectively is offered by Gitte Søgaard & Erik Werlauff in Koncernretten, Werlauff Publishing, (1st ed., 2015).

Acquisition of business by a single company will obviously not form a group. But the acquiring company can prior to the acquisition of business incorporate a new company for the very purpose of acquiring and subsequently running the business of interest.

Also through *majority takeover* a group can be formed or expanded when a company has acquired control over another company by acquiring shares to which the majority of the voting rights are attached.

5.4.2. CAN AN ALREADY EXISTING GROUP BE RESTRUCTURED THROUGH M&A METHODS?

All four methods of M&A can be applied for group-restructuring purposes cf. a short introduction below.

Merger, as a method of amalgamation of legal entities and hence, consolidation of their activities, can be applied in a combination of two or more group-related companies into one single continuing company.

Division can be applied for restructuring purposes of an existing group. By dividing itself a company can transfer parts of its business activities to one or several newly formed companies – the so-called drop-down approach - that after the division will remain under the control of the company being divided that now transformed itself to be the parent company of those newly formed companies cf. Directive 82/891/EEC art. 21 & art. 25.

Transfer of business from a company to a newly formed company is also applicable for restructuring purposes.

Creation of a holding company by the original company and simultaneous *majority takeover* of the original company – the so-called push-up approach – is another method used in restructuring groups.

5.4.3. CAN M&A METHODS BE USED IN CHANGE-OF-CONTROL PLANNING?

The core of any of the four M&A methods is change of control through the change of ownership. Through the method of *merger,* shareholders of the company being acquired transfer control over their company to the acquiring company by letting it merge with (i.e. by regular merger) or into the latter (i.e. by irregular merger). Through the method of *division,* shareholders transfer a part of the company that they own to the acquiring company. Through the method of *transfer of business*, a branch of business activities of a company is transferred from the transferring company to the acquiring company. Through the method of *majority takeover,* shares that constitute majority of the voting rights are transferred from the shareholders of the target company to the acquiring company and hence, the control over the target is transferred to the acquiring company.

When we deal with *potential* change of control through the application of M&A methods, we address the issue of *asset grooming* for subsequent/future sale. If a change of control is potential and not present it presupposes that notwithstanding restructuring through M&A, the assets that are subject to grooming remain under the control of the same owner also after that M&A-transaction is completed.

Asset grooming for subsequent sale can occur internally within one *company*; but it can also occur internally within a *group*.

Suppose, a company that encompasses several enterprises that operate in different areas of business, which can be production, service, research, etc., considers it to be more profitable to focus on fewer activities and decides to sell one of the enterprises it owns and operates. In order to make the enterprise more attractive for potential buyers, *i.e*., to make certain parts of its whole business ripe for sale, the company decides to separate the enterprise in question from the rest of the company's assets (and liabilities) and facilitates its emergence as an independent entity. Hence, the (parent) company subjects one of its businesses to asset grooming for possible subsequent sale, as occurred in 1998 when a Danish registered and listed company *Sophus Berendsen A/S* was split into two independent legal entities: the new *Sophus Berendsen A/S* and *Ratin A/S,* both listed on the regulated marked in Denmark. In 2002 *Sophus Berendsen A/S* was acquired by *Davis Service Group Plc.* and delisted from the stock exchange.

As one of the recent examples can the sale of *Bang & Olufsen A/S'* Car audio business by *Bang & Olufsen A/S*, a Denmark-based audio and visual systems manufacturer to *Harman International Industries, Inc*., a US-based company engaged in the development, manufacturing, and marketing of high-fidelity audio products and electronic systems can be mentioned. Another recent example is the sale of *Informationsteknik Scandinavia A/S*, a Denmark-based company engaged in designing, developing, manufacturing, and selling conference and voting, interpretation, and audio-visual solutions by *Shure Incorporated,* a US-based manufacturer of microphones and audio electronics to *3aIT Ltd.*, a UK-based company engaged in providing software development, website designing and IT support services.

Asset grooming within a group of companies is also possible and, perhaps with the similar argumentation. A conglomerate, which is defined as "a group of corporations engaged in unrelated businesses which are controlled by a single corporate entity,"[191] might find it appropriate to subject some already independent companies or enterprises *i.e.*, businesses that are encompassed into the legal framework of companies, to asset grooming for subsequent sale. This could be pursued by combining companies that have the same or similar line of business, or carve out parts of business within existing companies and transfer them to newly formed company/companies within the framework of which, these parts of businesses can be encompassed.

When in 2012, entering its next chapter, *Kodak* took this restructuring approach it resulted in emergence of three business segments: *Digital Printing and Enterprise, DP&E; Graphics, Entertainment and Commercial Films, GECF*; and the third segment consisting of two businesses: *Personalized Imaging, PI*, and *Document Imaging, DI*, whereas both of them desired sold. The sale of *PI* and *DI* actualized a year later in 2013.

Another recent example is the sale of *Solar Deutschland GmbH*, a Germany-based distributor of electrical, heating, plumbing, and ventilation products to *Sonepar S.A.*, a France-based company engaged in B-to-B distribution of electrical products and related services by *Solar A/S*, a Denmark-based wholesalers of electrical and provision of related services.

Likewise, the sale of *Well Come Support Center Co Ltd*., a Japan-based company engaged in homecare activities to *Yagami Seisakusho Co., Ltd*., a Japan-based company engaged in offering medical devices by *Coloplast A/S*, a Denmark-based company engaged in the marketing and sale of medical therapy products.

Asset grooming within a company, whereas a number of assets, which, combined together, constitute a business unit, cannot occur under application of the method of *merger*. Merger implies that a whole company ceases to exist as it merges into another either existing or a newly incorporated company.

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[191] Steven H. Gifis. Law Dictionary, Barron's, 2010.

The method of merger, however, can be applied for asset grooming within a group of companies. Two or more companies that belong to the same conglomerate can be identified as conducting similar business and desired merged into a single company, with the purpose of subsequent sale.

The method of *division* is well suitable to facilitate asset grooming within a company. It implies that the parent-to-be company prior to division incorporates a subsidiary that subsequently acquires the part of the company that through separation from the rest of the business is ready to be spun off. As a consequence thereof, the separated part of the business is now in possession of the subsidiary, but it is still under the control of the parent company through the possession of shares in the former.

Moreover, for the purposes of asset grooming within a group the method of division is suitable. Without losing control over a part of a company, which through division is being transferred from one company to another company within the same group, restructuring purposes are being observed as the transferred part of the transferor company remains under control of the parent company even though it is now encompassed into the framework of the transferee company.

Also the method of *business transfer* can be applicable for the purposes of asset grooming. Following the same approach as mentioned above in respect to the method of division, the parent-to-be company would want to incorporate a subsidiary, which will acquire the business from the parent company in a transfer of business operation. The business is now transferred to an independent legal entity, but it remains under the control of the parent company, as it is the sole shareholder of its subsidiary.

Likewise can the method be used for asset grooming within a group, where a business is transferred from one company to another company while both companies belong to the same group.

Majority takeover must be mentioned but immediately rejected as the inapplicable option of change-of-control planning through M&A methods within a company as well as within a group. Asset grooming implies identification and separation of assets that constitute a business and subsequent transfer of this business to another legal entity without losing control over the business. Acquiring majority of the voting rights in a company does not facilitate such transfer and, hence, does not serve the purpose of asset grooming.

Asset grooming for subsequent sale is a reversible process, not merely prior to completion of the transaction but also after the transaction is complete. It could be necessary to reverse the transaction if the controlling company is not satisfied with the received offers for the target or fails to find a buyer at all. This again is done under application of M&A methods. The groomed target company could be merged with the parent company or with another subsidiary within the group the target belongs to. Alternatively the target can be split under application of division method and acquired by other subsidiaries in the group. Or assets of one or more subsidiaries can be distributed to its parent company, and from that parent company transferred, by way of capital increase, to another subsidiary, perhaps in another country. Both the dividend and the capital increase will be tax-free.

5.4.4. CAN M&A METHODS BE APPLIED IN LIQUIDATION OF A GROUP?

An existing group of companies can be shrunk to encompass fewer entities by letting them amalgamate or merge with each other. The same approach can be used if termination of a group's existence is desired. The companies belonging to the group can amalgamate into one single continuing company, either already existing and being part of the group or newly formed for the purpose to encompass the companies of the group that is to be liquidated.

5.5. HOLDING-STRUCTURE ISSUES

Legislation does not offer an adequate definition of a holding company or a holding structure of a group. Both terms, however, are widely applied in the corporate world.

What is a Holding Company/Holding Structure?

As a legal person a holding company can be a public or a private capital limited liability company. Its distinctive feature is in its purpose, which is different from a purpose of an operating company.[192] Whereas an operating company exists to encompass corporate activities, a holding company exists to own shares of the operating company, or several operating companies. Thus, a shareholder instead of having ownership of an operative company directly through personal possession of its shares owns it indirectly as he owns shares of the holding company that owns shares of the operating company.

What are the Advantages of a Holding Structure?

The advantages of a holding structure are threefold. They concern corporate matters, matters of the imposition of levies and fees, and finally tax matters.

A corporation as an individual legal entity is responsible for all its obligations. If a company goes bankrupt it is responsible for satisfying the claims of its creditors with the capital and value of the assets that it possesses. Even though the holding company that owns the bankrupt company is experiencing a loss and a decline in its net worth as a result of the bankruptcy of its subsidiary, it is however, protected from claims of the bankrupt company's creditors.

Hence, the corporate advantages of a holding structure is increased limitation of liability, and an option of savings that are not placed in a reserve in the operating company but in a holding company, where they can either accumulate or they can be used for other corporate activities.

It is not unusual that large corporations structure themselves in this fashion: with a holding company on the top of the structure, *i.e.*, above the subsidiaries conducting commercial activities in different areas of business. A frequently used example to illustrate this is *Berkshire Hathaway Inc.*, a conglomerate, which is structured this way.

Alternatively or additionally, the subsidiaries can be assigned to own different assets separately. One subsidiary can be assigned to own equipment; another to own

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[192] "Selskabet er den juridiske person, som ejer og driver én eller flere virksomheder. Virksomheden er en enhed, der tilhører selskabet, og som består af et antal aktiver og passiver og med tilknyttede medarbejdere, dvs. Virksomheden hører til selskabets substans. Selskabet kan have flere virksomheder, og flere selskaber kan i fælleskab eje og drive én virksomhed." cf. Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 510.

real estate; and yet another one to own intellectual property, know-how, trademarks, etc.

Incorporation of own group-affiliated captive insurance company, CIC, or own group-affiliated captive financial company, CFC is another example of holding-structure benefits.

A CIC is incorporated for the purpose of providing group-internal insurance, which is cheaper, better, or the combination of both. The function and purpose of a CFC is to deal with, for example, financing of group-relevant activities, specific investments, and other financial issues.

Such structure ensures limited financial and legal liability for the holding company and for its individual subsidiaries alike. Moreover, limitation on tax liabilities can play a role in this structuring, whereas companies that own intellectual property, know-how, trademarks, etc. – the so-called mobile income, can be incorporated in jurisdictions with lower tax rates.[193] Furthermore, a group's captive financial company can be placed in a lower-tax jurisdiction cf. *C-196/04*, *Cadbury Schweppes*, a case on the allegedly wholly artificial arrangement, where a British group's financial company is placed in Ireland, a country with lower corporate taxes. The European Court of Justice ruled that:" Articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a controlled foreign company in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that controlled company is actually established in the host Member State and carries on genuine economic activities there."[194]

In respect to matters of imposition of levies and fees, it is an advantage that for example when a real estate is being sold, it is not sold directly but sold indirectly, when the company that own it is being transferred to a new owner. Significant savings on registration fees can be obtained when real estate is sold this way, as its owner, - the company that owns it, remains the same.

And in respect to tax matters the advantages are also significant. When a person receives dividends from his shares the amount is immediately taxed. As mentioned

[193] Alex Fomcenco, "The Special Purpose Vehicle: A 'Micro Merger' or Merely a Way of Cooperation?" European Company Law, February 2013, volume 10, issue 1.

[194] Cf. The judgment of the ECJ in C-196/04, Cadbury Schweppes.

earlier, in accordance to Danish national tax law dividend-related profits are subject to 27 % tax up to the progression threshold, which is DKK 49.200 (2014) and in 2013 was DKK 48.300. Dividend-related profits above this threshold are subject to 42 % tax. If you are married, your threshold is doubled cf. Personskatteloven, PSL § 4 a and § 8 a.

The same tax burden is imposed on financial profits stemming from a sale of shares if they are sold by an individual.

However, when a holding company receives dividends from the shares it holds in its subsidiary (datterselskabsaktier[195] cf. ABL § 4 a or koncernselskabsaktier[196] cf. ABL § 4 b), the dividends are free of tax cf. SEL § 13, sec. 1, nr. 2.

Can an Operating Company be Owned by Several Holding Companies?

In accordance to the stated above, a holding company will often be placed on the top of the structure, hence, being a parent company that owns one or more subsidiaries placed underneath it in a corporate pyramid. In corporate terms, this would constitute a group, as the parent company would be exercising control over its subsidiary(ies), which is required for the structure to be considered a group cf. SL § 6 & § 7.

This is, however, not the only way a corporate structure involving a holding company can be assembled. Hence, several holding companies can own one operating company - without any of them having decisive influence or control over the operating company's activities - as a number of shareholders possess shares in the company in question not directly but through a holding company each.

[195] If a company owns 10 % or more of capital of another company in accordance to Danish law these shares are referred to as datterselskabsaktier i.e., subsidiary shares cf. ABL § 4 a.

[196] If a company possesses decisive influence over another company due to its holdings in the capital of the latter company, these shares are referred to as koncernselskabsaktier i.e., group shares cf. ABL § 4 b.

5.5.1. FORMATION OF A HOLDING STRUCTURE THROUGH M&A

There are three options of how a holding structure can be established. Two of these options apply M&A methods.

The simplest way of establishing a holding structure is by incorporation of not one but two companies from the very beginning of the establishment of the business. Whereas one of the companies is the operating company, the other company is the holding company, which owns the operating company, and the originator(s) own(s) shares in the holding company, and hence, indirectly own the operating company.

But when this approach has not been followed from the initial incorporation of the business and the operating company is owned directly by its shareholders, M&A methods are applied in order to create a holding structure.

Under application of *transfer of business* method, the so-called *drop-down* approach, the operating company transfers its business to a newly formed subsidiary. As a consideration, it receives shares in the receiving company. It *drains* itself of corporate activities, which are now placed in the subsidiary, and transforms itself into a holding company cf. FUSL § 15 c – d.[197]

Under application of method of *majority takeover* the owners of the operating company incorporate another company – the holding company, and transfer their shares in the operating company to the holding company in exchange for the shares in the latter. This operation is two tracked; incorporation of a new legal entity – the holding company, and a majority takeover with the holding company as the buyer cf. ABL § 36.

When applying either transfer of business or majority takeover methods in the creation of a holding structure, regard must be had to potentially existing change-of-control clauses. Also in accordance to earlier addressed principle that change of debtor requires creditor's consent it must be kept in mind that application of the transfer of business method could result in change of debtor circumstances, which must be addressed accordingly.

In UfR 1985.664 V the Court had found that transfer of licensed items between group-related companies must be considered as sale without regard to the companies' group internal connection, hence, resulting in license payments to the

[197] If such transfer is to be concluded tax-neutrally no cash payments may be included in the consideration cf. TfS 1997.661 V and TfS 2000.568 LSK.

licensor by the licensee. Of course, the wording and interpretation of the licensing contract will always be of the paramount importance. In this case, there was no exception for group-internal sales and, hence, the selling of all the chairs that were subject of the licensing agreement from group company A to group company B triggered the payment of royalties, highly unexpected by the group's management and its advisers.

5.6. EMPLOYEES

Employees' related issues are not the type of issues that parties to a takeover would want to leave unattended, as their importance is undoubtedly grave.

On the one hand, the parties would not want to infringe the rights of the employees that emerge in a takeover situation. On the other hand, the parties would not want to ignite key-employees' desire to exit the company as that presently and potentially might lead to a loss for the company.

European legislator is actively seeking to protect rights of employees that emerge from different circumstances. A long list of legislative acts from the Council of the European Union witnesses thereof: *Parental Leave Directive* 2010/18/EU,[198] *Equal treatment in employment and occupation Directive* 2000/78/EC,[199] *Obligation to inform employees of applicable working conditions Directive* 91/533/EEC,[200] *Collective redundancies Directive* 98/59/EC,[201] *Protection of employees in the event of the insolvency of their employer Directive* 2008/94/EC,[202] *Safeguarding*

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[198] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

[199] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[200] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

[201] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[202] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

employees' rights in the event of transfer of undertakings Directive 2001/23/EC,[203] *Information and consultation Directive* 2001/114/EC,[204] etc. These are just some few examples from a wide array of legal acts that seek to address employee-related matters and they must not be forgotten in the context of a takeover.

This especially concerns employees' rights that are protected through Directive 2001/23/EC on safeguarding employees' rights in the event of transfer of undertakings. This directive applies also to a transfer between two companies in the same group under the same ownership, management, and premises, and which are engaged in the same or similar commercial activities. The European Court of Justice, ECJ, came to this conclusion in case *C-234/98, Amalgamated Construction,* stating that the directive "applies to a situation in which a company belonging to a group decides to subcontract to another company in the same group contracts for driveage work in mines in so far as the transaction involves the transfer of an economic entity between the two companies. The term 'economic entity' refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective."[205]

On the other hand an employee, as a debtor in kind in regard to his labor, whose employer is subject to a takeover is not obliged to continue with his employment under the new owner, who is his new money debtor cf. the discussion on change of debtor principles addressed earlier. This statement is consolidated by the judgment from the European Court of Justice in case *C-132/91, Grigorios Katsikas.* In this case the Court found that "Article 3(1) of Directive 77/187[206] on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings is to be interpreted as not precluding an employee of the transferor on the date of the transfer of the undertaking, within the meaning of Article 1(1) of the directive, from objecting to the transfer of his contract of employment or employment relationship to the transferee."[207] The fate of employee's contract of employment or employment relationship to the transferor

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[203] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[204] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation.

[205] Case C-234/98, Amalgamated Construction, premise 39.

[206] The directive is now replaced with Directive 2001/23/EC.

[207] Case C-132/91, Grigorios Katsikas, Summary, sec. 1.

falls, however, outside of the scope of the directive, and the Court underscores that it is up to the member states to regulate this issue: "The directive does not, however, require Member States to provide that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, the contract or relationship should be maintained with the transferor. Neither does the directive preclude this. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be."[208]

The matter at hand is addressed in closer details under the section *Combining Methods and Elements* below.

5.7. STOCK EXCHANGE LISTED COMPANIES

5.7.1. LISTED COMPANY IS A BUYER

When a listed company acts as the acquirer in an M&A transaction it might be interested to pay for the target a consideration in own shares rather than in cash. The reason behind it may not be only because of the option of a tax-neutral transaction, which requires a consideration in shares, but also because the liquidity of the shares (they are as good as cash) and because value of the acquirer's stock may be higher than value of cash.

When Net Asset Value, NAV, of the acquirer company is, for example, €100.000.000 and the price for its shares on the regulated market (market value) is indexed to €177.000.000, the price/NAV ratio is 1.77. This difference in price/NAV of own shares the acquirer company can use as an instrument of payment. The market, on the basis of market value, considers the acquirer company to be worth more than it is in accordance to its own books.[209] The company can speculate in this belief by, for example, acquiring shares of its target company, which on the market are indexed to a lower value than the acquiring company's own shares. In this connection, it makes no difference if the acquirer company offers consideration in

[208] Case C-132/91, Grigorios Katsikas.

[209] The price/NAV figure is the expression for the market's belief concerning the extent of the company's goodwill cf. Jan Schans Christensen, Grænseoverskridende Virksomhedsoverdragelser, GadJura, 1998, p. 24.

already existing shares or it has to issue new shares for the purpose of this particular transaction.

5.7.2. LISTED COMPANY IS A SELLER

When a listed company operated several businesses, which are comprised within the same legal entity it may consider selling one of those businesses. There could be a number of different reasons behind such a sale; Often the company finds it more appropriate to focus on fewer undertakings hence, increasing the outcome of its efforts. Such a transaction can be conducted through either the method of *division*, where the shareholders sell parts of their company to third parties and receive consideration therefor in form of shares in the acquiring companies or, through a *transfer of business* method where the company itself transfers one of its businesses to a third party. When the method of division is applied, the company in question decreases to a smaller financial and corporate volume. After the transaction – presumed that the division is partial - the company being divided carries on with its remaining business activities. On the contrary, as a result of the transfer of business method, the transferring company's financial volume does not decrease. Although, it now has fewer business activities, the value of the transferred business is replaced with the equivalent value of shares in the recipient company.

A choice of method to proceed with was subject to deliberations in *Danisco A/S*[210] in 2008. Its sugar unit *Danisco Sugar* was up for sale, but prior to transaction *Danisco A/S* had to make a choice between the method of division, on the one hand, and the method of transfer of business, on the other hand. The transaction took place in 2009 through business transfer method, where a foreign buyer acquired the business and offered consideration that mostly consisted of cash.

5.7.3. RESTRUCTURING A LISTED COMPANY

A listed company, which encompasses several businesses, can increase its overall value by restructuring itself. Whereas *merger*, as a method of non-organic growth,

[210] *Danisco A/S* is a Danish based listed public limited liability company with a number of business undertakings in food production, bio-products research and production, etc.

is applied in pursuit of expansion of a company, *division* is applied as a method of intended contraction. An often-presented example to that regard is the partial division of *Novo Nordisk A/S*[211] that took place in 2000. The company's enzyme production got spun-off and placed in a newly formed listed company *Novozymes A/S.* Thus, the division resulted in two separate listed companies under the control of the same shareholders. Each company now encompassing its distinct business: research and production of pharmaceutical substances remained in the *Novo Nordisk A/S*, and enzyme research and production was placed in *Novozymes A/S*.

Hypothetically, the above-mentioned restructuring of Novo Nordisk A/S could be conducted through the method of business transfer. The transferring company itself would, in this case, be the receiver of consideration from the newly formed receiving company. Consideration would consist of the latter company's shares. Thus, the value of these shares would replace the value of the transferred business maintaining the transferring company's overall value. This would also imply emergence of a different corporate structure. The division of *Novo Nordisk A/S* in 2000 resulted in two independent companies. If that restructuring were conducted by the method of business transfer, the receiving company would become a subsidiary of the transferring company. However, this was not the intended outcome of the transaction and the method of division was chosen.

5.8. CORPORATE NATIONALITY

The purpose of this section is to draw attention to the role that *corporate nationality* plays in the choice of an M&A method in a transnational transaction. By corporate nationality in this context I assume incorporation affiliation to a member state where the company in question is registered.

The whole purpose of federal corporate legislation is to reduce the significance of national affiliation of companies within the European Community. With the

[211] *Novo Nordisk A/S* is a Danish public limited company with a long corporate history. At the time of the mentioned transaction the company was listed on the regulated market and its dual business consisted of research and production of pharmaceutical substances as well as enzymes.

exception of the *supranational*[212] European company, SE, creation of which is facilitated by Council Regulation (EC) 2157/2001, incorporation and regulation of functioning of companies is a national prerogative of the member states. This has been clearly stated in the judgment passed by the European Court of Justice, ECJ, in case *C-81/87*, *Daily Mail*: “unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.”[213]

The parties’ choice of an M&A method, for obvious reasons, depends on the desired outcome of various perspectives: corporate structural, financial, and/or strategic. But their choice depends, likewise, on the legal options or (potential) legal limitations that legislation provides and imposes respectively.

Canada, as a federal state, can serve as an example here. Encompassing ten provinces and three territories, each with their own corporate legislation, the country also has a set of federal corporate laws. Provided that the relevant requirements for incorporation are complied with, initiators can freely register their company in the jurisdiction of choice. The reasons behind the choice of jurisdiction vary and can, for example, be tax driven, or driven by more accommodative requirements on citizenship/residency of directors.[214] When a company originally registered under jurisdiction of one province at some point in time desires to amalgamate with a company incorporated in another Canadian jurisdiction, federal or provincial alike, it faces a requirement that most Canadian jurisdictions[215] impose: “to carry out an amalgamation all of the amalgamating corporations must

[212] In spite of having legal origins in European federal law the influence of national laws of the state of incorporation must be remembered. Council Regulation (EC) 2157/2001 applies the so-called *renvoi* technics that in its essence refers governing of certain areas of functioning of an SE to national law of the state of incorporation. Neither taxation, competition, insolvency etc. are addressed hence, leaving these matters to be dealt with on national level. Cf. Alex Fomcenco & Erik Werlauff, Business Law, Europe, Werlauff Publishing, 2014, p. 252 - 253.

[213] The Daily Mail Case C-81/87, paragraph 19.

[214] Whereas, for example, Ontario corporate legislation (The Ontario Business Corporations Act) imposes requirements on the citizenship/residency of directors (25% of the directors of Ontario registered company must be resident Canadians: if an Ontario company has one to four directors, at least one of them must be either Canadian citizen or resident), New Brunswick corporate legislation does not impose requirements of this character.

[215] Under British Columbia Business Corporations Act it is permitted to for a British Columbia registered company to amalgamate with a company from another Canadian or foreign jurisdiction.

be governed by the same corporate law".[216] This requirement is, at the same time, accompanied with an option of *continuance*. "The corporate law of most jurisdictions in Canada permits corporations governed by its laws to leave the jurisdiction (the "exporting jurisdiction") and to be continued under and governed by the corporate laws of another jurisdiction (the "importing jurisdiction"). The basic requirement for doing so is the permission of the exporting jurisdiction",[217] which is granted upon an assessment concluding that continuance will not adversely affect creditors or shareholders of the corporation. Continuance does not imply liquidation and re-incorporation. It merely entails a change of jurisdiction of incorporation or, in other words – a change of nationality. When assessing on whether continuance will adversely affect creditors or shareholders of the corporation in question the business authority in the exporting jurisdiction does not deal with material reasons for the corporation's desire to move, which can be other than for the purpose of subsequent amalgamation.

In this respect, Canadian companies, notwithstanding their different corporate nationalities, are less restricted by this matter in comparison to their European brethren.

Due to freedom of establishment provided for in art. 49 and 54 in the Treaty of the Functioning of the European Union, TFEU, European companies are granted the right to establish or purchase agencies, branches, or subsidiaries. Whereas agencies or branches are of less importance in this context due to *inter alia* their lack of legal personality, subsidiaries are of a more significant interest.

Once incorporated under a jurisdiction of a member state the company is not granted the unimpeded freedom to move onto the territory of another member state, unless it is being liquidated in the original jurisdiction and subsequently re-incorporated under the jurisdiction of the other member state. Such mobility of national companies incorporated in any member state of the European Community

[216] VanDuzer, J. Anthony, The Law of Partnerships and Corporations. 3rd ed. Toronto [Ont.]: Irwin Law, 2009, p. 314.

[217] Ibid. p. 309.

was aimed towards by, proposed but until the present day not yet enacted, 14th Company Law Directive on transfer of registered office.[218]

Case law from the European Court of Justice, ECJ, offers an example in case *C-378/10, VALE*, where under the case-specific circumstances conversion of the company from one nationality to another nationality was permitted. The reason for the outcome is, however, not founded on the freedom to change nationality but on the principles of the prohibition of discrimination based on (corporate) nationality.[219]

10th Company Law Directive 2005/56/EC ensures that *cross-border mergers* are facilitated by the national jurisdictions throughout the European Community. However, the participants must keep in mind that only capital companies with limited liability fall under the scope of the directive cf. art. 1 and art. 2 (1). If a legal entity of a different corporate structure is involved in an M&A transaction prospect, it might need to convert itself into a capital limited liability company prior to participation in a cross-border merger that is facilitated by Directive 2005/56/EC.

Neither cross-border majority takeover nor cross-border transfer of business is governed by specific European federal legislation. National laws of the transaction-implicated member states govern these transactions.

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[218] This is remarkable in view of the fact that adoption of this Directive was a short term priority of the well-known Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM(2003) 284 final, 21.5.2003; Three consultations by the Commission (2003-2006) showed broad support for a Directive; The directive still featured in the Commission Legislative and Work Programme 2007, COM(2006) 629 final, 24.10.2006. The Advisory Group on Corporate Governance and Company Law, an advisory body to the Commission, also supported the initiative of a Directive on cross-border transfer, cf. and further on the topic Gert-Jan Vossestein, Leiden University, " Transfer of the registered office: The European Commission's decision not to submit a proposal for a Directive," Utrecht Law Review, vol. 4, issue 1, 2008.

[219] Daniel Gergely Szabó & Karsten Engsig Sørensen, Department of Law, Aarhus University, "Cross- border conversion of companies in the EU: the impact of the VALE judgment", Nordic & European Company Law, LSN Research Paper Series, nr. 10-33 discusses how the judgment has made it clear that the right to cross- border conversions is protected by the freedom of establishment and should therefore be facilitated by the Member States. Simultaneously the authors find that in order to promote free movement of companies within the Community harmonization of national laws establishing a common denominator in addressing the issue in question is needed by, for example, revival of the work on a 14th Company Law Directive.

Situation is different in regard to the method of *division*. Sixth Company Law Directive 82/891/EEC on division of public limited liability companies address *domestic* divisions. Cross-border divisions are possible, but only in situations where both for the division in question relevant states permit it; *i.e.*, the state of incorporation of the company being divided and the state of incorporation of the receiving company alike. Therefore, if companies with different corporate nationality choose to proceed with the method of division as their preferred M&A method they must investigate whether this procedure is possible under the relevant applicable national law.

Although, at a present state of Community law, companies do not have an unimpeded right to transfer their registered office from one member state to another member state and thus change their corporate nationality, they are not completely cut-off from an option of achieving that. Directive 2005/56/EC on cross-border mergers facilitates an instrument application of which can lead to the desired outcome. This instrument is the so-called "suction-cup method".[220] It implies a reverse vertical merger involving a parent company and its subsidiary, whereas the subsidiary is the acquiring company. For the lack of a better, and perhaps even simplified option in form of a legal act regulating the issue throughout the Community, the method is also referred to by Commissioner Charlie McCreevy in his speech of 3 October 2007 to the European Parliaments Legal Affairs Committee.[221] This in itself attributes the method with a *stamp of approval*. Following this method the "relocation of a private or public limited company from one EU member state to another can be done by establishment by P [parent company] of a subsidiary S in that other country, followed by a reverse vertical merger. This means that P disappears in the merger with S because company S is the continuing company. The merger consideration to P's shareholders is shares in S. This can be effected by first transferring P's shares to S as own shares, and then distributing them to P's shareholders as merger consideration."[222]

Because national companies are limited in their ability to change nationality by moving from one jurisdiction to another jurisdiction, considerations on corporate nationality must be included in the M&A deliberation process. The participants must assess what role the choice of jurisdiction of the corporate vehicle emerging

[220] The method is closely addressed by Erik Werlauff in "Relocating a Company within the EU" European Company Law, 2008, Vol. 5, Issue 3, pp. 136–139.

[221] Speech 07/592 by Commissioner Charlie McCreevy of 3 October 2007 to the European Parliaments Legal Affairs Committee.

[222] Erik Werlauff in "Relocating a Company within the EU" European Company Law, 2008, Vol. 5, Issue 3, pp. 136–139.

following the transaction will play in the company's future prospects and possibilities.

CHAPTER 6. COMBINING METHODS AND ELEMENTS

The present chapter of the dissertation will focus on combining the methods of takeover presented and analyzed above and the specific elements, their importance, and extent of their impact on consequences of the transaction that demand attention of the participants to a takeover in their considerations in connection to the choice of an M&A method.

Combining the elements and the methods, the approach and objectives laid down in the section 1.2. *Method* will be followed. Hence, the analytical interpretation of occurrence, interaction, and influence of legal provisions, available methods of takeover, and participants' considerations in the choice of an M&A method will be pursued.

In order to promote and maintain clarity in the expressed wordings when addressing situations where more than two companies can participate in a takeover I will continuously refer to participants as two parties only (buyer and seller, or acquiring company and company being acquired, or continuing company and company that ceases to exist) unless it is appropriate to express otherwise.

In order to maintain articulacy of expression and pursuing convenience of reading I have chosen to structure this section in such a manner, that analysis of each element is conducted in connection to each method of M&A, although, not dividing the text into method-subsections.

6.1. CONSIDERATION

The consideration that is offered to the vendor in the course of an M&A transaction by the acquirer can consist of securities, shares, cash, or a combination thereof, cf. Directive 2005/56/EC art. 2 (2), and Directive 82/891/EEC art. 2 (1) & art. 25 on cross-border *mergers* and *divisions* respectively.

For a transaction to be regarded as a takeover for corporate purposes, with thereto attached corporate succession due to cessation of the company being acquired without going into liquidation, a mandatory requirement is imposed on the acquirer: consideration must consist of shares representing the capital of the acquiring company. This entails that the acquirer must be a capital company and not a physical person.

The directives mentioned right above, in respect to consideration that consists of both shares and cash, prescribe that cash payment may not exceed 10 % of nominal value or accounting par value of those shares. This provision is, however, due to the status of the directive being principle based, is indicative and not mandatory. Both directives permit member states to regulate the issue of the amount of cash as a part of consideration without intervening with the status of the transaction being a takeover for corporate purposes cf. Directive 2005/56/EC art. 3 (1), and Directive 82/891/EEC art. 24 on mergers and divisions respectively.

The same applies to the methods of *business transfer* and *majority takeover*. Directive 2009/133/EC, which in the absence of other relevant legal acts offers definitions of these methods. The similar approach on the composition of consideration is followed in regards to the method of majority takeover. However, in respect to the method of business transfer the directive is not detailed on the matter of composition of consideration prescribing only that it must consist of shares representing the capital of the acquiring company. Yet again, the percentage particularities of the composition of consideration are entrusted to the member states to be regulated on the national level.

Who is the receiver of consideration?

Identification of the receiver of consideration depends on the method of takeover.

If the parties to a takeover choose *merger* as the method of transaction, the owners of the company being acquired are the receivers of the consideration. They are the ones that transfer the whole company to the acquirer and as a consequence of the transfer the target company ceases to exist.

Likewise, if *division* is applied as the method of transfer, the owners *i.e.,* the shareholders of the company being divided are the receivers of the consideration. If the company being divided ceases to exist as the result of the transaction *i.e.,* due to a complete division, the owners receive consideration from several acquirers and not from a single acquirer as it is the case with merger, where the target company is transferred as a whole. On the contrary, if the division is partial and several parts of the company are spun off, the target company does not cease to exist and hence, continues its existence merely in a reduced or decreased volume. In this case, the owners receive the consideration from the acquirers equivalent to the number of branches of activity that were spun off.

The situation is different with the *transfer of business* method. When the participants choose to proceed with this method the target company itself is the vendor of the business, which is being carved out and transferred to the acquirer. The transferred business is subsequently being replaced with the offered consideration received by the target company itself. Thus, even after the transaction, the shareholders of the transferring company are in possession of a company the volume and net asset value of which did not decrease.

Majority takeover method implies no alterations to the target company's legal framework. The method entails a transfer of shares representing the majority of the voting rights in the target company by the target's shareholders, the owners, to the acquiring company. They are the receivers of consideration, which most often consists only of shares in the acquiring company.

Is consideration fair and reasonable?

In order to ensure that the shareholders of the company being acquired by way of *merger* receive the correct consideration, the legislation cf. Directive 2005/56/EC art. 5 (b) & (c) requires that the managements of the merging companies, in cooperation with each other, draw up a common draft terms of the merger, wherein "the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment" and "the terms for the allotment of securities or shares representing capital of the company resulting from the cross-border merger" must be specified. Additionally, an independent expert report must be concluded, as a precaution measure, with the purpose of examination of the method used to arrive at the proposed share exchange ratio; to state whether such method is adequate in the case in question; to indicate the values arrived at using the method; and to give an opinion on the relative importance attributed to such method in arriving at the value decided on, cf. Directive 2005/56/EC art. 8 (3). In the report, the experts must in any case state whether in their opinion the share exchange ratio is fair and reasonable.

If the takeover transaction is conducted by way of *division* the same requirements as stated right above, securing fair and reasonable consideration, are activated, cf. Directive 82/891/EEC art. 3 (b), (c) & (i) on draft terms of division, and art. 8 on the expert report. It must be borne in mind that the 6th company law directive to a great extent follows the principles of the merger directives, *i.e.*, 3rd company law directive, and 10th company law directive.

A takeover transaction, which is conducted by the method of *transfer of business,* is regulated through an agreement reached by the parties involved, *i.e.,* an Asset Purchase Agreement, APA. This document is meant to encompass provisions governing all the relevant aspects of the transaction, including the consideration, which will be received by the transferring company itself. Commonly, negotiations in relation to the transaction of this kind would not involve any active participation of the shareholders, as transactions on a smaller scale would be considered to be a part of prerogatives attributed to the management. However, the management can decide to involve the shareholders in the decision making process, either because of the volume of the transaction: if the business desired transferred constitutes a substantial part of the company; or because the management is not unanimously supportive of the transfer. The statutes of the company can also prescribe that any decision on transfer of control must be brought before the general meeting for approval. Regularly, in the course of negotiations and with support from the advisers the purchase price *i.e.,* the consideration, or at least the way to calculate it, will be agreed upon. Obviously, in order to avoid potential liability claims, the management must be cautious in its undertakings in respect to the calculation of the consideration it will settle on.

Transfer of shares, which constitute the *majority takeover* method, in similar fashion as transfer of business, is regulated by an agreement between the vendor (the target company in respect to a business transfer, and shareholders in respect to a majority takeover) and the acquiring company. Share Purchase Agreement, SPA, will encompass the particularities of the transaction, hereunder the purchase price. Given that the shareholders, as vendors being party to the agreement, will negotiate the consideration (directly) with the acquirer. Whereas in case of merger and division, negotiations take place with the management of the target, which subsequently is required to participate in creating common draft terms of the transaction, which is accompanied by an export report; in the case of majority takeover the share exchange ratio and the amount of any cash payments are negotiated by the shareholders and stated in the SPA. It is the shareholders' own responsibility to ensure the fairness and reasonableness of the consideration they receive for their shares. If the transaction whereby the acquirer does not acquire all the shares in the target, the European federal law "does not include any general principle of law under which minority shareholders are protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy their shares under the same conditions as those agreed when a shareholding conferring or strengthening the control of the dominant shareholder was acquired", cf. judgment of the ECJ in case *C-101/08, Bertelsmann.*

The course of actions if the consideration is unfair, unreasonable, or not objectively justified

If shareholders of a company that ceases to exist as a result of *merger* find the consideration to be unfair, unreasonable, or not objectively justified can demand compensation from the target company, provided that they have objected against the merger or expressed reservations in that respect at the general meeting where decision to merge was approved. Directive 2011/35/EU[223] prescribes the member states are to lay down rules governing the civil liability of the management body of the target company in respect to misconduct in preparing and implementing a merger, cf. art. 20. The respective legislatures of member states must also enact rules governing the civil liability of the experts responsible for drawing up expert report in respect of misconduct in the performance of their duties, cf. art. 21. For the purposes of cross-border mergers protection of interests of objecting shareholders are secured by Directive 2005/56/EC art. 4 (2) and art. 10 (3). Without addressing the issue in greater details, the directives redirect the authority to do so to the national legislatures.[224]

The directives, however, remain silent in respect to possible discontent of the shareholders of the acquiring company, which on the contrary to the shareholders of the company being acquired find the consideration that is offered to them to large. Under these circumstances, in their cause of actions, the shareholders of the acquiring company would have to apply national rules on *e.g.*, abuse of power of the majority, or deficiency of a general meeting decision.

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[223] The original directive dealing with domestic mergers Directive 78/855/EEC has been substantially amended a number of times. In order to provide clarity it was found necessary to codify Directive 2011/35/EU in the original directive's stead.

[224] In Denmark, for example, this issue is in detail regulated by SL § 249:

"Stk. 1. Kapitalejerne i det eller de ophørende kapitalselskaber kan kræve godtgørelse af kapitalselskabet, hvis vederlaget for kapitalandelene i det eller de ophørende kapitalselskaber ikke er rimeligt og sagligt begrundet, og hvis de har taget forbehold herom på generalforsamlingen, hvor der blev truffet beslutning om fusionens gennemførelse.

Stk. 2. Sag i henhold til stk. 1 skal anlægges, senest 2 uger efter at fusionen er besluttet i alle de fusionerende kapitalselskaber.

Stk. 3. Er der taget forbehold i henhold til stk. 1, kan den vedtagne fusion først registreres efter udløbet af fristen efter stk. 2, medmindre vurderingsmændene i deres udtalelse om den påtænkte fusion, herunder vederlaget, jf. § 241, finder, at vederlaget for kapitalandelene i det eller de ophørende kapitalselskaber er rimeligt og sagligt begrundet."

If shareholders of a company being divided by the method of *division*, irrespective of the division being complete or partial, are not content with the consideration finding it to be unfair, unreasonable, or not objectively justified can demand compensation from the target company, provided that they have objected against the division or expressed reservations in that respect at the general meeting where the decision to divide the company in question was approved.

In its art. 18 Directive 82/891/EEC on divisions prescribes that the member states are to lay down rules governing the civil liability of the management body of the company being divided in respect to misconduct in preparing and implementing the division, and also rules governing the civil liability of experts responsible for drawing up expert report in respect of misconduct in the performance of their duties. The directive does not provide particularities on how to address the issues of civil liability of management and experts thus, referring this regulation to the national legislatures. [225]

Legal options for dealing with the discontent of the acquiring company's shareholders are similar to those that are stated above in respect to a takeover by the method of merger.

Transfer of business and *majority takeover* transactions are governed by the provisions of the contract agreed upon by the parties involved, *i.e.* Asset Purchase Agreement, APA, and Share Purchase Agreement, SPA, respectively. These agreements respectively are the paramount sources of law governing these transactions. It would appear peculiar if the vendor after the closure of the transaction demands a higher price than the price established in the contract. Nevertheless, in such a case the lawsuit will have to be brought before a court of

[225] In Denmark, for example, this issue is in detail regulated by SL § 267:

"Stk. 1. Kapitalejerne i det indskydende kapitalselskab kan kræve godtgørelse af kapitalselskabet, hvis vederlaget for kapitalandelene i det indskydende kapitalselskab ikke er rimeligt og sagligt begrundet, og hvis de har taget forbehold herom på generalforsamlingen, hvor der blev truffet beslutning om spaltningens gennemførelse.

Stk. 2. Sag i henhold til stk. 1 skal anlægges, senest 2 uger efter at spaltningen er besluttet i alle de bestående kapitalselskaber, der deltager i spaltningen.

Stk. 3. Er der taget forbehold i henhold til stk. 1, kan den vedtagne spaltning først registreres efter udløbet af fristen efter stk. 2, medmindre vurderingsmændene i deres udtalelse om den påtænkte spaltning, herunder vederlaget, jf. § 259, finder, at vederlaget for kapitalandelene i det indskydende kapitalselskab er rimeligt og sagligt begrundet."

law, which will rule in the case under inclusion of relevant law, *e.g.*, contract law, law on sale of goods, securities law, etc.

Own shares

No shares in a recipient company shall be exchanged for shares held in the target company by the recipient company itself or persons acting in own name but on the company's behalf or, by the target company itself or persons acting on behalf of the company, cf. Directive 2005/56/EC art. 14 (5) in regards to *mergers*, and cf. Directive 82/891/EEC art. 17 (2) in regards to *divisions.* The reason behind this approach is that otherwise a consideration of this nature to the acquiring company as a shareholder in the target company will imply that the acquiring company receives a consideration for shares it already owns. Furthermore, the directives' approach to a great extent aims at exchange of shares between the transferring shareholders and the acquiring company. The reason for this is that the legislature, through the text of the directives, presupposes that the consideration to the shareholders in the target company consists mostly of shares in the acquiring company, and not in cash.

Consideration in shares *as is*

The recipients of consideration in shares do not have any influence on the articles of incorporation of the acquiring company wherein special rights can be attributed to shares. They receive the consideration in shares *as is*. Thus, the acquiring company is not obliged to adjust or alter its statutes in order to facilitate any special share-related rights and/or limitations that the target company either had or did not have in its articles of incorporation. However, if the acquiring company desires to confer any special rights to its shareholders-to-be, they should be outlined in the draft terms of a merger cf. Directive 2005/56/EC art. 5 (g) and in the draft terms of a division cf. Directive 82/891/EEC art. 3 (f).

6.2. SUCCESSION

This section of the study is dedicated to analysis of *corporate* succession for the purposes of the four methods of M&A: merger, division, business transfer, and majority takeover.

Corporate succession is one of the most central and bearing elements that accompany any of the four methods. As mentioned earlier in this study, the main purpose of M&A transactions is acquisition of control over the target, regardless of the reasons that form the basis for the desired control, *e.g.*, increased competitiveness, enhanced negotiation gravity, achievement of synergies, etc., cf. the section on M&A incentives above.

Following the idea that *Mille viae ducunt homines per saecula Romam*[226] implies that *"*arrival to Rome" equals acquisition of the desired control, and the various M&A methods are merely different paths that can be chosen to reach the goal. And as a traveller would consider his *pros and cons* before choosing his path, so do the companies that participate in M&A transactions, hence, choosing the most appropriate path in reaching their goal: acquisition of control.

Control, as being the central element behind M&A rationale, is aimed not at the target company, but rather at what the company encompasses, *i.e.*, its contents, and its business. A company is a *shell*, and the business within it is the *core*.[227] A legal entity, without a business has a quite limited financial value. Its registration related fees and mandatory minimum capital varies from jurisdiction to jurisdiction, but can be as low as DKK1 in Denmark,[228] or £1 or £0 in the United Kingdom where the law imposes no requirements on limited liability companies as to the paying-up of the minimum share capital.[229] Thus, an empty company, - a shell, represents little value for a potential acquirer. On the contrary, the business of the company can have a quite substantial value for the buyer; and in pursuit of control over the business he will, under certain circumstances, have to acquire control over the company that possesses the business of interest. Moreover, and undoubtedly equally important, the acquirer would want to succeed in the transferor's position in respect to rights, and also, where appropriate, its liabilities. Without the presence of the element of succession, the value of any M&A transaction would scale down significantly, and possibly having an effect on whether a transaction will take place at all.

When a company is being acquired by the way of *merger*, all target's assets and liabilities are transferred to the continuing company, as the target company ceases to exist, cf. Directive 2005/56/EC art. 14 (1) in regard to the irregular merger, and

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[226] Latin: All roads lead to Rome.

[227] Erik Werlauff, Selskabsret, Karnov Group, 9th ed., 2013, p. 742.

[228] Iværksætterselskab, IVS, a private limited company with certain specific provisions on capital & distribution of dividends. Otherwise, for the most part, this form of company follows provisions related to a private limited liability company, anpartsselskab, ApS.

[229] Private Limited Company, PLC see Case C-212/97, Centros.

art. 14 (2) in regard to the regular merger. Hence, the acquirer succeeds in all rights and obligations of the transferring company. These obligations can originate from contractual obligations but also from non-contractual obligations as for example occurred in case *C-343/13, Modelo Continente Hipermercados SA*, where the Court concluded that provisions of the third company law directive on domestic mergers "must be interpreted as meaning that a 'merger by acquisition' in Article 3(1) of the directive results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for infringements of employment law committed by the acquired company prior to that merger."

This is the core of universal succession aimed for by the federal European legislation.

Change-of-control clauses

As mentioned earlier, in accordance to the law of obligations, rights can freely be transferred without prior consent from the debtor. Whereas on the contrary, obligations, implying change of debtor, cannot be transferred from debtor 1 to debtor 2, unless the creditor has accepted this transfer or, accept of change of debtor is mandatory under the law. Directive 2005/56/EC constitutes this mandatory accept of change of debtor in the context of merger.

The acquirer, to whom succession in respect to certain rights originating from, for example, a contract between the target company and a third party, are significantly important, which is often the case reflecting corporate reality, must investigate whether his option for succession is impeded by a contractual agreement, *i.e.*, change-of-control clause, which implies that takeover of the target company renders the contract in question to be terminated or, it automatically leads to renegotiations of the contractual particularities. Thus, contractual agreements through a change-of-control clause can override directive-enacted provisions on mandatory accept of change of debtor and waive the right of succession for the acquirer.

It might seem to be the approach of preference for the creditor, as he applies a change-of-control clause as a bulwark to shelter himself from law-bound accept of change of debtor as a result of takeover that his debtor is subject to. On the other hand, it will seem to be less attractive for the debtor to the agreement that the contract is furnished with a clause of this character. A change-of-control clause from his point of view will constitute a blemish to his value, as the acquirer may consider its target worth more with the contract in question, rather than without it.

Unless the matter of change of control is unsettled by choice or otherwise, it will be left to the parties' negotiations to form the clause hence, by its wording, satisfying (conflicting) interests of both parties. Although in many occasions this does not impose negative implications, in other cases undesired implications occur especially when a dispute arises in a common law jurisdiction. This requires extraordinary attention and close investigation by the parties involved in a takeover and their advisers. Although, composition of change-of-control clauses does not seem to appear as a complicated affair, the lack of clarity in these clauses, hence, leading to undesirable consequences for the parties, is a recurring event in case law.

In *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, 1994 WL 267285 at 3 (Del. 1994), for example, a Delaware court was to rule on whether a "no assignment or transfer" clause was violated when a party to a partnership merged with its subsidiary. The Court ruled that no violation of the clause occurred, but the analysis and substantial and lengthy argumentations suggest that the outcome of the judgment could be different if the party to the partnership merged together not with its subsidiary but with an unrelated entity.

In *Brentsun Realty Corp. v. D'Urso Supermarkets, Inc.*, 182 A.D.2d 604, 605 (N.Y. App. Div. 1992) where a tenant under the contract merged into its parent company, the Court ruled that no violation of the change-of-control clause took place, as no change of debtor occurred. The judgment was passed in the State of New York.

In *Ninety-Five Madison Co. v. Active Health Management*, 2007 WL 2702820 at 4 [N.Y. Civ. Ct. 2007] a court in New York reached the opposite decision. In this case the tenant company was acquired by an unrelated entity hence, breach of change-of-control clause was constituted, as the change of debtor took place.

In *SQL Solutions, Inc. v. Oracle Corp*., 1991 WL 626458 at *4, *6 (Cal. Ct. App. 1991) case the object of litigation was transfer of software license awarded to a company, which was subject to acquisition. The ruling court in California found that change of debtor took place, hence, violating the change-of-control clause in accordance to which, transfer of software license could not occur without obtaining licensor's prior consent. This case contains material similarities with the earlier mentioned example from the Danish case law in case UfR 1985.664 V.

Because the method of *division* and the method of merger are quite similar, when the former is chosen as the preferred method of M&A the emerging issues are quite similar as well. In fact, third company law directive on domestic mergers was in its original draft proposed to include also the method of division. The close connection between the methods is also witnessed by the wording of Directive 82/891/EEC, which quite frequently refers to provisions of Directive 78/855/EEC. What constitutes a difference between the method of merger and the method of division is that in the case of the latter the target company is not acquired by one continuing company, but rather by two or more. Moreover, a merger transaction cannot be partial; but the sixth company law directive 82/891/EEC enacting the method of division facilitates this option if division is chosen as the method of acquisition, cf. art. 25.

In respect to succession the same principles as those addressed above apply albeit, with the modification that succession of the transferee in the transferor's stead relates not to the target company as a whole, but to the part (a division) of the company, that is acquired.

In its art. 2 Directive 82/891/EEC defines the method of division by acquisition as "the operation, whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities… ." Division by formation of new companies is facilitated by art. 21.

Regardless of whether the company that is subject to division transfers all its assets and liabilities to already existing companies, newly formed companies, or combination thereof, succession into the transferor's rights and liabilities takes place accordingly and proportionally.

The main rule, with origins in the law of obligations, in accordance to which, change of debtor requires creditor's accept thereof applies also here. And precisely as in case with method of merger the European federal legislature imposes law-bound accept of change of debtor if the transaction falls under the scope of division as an M&A method hence, enacting an exception to the main rule.

Yet again, an option of waiving the mandatory requirements to accept change of debtor is present; by including a change-of-control clause in the contract the creditor ensures that in case the other party to the contract is subject to takeover, he will not be forced to accept the new debtor following the transaction.

Whereas European federal legislature addresses the matter of domestic mergers by enacting Directive 78/855/EEC, which is now replaced by Directive 2011/35/EU and, whereas cross-border mergers are facilitated and governed by Directive 2005/56/EC and, the method of divisions is enacted by Directive 82/891/EEC, the method of *business transfer* is not addressed by federal legislation.

In European M&A mindset and practice, transfer of business is a method that, for the most part,[230] is governed by the parties' contractual agreement, - the so-called

[230] Protection of rights of employees in case of transfer are secured by Directive 2001/23/EC; An option of a tax-neutral transfer of business is secured by Directive 2009/133/EC.

Asset Purchase Agreement, APS.[231] Although, similar approach is widely applied by numerous jurisdictions, hence, with some exceptions, leaving the governance of a business transfer to a contract suitable for the particular transaction, other jurisdictions choose to impose some additional legislation and requirements in respect to transfer of business method, albeit to a limited extent. For example under Canada Business Corporations Act,[232] s. 189(3), a provision reflecting state of law in most Canadian provincial jurisdictions, “when a corporation proposes to sell, lease, or exchange all or substantially all of its property, other than in the ordinary course of business, the sale must be approved by the corporation’s shareholders”.[233] This, obviously, opens up for a whole new discussion on how to define “all or substantially all”. Whereas the definition of “all” is a more simple one, the definition of “substantially all” appears to be slightly more complicated.[234] Another example is a peculiar Bulk Sales Act of Ontario,[235] the purpose of which is to protect interests of the creditors of the transferring company by imposing certain clumsy and potentially transaction-thwarting requirements on the buyer to “ensure” that after the transaction the seller will still be able to fulfill his obligations towards the creditors. The reason why “ensure” is stated in quotation marks is to underline that an outcome of the requirement appears to be more illusionary rather than material.[236]

In contrast to the methods of merger and division, transfer of business is not accompanied by law-bound corporate succession. Hence, the parties to transaction, through an APA, come to an agreement, which put in simple terms, encompasses transfer of specifically picked out assets from the seller to the buyer, who in return pays a closer identified purchase price to the seller.

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[231] For detailed review of structure and contents of an Asset Purchase Agreement, APA, in Danish see Johannus Egholm Hansen & Christian Lundgren in Køb og salg af virksomheder, Nyt Juridisk Forlag, 2014, p. 166 ff.

American Bar Association offers a highly detailed and comprehensive guide for negotiation and drafting of an APA in Model Asset Purchase Agreement with Commentary, ABA Book Publishing, 2001.

[232] CBCA, R.S.C., 1985, c. C-44.

[233] Christopher C. Nicholls, Mergers, Acquisitions, and Other Changes of Corporate Control. Toronto: Irwin Law, 2012, p. 80.

[234] Ibid., p. 82 ff. with numerous examples from the Canadian case law.

[235] Bulk Sales Act, R.S.O. 1990, c. B.14

[236] For more details and critique of the Bulk Sales Act, R.S.O. 1990, c. B.14 see Christopher C. Nicholls, Mergers, Acquisitions, and Other Changes of Corporate Control. Toronto: Irwin Law, 2012, p. 73 ff.

As mentioned earlier the main purpose of any M&A transaction is acquisition of control over the target, which in respect to the method of business transfer is not a company – a shell, but a business – the core inside the shell. The desired acquisition of control is, of course, accompanied by succession, which entitles the acquirer to enjoy the rights of the owner, which prior to acquisition were in possession of the seller, - the transferring company.

Because the buyer, through the method of business transfer is given an option of picking out the assets that he desires, it may seem that he would always lean towards preference of this method of M&A, whereas on the other hand, the seller would lean towards preference of share sale transaction, whereby he will be able to transfer target company as a whole, inclusive all its assets and liabilities. The reality of M&A market, however, proves that this assumption is hardly the rule, even though at first glance it makes sense.

Thus, when assets are transferred from the seller to the buyer, the latter acquires owner's rights to those specifically picked out assets. In accordance to the discussion earlier in this dissertation, if follows from the law of obligations that rights can freely be transferred without prior consent from the debtor. If the assets transferred are, for example, already paid-in-full-for movable property, no third party creditor rights are attached to them, and the transfer does not seem to trigger further reflections.

However, if among the assets of interest some current contracts with recurring performances are present, the situation requires further investigation of particularities of those contracts. And these circumstances are often present in connection to transfer of business method, as the transfer implies a sale of not merely a number of unrelated items but a transfer of a branch of activity or economic entity, *i.e.*, a business.

In case *C-13/95, Ayse Süzen*, the European Court of Justice is asked whether a transfer of business occurs when "a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of a similar work, enters into a new contract with a second undertaking".[237] The Court ruled that "the concept of transfer … relates to cases in which an *economic entity* [my italics] – that is to say an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues an objective specific to it – retains its identity following the transaction in question".[238]

[237] Cf. C-13/95, Ayse Süzen, the Judgment of the Court.

[238] Ibid., Summary of the Judgment.

Thus, if the economic entity, which is subject to transfer, includes any contractual obligations under current single-performance or recurring-performance contracts, which is often the case, those cannot be transferred unless a prior consent from the relevant creditor is acquired. As mentioned earlier, transfer of business method is not, in contrast to the methods of merger and division, accompanied by law-bound succession; hence, the principles of law of obligations apply under which, change of debtor requires creditor's consent.

Likewise, if the transferor company, *i.e.*, the seller, has obtained license to, for example, manufacture certain products and subsequently an obligation to pay the licensor royalties for every product manufactured and sold, and one of its economic units, which is now subject to transfer by the method of business transfer, must be aware, that the license in question in all likelihood (it will naturally depend on the particularities of the license agreement, which under concrete circumstances can decide otherwise) cannot be transferred without prior consent from the licensor. A parallel can be drawn to the earlier mentioned case UfR 1985.664 V, where transfer of stock of chairs between two group related companies was considered a sale, which subsequently triggered license payments and compensation payments for financial losses to the licensor: a consequence that neither the majority shareholder nor the management or the legal advisers considered possible.

Intellectual property, know-how, patents etc., which often constitute a great interest for the buyer, which belong to the transferor company and simultaneously are considered to be a part of the economic entity's business related assets can be transferred without negative implications, presumed their ownership is not shared with third parties.

When immovable property, *i.e.*, real estate is transferred in the course of business transfer it is, for the buyer, worthwhile identifying whether any third party has any rights *in rem*[239] in the property in question. A relevant question to investigate further would be whether there is a remaining mortgage in the property, which in all likelihood will fall due as a direct result of the transfer and hence, change of debtor. Likewise, there could be given security to third parties in the real estate in question, which could follow along with the property hence, decreasing its economic value. In this regard, it is not a matter of *direct* succession in the debtor's obligations, because a right in rem is not attached to a person but to an asset however, in reality, the purchaser inherits the obligations imposed on the property, which can be defined as *indirect* succession.

[239] Signifies rights in or claims against the object rather than against the person who owns the object.

Furthermore, registration of the change of ownership in accordance to the law in the state where the immovable property is situated can be quite substantial and costly. This is likely to have an effect on the purchase price, which can be reduced when the buyer takes these expenses into account. All else equal, the buyer would prefer not to pay those costs, and yet again, all else equal, the seller would prefer his purchase price not to shrink due to these expenses.

The relevant question to ask in this connection is whether the method of transfer of business is the right method to choose. The costs, large or small, which are linked to re-registration of ownership of immovable property, can be avoided by acquiring the company, which owns the property through, for example, majority takeover method, and not the assets directly. This can be done by *asset grooming* for subsequent sale approach, which is addressed earlier in this study. And when the assets desired purchased by the acquirer are identified and transferred to a newly formed company accordingly, this newly formed company becomes the target, and can be transferred by majority takeover method to the acquirer. As the immovable property - also after the change of ownership of the target - remains under the ownership of the target company in question, no re-registration of ownership is required.

In respect to the protection of rights of employees, who in the course of their employment are connected to the unit, which is subject to transfer, law-bound succession is imposed by Directive 2001/23/EC. This matter will be addressed in greater detail under the section on employees below.

In a similar fashion, the question on corporate succession is central in respect to the method of *majority takeover*. As in the case of the method of business transfer, majority takeover method is not addressed by a specifically for the purpose designated directive, which could regulate the process, provide definitions, or contribute to understanding of the legal consequences that the application of the method leads to, as this is observed in Directive 2005/56/EC and Directive 82/891/EEC on cross-border mergers and divisions respectively.

However, keeping in mind that the pursued outcome of utilization of the method of majority takeover, as well as any other M&A method, is acquisition of control over the target company, the question on succession, due to its close affinity with acquisition of control, into the rights and possibly obligations of the target must inevitably be considered.

In most instances, when contemplating succession in connection to majority takeover, it is being dismissed because no alterations to the legal personality of the target company occur. The target company remains the same, merely with a new majority owner. Hence, the contracts that the company is party to remain unchanged; immovable property that the company owns, remains under its ownership; the employees of the company do not get a new employer, etc.

Succession, as we know it, is double-sided: one the one hand, there is the succession in rights, and, on the other hand, there is the succession in obligations.

Succession in obligations can either be law-bound, as it appears in merger and division methods or voluntary, when the creditor accepts that a new debtor is replacing his original debtor. And succession in rights, as stated earlier, can occur with no restrictions, as rights can be transported and assigned freely. That is why when, for example, *Finansiel Stabilitet*, the Danish state-owned company the purpose of which is to acquire and deal with financial institutions that are on the verge of bankruptcy, transfers some of its rights to payables from those institutions with nominal value of DKK 7,5 billion to *Cerberus*, the American equity fund, the debtors have no say in regard to the transfer, even though, Cerberus' well-known aggressive methods to collect the debts can potentially lead to liquidation of those institutions.

Mandatory or law-bound succession, as the term suggests, exists by virtue of law. Since there is no legal act facilitating this in regard to majority takeover, no law-bound succession exists. At the same time, it must be borne in mind that no change of debtor in the target company's contractual obligations takes place, as the target company remains the same even following the majority takeover transaction. This does not, however, mean that the creditor has no say at all if he does not fancy to conduct business with a company that is owned by certain majority shareholders. If the creditor is not being proactive securing his right to object continuation of contract in connection to the other party's acquisition by enacting a change-of-control clause, he waives his right to do so at a later point in time. It could, for example, appear meaningful for A to conduct business with B, but if B is subject to majority takeover by C, who happens to be A's worst competitor, A might lose interest in continuing conducting business with B, even though B, as a legal entity remains the same. If there is no change-of-control clause in the contract between A and B, A will be forced to comply with his obligations under the contract, unless he chooses to breach the contract and face sanctions.

A peculiar drama, with similarities to the example right above played out in 2014 when *Bose*, a headphones' manufacturer whose products could be purchased in *Apple*'s online and retail stores filed a lawsuit against *Beats*, another headphones' manufacturer, accusing it of stealing *Bose'*s noise cancellation technology. As the reaction to the lawsuit, which was filed shortly after *Apple* acquired *Beats* for US$ 3 billion, *Apple* dramatically removed all *Bose*'s products from its stores. And although *Apple* and *Bose*'s relationship since the incident bettered, and the patent dispute was settled prior to coming before a judge, and *Bose*'s popular products are again available at *Apple*'s stores, the example emphasizes just how important the role of the owner (majority holder) is for the relationships that other cooperation partners have with the company in question.

However, change-of-control clause must not be confused with change-of-debtor clause. Whereas a change-of-control clause can bring the creditor to the desired outcome of termination of contract or renegotiations of the particularities of the contract, a change-of-debtor clause in connection to majority takeover would most likely not result in the same outcome, namely because the debtor remains the same, as the target company is not subject to legal structural amendments.

Litigation proceedings were brought before a Delaware court in *Baxter Pharm. v. ESI Lederle*, 1999 WL 160148 at 5 (Del. Ch. 1999) investigating whether the acquisition of shares of the target company violated change-of-debtor clause (anti-assignment provision). The court came to the conclusion that violation of the clause did not occur as the debtor remained the same.

Even though we do not talk about direct succession in connection to the method of majority takeover, indirect succession must be mentioned. It is clear that due to not-occurring amendments to the legal personality of the target company it remains liable for own obligations, even though after the transaction it has a new owner. The new owner is at the same time not liable for the obligations of his newly acquired company due to the central and most essential principle of separation of the company from its owners *i.e.,* due to the capacity of the company's legal personality. But at the same time, through acquisition of control over the target company, he has gained access to its assets, which are now subject to his control, in spite of being under the ownership of the target company. His majority holding equips him with the power to direct the company onto a specific path, supervise its actions, and benefit from the assets of the company. He seems to have gained the ultimate level of succession in the rights of the company. For example, in connection to the EU rules on public tender, a parent company is permitted to include competences, expertise, skills, etc., which belong to its subsidiary, when participating in a race for a publicly announced contract, cf. *C-389/92, Ballast Nedam Groep:* "when a parent company makes a bid for a public contract which involves documenting its expertise and experience within the relevant area, the parent company may also include the resources which the parent company lacks, but which one or more of its subsidiaries possesses".

In *C-176/98, Holst Italia SpA (Ruhrwasser),* "the newly formed German company Ruhrwasser AG did not itself have the resources, but referred to the resources placed in one of the six public-law bodies which had founded the company, i.e. resources at the level of 'parent company'."

In *C-73/95-P, Parker,* "it was found that when the actions of subsidiaries are wholly 'controlled' by the parent company, they and the parent company constitute one economic unit within the meaning of the competition rules." With these examples in mind, the concept of indirect succession or an option of dipping into the rights and exploiting the assets of a newly acquired subsidiary through majority takeover presents a different dimension.

6.3. TAXES AND FISCAL NEUTRALITY

Imposition of taxes is a national state prerogative. Imposition of federal taxes occurs in federal states and on federal level simultaneously with the imposition of state taxes as in the USA,[240] or provincial taxes as in Canada.[241] Similar federal taxes do not exist in the European Union and the member states' contributions to the European Union budget stem from taxes collected on the national level.

Starting point

In respect to corporate takeovers, *i.e.*, M&A transactions, as a starting point they are, from a fiscal point of view, taxable events. Hence, when in the course of irregular *merger* the acquired company ceases to exist, in optics of corporate law this occurs without liquidation of the company in question cf. Directive 2005/56/EC art. 2, 2(a) however, in corporate fiscal perspective the company in question is in fact subject to liquidation, which is a taxable event. Also in regard to the method of complete *division*, cf. Directive 82/891/EEC art. 2 (1), the company being divided ceases to exist without going into liquidation; in corporate fiscal terms the company being divided in fact is liquidated, which yet again is a taxable event. In a similar manner, although the company being divided does not cease to exist due to partial division, the transfer of parts of the company in question as a starting point trigger imposition of taxes. Likewise, the sale of assets by the method of *business transfer* and the sale of shares by the method of *majority takeover* are taxable events.

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[240] On the matters of federal and state taxation in the United States see Howard E. Abrams and Richard L. Doernberg in Essentials of United States Taxation, Kluwer Law International, 1999, where the authors in a clear-cut manner explain basic features of the US taxation law.

[241] A highly comprehensive and coherent presentation on Canadian system of taxation of income, personal and corporate alike, is given by Vern Krishna in Income Tax Law. 2nd ed. Toronto: Irwin Law, 2012.

The exception

The exception to the main rule that the material transactions in the course of M&A methods are taxable events cf. right above, is enacted by the federal European legislature in Directive 90/434/EEC. The directive has since been substantially amended several times and it is now replaced by Directive 2009/133/EC. The directive's core purpose, however, remains the same *i.e.*, to facilitate a common system of taxation applicable to mergers, divisions, complete and partial alike, business transfer, and majority takeover, which is ought to avoid the imposition of tax in connection with these transactions cf. the directives preamble para 5. In colloquial language, the directive is referred to as *merger taxation directive*.

The purpose of this directive is to ensure that a takeover transaction, whether it is a merger, a division, a transfer of business, or a majority takeover, provided applicable requirements under the law are fulfilled, does not trigger imposition of tax. The member states are bound by the provisions of the directive and may not exercise practices that are contrary thereto, cf. case *C-321/05, Kofoed*, where the Court concluded that in the case-related circumstances "a dividend, such as that paid, is not to be included in the calculation of the 'cash payment' provided for in Article 2(d) of Council Directive 90/434/EEC. Consequently, Article 8(1) of Directive 90/434 precludes, in principle, the taxation of such an exchange of shares, unless national rules on abuse of rights, tax evasion or tax avoidance may be interpreted in accordance with Article 11(1)(a) of Directive 90/434 and thus justify the taxation of that exchange."

Nor are the member states permitted to impose more strict requirements in order to permit tax-neutrality under the directive, cf. case *C-28/95, Leur-Bloemm*, in respect to additional requirements on "the acquiring company to carry on business itself or there to be a permanent merger, from the financial and economic point of view, of the business of two companies into a single unit. Similarly, the fact that the same natural person who was the sole shareholder and director of the companies acquired becomes the sole shareholder and director of the acquiring company does not prevent the operation in question from being treated as a merger by exchange of shares."

In case *C-352/08, Modehuis A. Zwijnenburg BV*, the Court found that the directive "is to be interpreted as meaning that the favourable arrangements which that directive introduces may not be withheld from a taxpayer who has sought, by way of a legal stratagem involving a company merger, to avoid the levying of a tax such as that at issue in the main proceedings, namely transaction tax, where that tax does not come within the scope of application of that directive."

However, application of the provisions of the directive should not lead to tax losses for the member states and, in order to avoid such losses the member states are permitted to impose adequate requirements upon M&A transactions to secure their right of taxation, cf. case *C‑207/11, 3D I Srl*, where the Court found that “Directive 90/434/EEC … must be interpreted as not precluding … taxation of the transferring company on the capital gain arising from that transfer, unless the transferring company carries over in its own balance sheet an appropriate reserve fund equivalent to the capital gain arising upon that transfer.”

The member states are, on the other hand, permitted to reject an application on tax-neutral transaction if a detailed investigation of the purposes of the transaction are based on tax evasion and not on commercial considerations such as the restructuring or rationalization of the activities of the companies participating in the operation, cf. art. 15, 1 (a).

The mere fact that a single directive addressing the issue at hand encompasses all four methods implies a broader meaning of the essence of the transactions for fiscal purposes, – transfer of control accompanied by succession. The directive also provides a definition of transfer of business, which in the directive’s terminology is referred to as “transfer of assets”. Moreover, a definition of majority takeover method is provided, which in the directive’s terminology is referred to as “exchange of shares”.

In respect to definitions of *merger* and *division*, the directive states that for the purposes of both methods the company that is being dissolved and ceases to exist is not subject to liquidation, which in ordinary application of tax law is a taxable event. Hence, the directive facilitates or ensures tax-neutral dissolution of a company in one member state for the purpose of the same to be engulfed into a company in another member state.

The directive is addressed to the member states, which are bound to implement its provisions in their respective national legislations. It is national corporate tax law, and the course of actions of tax authorities in the member states, that are targeted by the provisions of the directive.

As stated above, when tax authorities behold M&A transactions unfolding “in front of their eyes” they see taxable events. The provisions of the directive, prevent this immediate imposition of tax by attributing the transactions with an element of transparency, *i.e.*, not by eliminating the states’ right to impose taxes on transactions where values exchange hands, but precluding the states’ imposition of taxes on events where exchange of values occur in the course of M&A transactions. And for obvious reasons, definitions of the transactions, inclusive requirements, which must be fulfilled, in order to fall within the scope of the transactions, are necessary, which the directive successfully provides.

Among these requirements is the constitution of consideration, which must be in shares of the acquiring company with a possible settlement cash payment not exceeding 10 % of the nominal value or accounting par value of those shares. This implies that the acquirer, regardless of the method chosen, must be a capital legal entity the capital of which is divided into shares. The 10 % bar is, however, suggestive and, the member states can adjust that bar in accordance to their discretion. Denmark, for example, has taken a quite liberal approach to this matter removing the threshold, which implies that even if a single shareholder receives a single share as consideration and the rest of the consideration is paid in cash, the transaction can still be regarded as an M&A transaction for the purposes of the provisions of the Directive 2009/133/EC.[242]

The immense focus that is aimed at consideration being in shares is inseparably connected to the option of succession with thereto-attached continuation. To the extent of the settlement in cash, mentioned above, the transaction is considered a regular sale, which is immediately taxable. Succession and fiscal continuation, which provides for tax-neutrality, extend solely to the limits of consideration in shares, as it is within these limits that tax authorities retain their creditor position. In the course of the objectives of the directive, the tax authorities consider the transfer of values to be transparent to the extent they are paid for in shares.

In regards to *merger* and *division* methods, shareholders of the company being acquired (for the purposes of partial division this applies accordingly to the parts of the company that are being transferred) transfer the company that they own through ownership of its shares to the acquirer. In return, as consideration, they receive shares in the continuing/acquiring company. Thus, their shares in the company that is being acquired through the method of merger or divided through the method of division are exchanged with shares in the continuing/acquiring company. Hence, these shares, for fiscal purposes, are not sold but merely replaced with other shares of equivalent value.

In regard to *transfer of business*, or transfer of assets method as defined by the directive, the transferring company's business is replaced by shares in the acquiring company, and to the extent of consideration in shares it is not considered sale and under the provisions of the directive constitutes tax-neutrality.

Similarly, the method of *majority takeover*, which for the purposes of the directive is referred to as exchange of shares, the acquiring company replaces the shares in the hands of the shareholders in the target company with own shares thus, acquiring possession of majority holding in the target company. Yet again, for fiscal purposes no sale of shares takes place; shares of equivalent value are being exchanged.

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[242] Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 538 – 539.

A parallel to a law-bound change of debtor reflections and observations for the purposes of the law of obligations can be drawn. A contractual creditor is compelled to honor the law-bound change of debtor as a result of a merger or a division. His claims can after the transaction be targeted at the acquirer, as the latter has assumed not only the liabilities but also the rights of the target company. For corporate fiscal purposes, the obligee is the tax authority, which is compelled to, in accordance to the objectives of Directive 2009/133/EC, honor the exchange of equivalent share values when the continuation of the obligor's liabilities are not eliminated but merely transported from one individual to another.

In accordance to the objectives of the directive, no member state should lose its right of taxation. From this follows that if company A, which ceases to exist in one member state because it is acquired by a company B from another member state has a branch in member state C, the member state of company A is entitled to tax the branch of company A in connection to the transfer, even if the transfer otherwise is conducted tax-neutrally, cf. Directive 2009/133/EC art. 10.

The option of tax-neutrality for an M&A transaction is precisely that – an option. The parties can also choose to conduct their transaction as immediately taxable, which under certain circumstances *e.g.*, in regards to carry-forward of losses, could be the most attractive approach. In order to proceed with a tax-neutral transaction, it materially must be founded on commercial reasons, cf. art. 15, 1 (a) however, parties are not barred from the option just because their motives for the transaction are tax related.[243]

Carry-forward of financial losses

Whereas an option of tax-neutrality in connection to M&A transactions is facilitated by federal European legislation, the question on carry-forward of financial losses for tax purposes in the same context is left to regulation by the member states in accordance to their respective discretion.[244] However, the member states must exercise "that competence in a manner consistent with European Union law", cf. case *C-123/11, A Oy,* premise 29, which is referred to in greater detail below.

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[243] Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 515.

[244] The Commission of the European Union has attempted to propose a Council Directive on the harmonization of the laws of the Member States relating to tax arrangements for the carry-over of losses of undertakings cf. COM(84) 404 final (Submitted by the Commission to the Council, on 11 September 1984) (84/C 253/05). The proposal, however, never materialized into legislation.

In accordance to Danish national provisions to this respect, in connection to domestic *merger*, both merger-participating companies, the company that ceases to exist and the continuing company alike, lose their existing carry-forward if they choose to conduct the transaction tax neutrally.[245] Under certain circumstances loss of (substantial) accumulated carry-forward for a larger company, which desires to acquire a smaller company, would be inappropriate from *e.g.*, the financial planning point of view and, an immediately taxable transaction would seem as a better plausible approach. Moreover, if the transaction is conducted as immediately taxable, the continuing company maintains its carry-forward, cf. LL § 15,[246] and the company that ceases to exist is entitled to use its accumulated carry-forward prior to completion of transaction.

The same approach applies to a cross-border merger with a Danish continuing or acquiring company. The acquiring company domiciled in Denmark can maintain its carry-forward if in accordance to the provisions of relevant Danish law the transaction is conducted as immediately taxable even though the same transaction, in accordance to the law in other case-relevant jurisdictions, is conducted tax-neutrally, cf. TfS 2009.1140 SR.[247]

When jointly taxed parent company and its subsidiary are merging through a tax-neutral transaction, the carry-forward accumulated in the period where the companies were jointly taxed can be preserved for the purposes of subsequent deduction against gains in the continuing company, cf. FUSL § 8 (6), also when the subsidiary in question is not owned directly but through another subsidiary in the group constellation, cf. TfS 2005.94 LR.

In case *C-123/11, A Oy*, where the Court ruled from the right of establishment perspective,[248] it was emphasized, cf. premise 22, that "Directive 2009/133 does not address the question of the taking over … any losses that the merged company may have made." In this case, a Finnish company A desired to deduct against its

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[245] Cf. Fusionsskatteloven, FUSL § 8 (6).

[246] Ligningsloven; Danish Tax Assessment Act.

[247] Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 526.

[248] The Court, in spite of objections from Italian, Finnish, German and UK governments stated that "cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They are thus regarded as constituting particular methods of exercise of freedom of establishment, important for the proper functioning of the internal market, and are therefore among those economic activities in respect of which Member States are required to respect the freedom of establishment laid down by Article 49 TFEU," cf. premise 24.

financial gains for tax purposes the losses of its Swedish subsidiary B, which A was to merge with. In accordance to relevant Finnish legislation, this would be permitted, provided the subsidiary also was governed by the Finnish law. Investigating whether such legislation was incompatible with art. 49 & 54 of TFEU the Court concluded that it was not provided, that the same law allows “the parent company the possibility of showing that its non-resident subsidiary has exhausted the possibilities of taking those losses into account and that there is no possibility of their being taken into account in its State of residence in respect of future tax years either by itself or by a third party.” Cf. premise 56. Thus, the Court places emphases on preventing companies from double use of losses (double dipping) and tax avoidance and at the same time ensuring “a balanced allocation of the power to impose taxes between the Member States,” cf. premise 43. With reference to case *C‑446/03, Marks & Spencer*, which is outlined right below, the Court justifies the difference in treatment of a merger between two domestic companies and a merger of a domestic parent company with its subsidiary from another member state presumed the grounds are found in preclusion of companies from double use of tax losses and of tax avoidance. However, the relevant national legislation, in pursuit of the objectives in question, must not go beyond what is necessary in order to achieve the purpose. Hence, when the subsidiary in question has exhausted all its options of utilization of the accumulated losses in the member state of incorporation, the remaining losses can be utilized by the acquiring parent company incorporated in another member state against its own gains for tax purposes.

In case *C‑446/03, Marks & Spencer* the situation was similar to that addressed right above. Here, a UK incorporated parent company sought to deduct losses accumulated by its subsidiaries in several other member states against its own profits for tax purposes in the United Kingdom. Under the UK corporate tax law, the parent company was permitted such deductions if the subsidiaries in question were incorporated and governed by the UK law, and refused to provide the same treatment in respect to subsidiaries incorporated otherwise than in the United Kingdom. The question presented before the Court was whether these provisions were contrary the freedom of establishment cf. art. 43 EC and 48 EC, now art. 49 and 54. The Court found that this differentiation in treatment “constitutes a restriction on freedom of establishment” as “it applies different treatment for tax purposes to losses incurred by a resident subsidiary and losses incurred by a non-resident subsidiary” cf. premise 34. However, “such a restriction is permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it”, cf. premise 35. It has been argued, that the restrictions are justified base on the following: “First, in tax matters profits and losses are two sides of the same coin and must be treated symmetrically in the same tax system in order to protect a balanced allocation of the power to impose taxes between the different Member States concerned. Second, if the losses were taken into consideration in the parent company's Member State they might well be taken into account twice. Third, and last, if the losses were not taken into account in the Member State in which the subsidiary is established there would be a risk of tax avoidance." In spite of the Court's acceptance of the argumentation the Court found that general application of the law in question implies general exclusion from the benefits of the legislation, which goes beyond what is necessary to attain the essential part of the objectives pursued. Thus, the Court reached the same conclusion as seen in case *C-123/11, A Oy*, addressed right above.

Likewise, in case *C-414/06, Lidl Belgium GmbH & Co. KG*, the Court came to a congruent decision that losses of the permanent establishment of a company incorporated and governed by the law of another member state can be deducted against profits of the permanent establishment in its member state.

In case *C-126/10, Foggia – SGPS,* a Portuguese company acquired one of its subsidiaries by the way or merger and desired to apply the subsidiary's accumulated losses against its taxable income. The relevant authorities did not object to the merger for corporate purposes, but for fiscal purposes did not permit transfer of the accumulated carry-forward arguing that the merger was not based on commercial reasons and, the mere purpose of the transaction was tax avoidance. The acquired subsidiary did not have any assets, nor did it conduct any business activities. The Court ruled that "even though that operation has a positive effect in terms of cost structure savings for that group, [it] may constitute a presumption that the operation has not been carried out for 'valid commercial reasons'. It is incumbent on the national court to verify, in the light of all the circumstances of the dispute on which it is required to rule, whether the constituent elements of the presumption of tax evasion or avoidance, within the meaning of that provision, are present in the context of that dispute."

The same approach applies to the method of *division* whereas all the participating companies, the company being divided and the receiving companies alike, lose their accumulated carry-forward if the transaction is conducted tax-neutrally, cf. FUSL § 15 b (1) & (2), FUSL § 8 (6), and LL § 15.

The option of tax-neutrality for the purposes of the method of *transfer of business* in Danish national corporate tax law is regulated by FUSL § 15 c-d. The reference to FUSL § 8 (6) in this respect implies the loss of accumulated carry-forward if the transaction is conducted as tax-neutral.[249]

Acquisition of a target company by the *majority takeover* method, however, secures preservation of the accumulated carry-forward by the companies involved in the

[249] Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 569.

transaction; no amendments to corporate structure of the companies take place, and they carry on with their respective rights and obligations. This is the starting point. If company A, which generates taxable profits, acquires, by the method of majority takeover, company B, which has accumulated carry-forward, company A will be able to apply those losses against its taxable income and hence, make that income tax free. If such trade with accumulated losses is considered unacceptable by the legislature, restrictions can be applied to prevent this. This approach is taken by *e.g.*, Denmark. In accordance to the relevant Danish legislation[250] carry-forward accumulated by the company, which is acquired through majority takeover method, either a) changes status if the company after the transaction is going concern or, b) if the target company is without any corporate activities the accumulated carry-forward is lost.

In respect to a), if the target company S is a subsidiary of the parent company P, one may think that selling shares in P would not constitute a change of ownership of company S. However, also this option is eliminated by the legislation, which, in the context at hand, demands that company P's ownership of company S must be considered transparent; hence, change of ownership of company P equals change of ownership of company S. Nonetheless, the rule can be circumvented by letting another company which is owned by the same shareholders as those that own P to acquire S. To this respect no change of ownership occurs and the rules are not triggered.

On the contrary, if such operation of circumvention of the rule fails and the provisions are activated the question then arises as to what profits can the accumulated carry-forward be applied against? The legislation provides that only profits originating from sources other than capital-related earnings *i.e.*, interest-related profits, dividends, capital gains, etc., carry-forward can be applied against. Nevertheless, this rule does not apply if the carry-forward losses originate from financial activities conducted by for example a bank, an insurance company, equity fund, etc., the core activities of which are capital related.[251]

In respect to b), if the target company has no activities or in financial terms has insignificant business activities, its accumulated carry-forward cannot be utilized by the acquirer by the way of majority takeover. Thus, it will be lost. This applies also to companies the business activities of which were of financial character *i.e.*, banks, insurance companies, etc.[252] However, if the target company A has no business activities itself, but it owns a subsidiary B, which conducts business activities, the

[250] Danish Corporate Tax Act § 12 D.

[251] TfS 2012.583 SR.

[252] TfS 2014.199 SR.

target company A cannot in the light of these provisions be considered without business activities. This leads to exemption of application of principles in the present section b) and leads up to the application of principles under section a) right above.

“Double-dipping”

It is obvious that a company should not have a right to obtain deduction for losses in the member state of a permanent establishment or a branch, and at the same time to obtain a right to carry-forward originating from the same losses in the member state of incorporation of the parent company. This is the core of the ban against “double dipping”. However, a member state cannot in accordance to its legislation preclude deduction of losses accumulated by a permanent establishment from the profits gained by a group-related company in the same member state in course of abstract-based preventive measures against double deduction,[253] cf. case *C-18/11, Philips Electronics*[254]. Thus, “the objective of preventing the risk of double use of losses cannot allow the Member State in which the permanent establishment is situated to exclude the use of losses on the ground that those losses may also be used in the Member State in which the non-resident company has its seat.” “The host Member State, in whose territory the permanent establishment is situated, therefore cannot, in order to justify its legislation in a situation such as that in the main proceedings and in any event, plead as an independent justification the risk of the double use of losses.”

6.4. GROUP-RELATED ISSUES

Throughout the human history, our legal consciousness has been subject to constant evolvement. Some periods are characterized and kept in remembrance for rapid development with thereto-attached significant milestones that influence the society many generations ahead, such as *Magna Carta* of 1215, which is considered to be one of the most important documents in human history.[255] But not only our

[253] Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 54.

[254] C-18/11, Philips Electronics, premise 32 &33.

[255] On emergence and development of various legal systems see John Maxcy Zane, The Story of Law, Liberty Fund, Inc., 1998.

perception of human liberties and rights was and still is evolving. Likewise, the corporate legal consciousness has been and still is subject to development.[256]

In the early stages of development of company law, particularities of which are relatable to and reflects in contemporary company law, the focus of business participants was firmly fixed at the very specific aspects of the undertaking. When an East India Company (one of many) was established some time in the beginning of 17th century, its business participants, - the shareholders, knew exactly which ship will undertake the journey, where the journey will go, and for what purpose. And upon arrival, if the trip was successful, the shareholders received their dividends and the company would dissolve. Thus, shareholders' involvement was closely connected to the business of the company, which was not of any abstract nature but rather something very specific and tangible.

The development of company law led to a shift of shareholder focus from the enterprise, *i.e.*, the business of the company, towards the company itself. Articles of association or statutes of a company are not required to specifically identify the purpose of the company or the business the company is ought to conduct cf. *case C-106/89, Marleasing*, where *Marleasing SA* sought nullification of *La Comercial SA* claiming that the company did not have any specific cause or purpose, which the ruling Court rejected, cf. Directive 68/151/EEC, now Directive 2009/101/EC. The statutes of a company can merely identify that the company in question will conduct business in manufacturing and sale, or providing services, etc. The shareholders are, generally, more concerned about increase in shareholder value, rather about the means applied to achieve it; presumed that the company operates within the limits of the law, and for some, possibly also in accordance to their moral convictions and beliefs.

This shift, however, does not eliminate the importance of focusing on the business itself, and also its geographical location. Therefore, some shareholders of locally based companies ensure that the business is conducted in their local areas hence, providing jobs and developing their community. But also shareholders of large companies promote undertaking of business in the local communities with the same argumentation. The connection between a shareholder and his interest in a particular business is, thus, not eradicated.

When we say that "company law is not only company law but also – and certainly in equal measure – enterprise law,"[257] we are assuming a wider and broader

[256] See for example Alex Fomcenco, "Rise of a New Corporate Vehicle: Public Benefit Corporation" (2014) European Company Law, vol. 11, issue 6, p. 276–280.

perception of company law we know today, which is the result of evolvement through many centuries. When we consider an enterprise on a larger scale, we consider it beyond the boundaries of legal framework – a company. Hence, one company can conduct its business within its legal framework; as well as many companies can conduct business or businesses across the limits of their formal single-company structure. This is the corporate core of enterprise law for group-related purposes.

European federal legislation on group law

In spite of attempts to enact a common federal European legislation on group law by proposal of ninth company law directive on groups, the enactment of the act never took place, and at the present moment must be considered completely stranded. Thus, there is no federal corporate legislation on the matter. This, however, does not prevent companies from forming groups, also across borders, and not only within the European Union, but also beyond its frontiers. Even though European federal legislation addresses group-related issues such as consolidated accounts cf. Directive 2013/34/EU, previously Directive 83/349/EEC (seventh company law directive); taxation of parent companies and their subsidiaries cf. Directive 2011/96/EU; the common system of taxation applicable to interest and royalty payments between associated companies cf. Directive 2003/49/EC; in regard to corporate matters of groups of companies it maintains the “I don’t know how to describe the elephant, but I’ll recognize it when I see it”-approach. This approach of reluctance to legislate on the matter results in a substantive judge-made group law.

Distinctiveness of group affiliated companies and their activities

In respect to rights and obligations every company in a group, for corporate purposes, is considered to be its own individual entity, carrying its own responsibilities for its own actions. Thus, creditors of one company in a group cannot aim their claims against another company in that group. Transfers between group-related companies are considered transfers between independent entities cf. case *C-234/98, Amalgamated Construction,* where transfer of business between group-related companies, for the purposes of protection of rights of employees, is

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[257] Erik Werlauff, EU Company Law – Common business law of 28 states, 2nd ed., DJØF Publishing, 2003, p. 190.

considered a genuine transfer. The same in case UfR 1985.664 V, a transfer of stock of chairs from one group-related company to another, in connection to an internal restructuring process, was considered a sale in an ordinary course of business. The same in case *C-524/04, Thin Cap Group,* where interests arising in connection to a loan provided by a group-related company are considered genuine expenses, which are deductible against profits. Also in case *C-324/00, Lankhorst-Hohorst GmbH,* in the similar context, companies from different member states, notwithstanding their group-ligament, are to be treated as independent entities, which can conduct business with each other, provide loans to each other, and pay agreed-upon installments and interests, etc.

On the other hand, it is widely accepted that group-related companies provide security to the loan givers for each other's financial commitments. Hence, for example, a bank that provides financial services to the companies belonging to the same group would often demand and get financial warranties for one company's obligations from another company(ies). Such collateralization is common outside of corporate definition as well, but under the similar conditions, whereas guarantees or financial securities are provided for related parties. Group-related companies are, likewise, more inclined to offer financial support to one another, in form of *inter alia* loans, which can be considered financial rescue measures, cf. above-mentioned case *C-324/00, Lankhorst-Hohorst GmbH*, where a parent company established in the Netherlands granted a loan to its subsidiary established in Germany, which at that time was in financial distress and was probably not able to get a loan otherwise due to its lack of ability to provide security. Also in case *C-287/94, A/S Richard Frederiksen & Co.,* where a parent company granted an interest-free loan to its subsidiary.

Case law: a group of companies is a single operating unit

Case law from the European Court of Justice, ECJ, in some occasions considers a number of companies, which together constitute a group, as a single operating unit. However, in some other cases this approach is replaced by the contrary hence, ruling against the identification of group-related companies as a single operating unit. Please allow me to present a few examples.

In connection to acquirement of publicly offered contracts in accordance to the federal European procurement rules, the case law provides the understanding that when a group-related company offers a bid on a contract, it is permitted to include capacities and expertise of other companies belonging to the same group as if those capacities and expertise were its own provided, the bidder has a reality-based access to those assets. This understanding is consolidated by: *C-389/92, Ballast Nedam Groep,* - "when a parent company makes a bid for a public contract which involves documenting its expertise and experience within the relevant area, the parent company may also include the resources which the parent company lacks, but which one or more of its subsidiaries possesses";

C-176/98, Holst Italia SpA (Ruhrwasser), "where the newly formed German company Ruhrwasser AG did not itself have the resources, but referred to the resources placed in one of the six public-law bodies which had founded the company, i.e. resources at the level of 'parent company'". However, if a group-related company or a consortium of companies has acquired the public-works contract, in accordance to the federal European procurement rules, subsequently changes its composition, it might also lose the right to the contract in question in accordance to the relevant national rules, cf. Case *C-57/01, Makedoniko Metro,* where the Court concluded that the European provisions do "not preclude national rules which prohibit a change in the composition of a group consortium taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders."

For the purposes of competition law: *C-73/95-P, Parker,* "it was found that when the actions of subsidiaries are wholly 'controlled' by the parent company, they and the parent company constitute one economic unit within the meaning of the competition rules."

For the purposes of the European broadcasting directive:[258] In *C-222/94, The Commission v. United Kingdom,* the Court deems the broadcasting group to be domiciled and thus, governed by the law of the member state in which the center of its activities is located. Nevertheless the broadcasting services are divided into domains of several other companies incorporated in different states, the Court considers them to be branches of the company, which encompasses the center of the group's activities.

Case law: a group of companies is *not* a single operating unit

In opposition to the identification of group-related companies as one operating unit is case *C-126/10, Foggia – SGPS.* In this case a parent company merged, through an irregular merger, with its subsidiary, which ceased to exist as the result of the transaction. For corporate purposes, the operation did not raise any difficulties. However, for fiscal purposes, the problem emerged when the parent company

[258] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

wished to apply the subsidiary's carry-forward against its profits for the purpose of tax benefits. The authorities opposed such utilization of the carry-forward in question on the grounds "that there are no serious commercial reasons for the acquiring company's request to transfer tax losses, leading them to conclude that, from the acquiring company's point of view, there was no apparent commercial interest in acquisition, since the acquired company had developed no activity as a holding company and had no financial holdings, and would consequently transfer only substantial losses, although the merger might represent a positive effect in terms of the cost structure of the group."[259] The Court ruled that "in the case of a merger operation between two companies of the same group, the fact that, on the date of the merger operation, the acquired company does not carry out any activity, does not have any financial holdings and transfers to the acquiring company only substantial tax losses of undetermined origin, even though that operation has a positive effect in terms of cost structure savings for that group, may constitute a presumption that the operation has not been carried out for 'valid commercial reasons'."[260]In this context, a company, albeit, belonging to a group, is a separate and independent entity, with own rights, liabilities, options to carry forward losses, and subsequent entitlement to apply those losses against own generated profits, independently from the overall interests of the group.

In case *C-287/94, A/S Richard Frederiksen & Co.,* for the parent company it seemed completely acceptable to grant an interest-free loan to its subsidiary. The authorities considered the transaction in question to be unusual in relation to normal market practice and assumed that the unusual terms are the product of common interests. "The granting of an interest-free loan allows the company to have capital available without having to bear its cost. The resultant saving in interest leads to an increase in its assets by allowing the company to avoid expenditure which it would otherwise have to bear."[261] Hence, the company benefits from an interest-free loan and must be taxed to the amount of interest saved, notwithstanding that the loan stems from the parent company in the group.

The above-mentioned examples demonstrate, that the Court's determination of a group, and its way to address the issues at hand accordingly, rests firmly on concrete assessments.

[259] C-126/10, Foggia – SGPS, premise 15 (2).

[260] Ibid. The judgment.

[261] C-287/94, A/S Richard Frederiksen & Co., premise 12.

Now, after revealing a somewhat diffuse and unclear definition of a “group” that emerges from the ECJ’s case law, whereas the Court in some occasions rules in favor of the group and in some other occasions it rules against the group, hence, denying identification of a group as one unit and, taking in account the different definitions of a “group of companies” that is mentioned earlier, under the section *Elements*, where group-related issues were initially presented, we find ourselves concluding that “if it looks like a duck, if it walks like a duck, if it quacks like a duck – it *is* a duck”.

Without substantial contribution to clarity of definition, this metaphoric wisdom, which, in concert with the case law from the ECJ, confirms existence of groups, and under application of relevant legal provisions, certain areas of groups’ undertakings are regulated. The question of interest under reference to the topic of this study is: What is the role of M&A in a group’s corporate reality?

Can a group of companies be created through M&A methods?

Corporate growth that is mentioned in the beginning of this study does not apply only to a single legal entity *i.e.*, a company, but it applies also to corporate growth beyond its framework, which extends to several companies that together form a group. Organic growth would most often be closely connected to the growth of group-related core enterprise; whereas growth through M&A can expand the options to encompass other areas of business. It can hardly qualify as a rule, but one can imagine that expansion of a group through organic growth by *e.g.* incorporation of a new subsidiary would pursue encompassment of a business that is somehow related to the business of other company or companies in that group. On the other hand, yet again without qualifying as a rule, one can imagine that growth through M&A could be less bound by business relevance criteria and, hence, branch out to different, new, and possibly previously unexplored areas of business.

Merger, as an M&A method, as a starting point does not seem to be the method of interest for the purpose of creation of a group of companies as it leads to reduction of the number of participating companies. Regardless of whether the merger in question is regular or irregular, - the number of participating companies will decrease. However, if a company desires to acquire control over a target company, which it does not have any previous connection to or, its connection to it is of limited extent, by the way of merger, it could incorporate a subsidiary for the purpose of being the acquiring company. Without such a subsidiary it could merge directly with the target, which would not lead to creation of a group, as one of these two participating companies by way of irregular merger, or both of these companies by way of regular merger will cease to exist. With such a subsidiary, however, it will be able to acquire indirect control over its target by letting its newly formed subsidiary to be the acquiring company: a forward triangular merger.

Division method, however, can be applied for group creation purposes; although, it presents its own challenges. It must be borne in mind that sixth company law directive 82/891/EEC on divisions, as a starting point, regulates complete divisions of companies, but offers an option of partial divisions, if a member state permits it in its national legislation when implementing the provisions of the directive.

In a jurisdiction where partial division is permitted, a company, which is subject to division, can transfer the spin-off units to newly formed companies, which are incorporated prior to division with the very purpose of being the receiving companies. Thus, without losing control over any part of its business, a divided company creates a group where each company encompasses its own business, which prior to the division were all parts of the same company. In this scenario, it must be remembered that the receivers of the consideration from the recipient companies are the shareholders in the company being divided. Hence, for a group to be created, the company being divided must retain decisive influence over the recipient companies.

In respect to a complete division the company being divided ceases to exist and thus, per se, cannot become a parent company. Even though if prior to the division a number of receiving companies are incorporated by the company being divided, the receivers of consideration are the shareholders of the divided company. As a result, after the division, we are left with a number of independent companies, which have the same shareholders as those that owned the divided company; this in itself does not create a group. This can, however, be rectified by incorporation of a holding company, provided that the same shareholders transfer their holdings of shares in the newly emerged companies to the holding company.

Transfer of business appears to be a better suitable alternative when a company seeks the creation of a group by becoming a parent company itself. Here again incorporation of a new company is required prior or directly in connection to the transfer of business transaction. The newly formed company to which a business is transferred pays its consideration in shares not to the shareholders of the transferring company as it is the case with the method of division but to the transferring company itself, hence, creating the right conditions for creation of a group relationship between a parent company and its subsidiary; for corporate purposes a subsidiary can only have one parent company, which exercises de facto control over it.

In comparison to the method of division, the method of transfer of business is *disadvantaged* by the absence of universal succession, where transfer of liabilities and reciprocal contracts requires creditors' and other contracting parties' consent. This disadvantage is, however, somewhat limited as statutory accept of change of debtor in connection to a merger or a division can be prevented by contractual agreement between the relevant parties, cf. the discussion earlier in this study.

Whereas the methods of division and transfer of business cf. right above are addressed from the perspective of restructuring a single company into a group of companies by either push-up or drop-down methods, the method of *majority takeover* can be applied provided a separate company becomes the subject of interest and hence, the target. Acquisition of control over the target by acquiring the majority of its voting rights creates the parent-subsidiary relationship. Such control can be acquired directly by exchange of shares between the acquiring company and the target company's shareholders. But it can also be acquired indirectly by letting a subsidiary formed for the purpose to be the acquirer of the majority of the voting rights in the target by exchange of its shares with the shares of the target held by its shareholders.

Reconstruction: Newly Formed NewCo, and its various positions in a newly former group.

The need of reconstruction, unlike restructuring, of a company, for corporate purposes, is triggered by financial hardships that the company in question undergoes. In reality, this implies that reconstruction is a necessary undertaking in order to ensure the survival of the business (but not the survival of the company). Such a reconstruction approach can activate application of one of the three models, each one of them involving incorporation of a new legal entity, – a NewCo, which together with the company in distress forms a group or contributes to extension of an already existing group. These three models are: a NewCo-holding model, a NewCo-subsidiary model, and a NewCo-affiliated model.

A NewCo-holding model entails financial injection into the operating company, which is in distress. The ownership of the company in question is transferred to a newly formed holding company, which in return issues shares as the consideration to the transferring shareholders. This is done by the way of majority takeover of the operating company by the newly formed NewCo-holding company. Hence, the group of companies is established. By injecting capital into the subsidiary, the holding company offers it a chance to rectify its undertakings and, hence, overcome its hardships. The capital in question would commonly stem from either a shareholder loan to the NewCo-holding company or a loan granted to it by a third party. In case the injection of capital leads to the intended outcome and the subsidiary in distress betters its circumstances resulting in generation of profit and subsequent ability to pay dividends to its shareholder *i.e.*, the NewCo-holding company, these dividends will be tax free in accordance to the provisions of Directive 2011/96/EU on common system of taxation applicable in the case of parent companies and subsidiaries of different member states or, in accordance to corresponding provisions of national law of the common jurisdiction of both companies. Consequently, the NewCo will pay off its debt to the loan giver, who is either the shareholder or a third party. In those jurisdictions where tax law offers an option of joint taxation of parent companies and their subsidiaries or, if such joint taxation is mandatory in accordance with national tax law, as it is the case in Denmark cf. SEL § 31, the NewCo-holding company will be entitled to a full deduction of loan interest expenses occurred in connection to reconstruction loan taking. National law of a member state can, however, prevent a parent company incorporated in that member state from deducting losses incurred by its subsidiary incorporated in another member state against its taxable profits, if the subsidiary in question has not yet exhausted all its options of deduction of those losses against its profits gained in its member state of incorporation. European federal law, as it now stands, does not prevent this cf. the judgment in case *C-446/03, Mark & Spencer*.

A *NewCo-subsidiary model* implies a transfer of the business of the company in distress to a newly formed subsidiary, - the so-called drop-down approach. This is done by the way of *business transfer*. The seller is the transferring company itself who is also the receiver of the consideration, which consists of shares in the acquiring company, - the subsidiary. The business relevant assets, which constitute the business itself and which secure its healthy onward development, are being transferred, whereas all the financial liabilities remain in the parent company. Besides, it lies in the core of business transfer method that only assets can be transferred, as transfer of liabilities, which implies change of debtor can take place only when the creditor offers his or her consent to such change of debtor or, it is mandatory in accordance to the law as observed in connection to the methods of merger and division. Even if liabilities could follow assets in connection to business transfer in this particular context the purpose of creation of a NewCo-subsidiary for reconstruction purposes would not be achieved. The obvious question arises: are the creditors' possibilities to collect what rightfully belongs to them became weaker since their debtor has now transferred the valuable assets, *i.e.*, its functioning and profit generating business to a subsidiary? The answer is in the negative. Although the profit generating business is now transferred, the debtor company remains the sole shareholder of the subsidiary encompassing the business in question. Furthermore, if the parent company is declared bankrupt and subsequently dissolved, which is most often the case, the dividends that the creditors will receive from the positive estate of the bankrupt parent company will be higher than what they would receive if the parent company went bankrupt still owning the business now transferred to the NewCo-subsidiary.

Creation of this group structure with a trouble-afflicted parent company owning a NewCo subsidiary should be a temporary remedy, hence, aiming for a sale of the

NewCo to a third party acquirer. This goes in accord with the asset grooming though thread. Although, asset grooming, as addressed earlier, is often used by healthy organizations in restructuring proceedings, it is well suitable in reconstruction situations, where a healthy company has a chance to be sold prior to its demise by possibly incompetent management, which in the first place may have led it to the reconstruction necessities.

A NewCo-affiliated model implies a transfer of the business of the company in distress to a newly formed company, - the NewCo, under the control of the former company's parent company. Here again, as mentioned right above, only the assets are transferred, whereas all liabilities of the transferring company remain in the transferring company. In case the received consideration for the business transferred by the company in distress is not enough to satisfy creditors' claims against the transferring company, the parent company can let it go bankrupt without this having any influence on the business, which is being transferred and, thus, now has a tangible chance for onward progress. At the same time, it must be borne in mind, that payment of the correct and indisputable purchase price of the business received is of paramount importance, as the creditors of the transferring company must not suffer as the result of the transfer. Otherwise, the deal can be revoked with following adverse consequences for the implicated parties.

From the shareholders' perspective it is the responsibility of the management of the company to lead it towards profit generation and hence, shareholders' profit maximization, and from the creditors' perspective it is the responsibility of the management of the company to ensure that the business it conducts is financially sound, and the company can honor its financial commitments. In case of the contrary, the management of the company can become liable for adverse effects of poor management. Therefore, when realizing that the company in question is in distress it is crucial to look for solutions, which could lead to the implementation of reconstruction models.

Can an already existing group be restructured through M&A methods?

It is common that when a question on restructuring of an existing group of companies, under application of M&A methods, is being addressed, the focus is aimed on internal restructuring, *i.e.*, without involvement of legal entities, which are not related to the group in question. However, internal restructuring can happen simultaneously with transactions that involve other companies than those that already are integrated into the group.

For the purposes of simplification of a group's structure, the method of *merger* is the choice of preference. Several companies can be amalgamated into a single entity, hence decreasing the number of group-participating companies in pursuit of, for example, corporate synergies, the efficiency of administrative activities, etc. But also in respect to expansion of the group the method of merger is useful. The acquiring group should carefully consider where in the group structure to place the target *i.e.*, which company in the group should be the acquirer. It may even be more appropriate to incorporate a new legal entity for that purpose or, to merge several companies at the same time. The course of actions will, obviously, depend on specific circumstances and the desired outcome.

The method of *division* can also be applied for group-restructuring purposes. Whereas the method of merger is mostly used to simplify the group structure by amalgamating already existing companies, the method of division, on the contrary, is used to split existing companies and transfer parts of their business activities to already existing companies but often to newly formed companies, resulting in expansion of the group. A division of a company can take place by the drop-down approach, *i.e.,* when parts of its corporate enterprise are transferred to its newly formed or already existing subsidiaries. If the division is partial, the company in question carries on with its existence, now merely in a new and decreased volume. If the division is complete, the company ceases to exist, as all its assets and liabilities are transferred to several receiving companies. If those companies belong to the same group as the divided company, the group shrinks; however, the overall enterprise of the group remains the same. On the contrary, if the receiving companies do not belong to the same group as the divided company, the group shrinks, as well as its overall enterprise, as the transferred corporate activities leave the domain on the group.

Similarly to the method of division the method of *transfer of business* can be used for group-restructuring purposes. When the business in question is transferred to a newly formed company within a group, the volume of the group's structure increases, but without increasing the group's overall enterprise. However, if the receiving company is not group related, the business leaves the group's domain, although, without having an impact on the structure of the transferring company, nor on its financial value or the overall value of the group. This is because the transferred business is being replaced with shares of the equivalent financial volume. Here, the transferring company is the receiver of consideration. Transfer of business, which is contrary to the method of division, does not result in structural amendments of the transferring company.

The method of *majority takeover* does not in itself lead to the creation of new legal entities, nor does it imply changes to the corporate structure of already existing legal entities. The method involves transfer of shares, to which the majority of the voting rights in the target company are attached, from one shareholder to another shareholder; thus, the control over the target company is being transferred. If such majority of shares and voting rights in the target company belonging to a group is transferred to another company from the same group, the overall group value remains the same. However, if the acquiring company does not belong to the same group, the target company exits the group's corporate structure, thus, leading to the group's decrease. On the other hand, if the acquiring company is a group-related company and the target company is not, the acquisition will result in the expansion of the group, as its new member is welcomed.

Can M&A methods be used in change-of-control planning?

The topic of change-of-control planning is basically the same as the topic of asset grooming for subsequent sale. In the center of the topic lies the desire of the owner to sell part or parts of its enterprise to either existing buyers or potentially interested buyers. The acquirers are rarely interested in the company without a business. Their interest is aimed *at* the business. In this respect the difference between a company and a business must be borne in mind: a company is a shell and its business is the core.

Depending on what is desired to be groomed for subsequent sale, the various M&A methods can be utilized.

Suppose that a certain business unit of a company within a group is desired sold to a company not belonging to the same group. The business unit in question can be transferred by *e.g.* the method of business transfer directly from the transferring company to the acquiring company. In case the acquirer has not yet been found and the transfer is still in the planning stage the asset grooming process for corporate purposes will expectedly take form of transfer of business to a newly formed company under the ownership of the transferring company. In other words, the transferring company will transfer the business in question to its newly formed subsidiary. This subsidiary, now encompassing the sale-ready business can subsequently be transferred to an acquirer by *e.g.* the method of merger or the method of majority takeover.

Alternatively, the company that owns the business in question can be divided, wholly or, where permitted under the jurisdiction of incorporation, partially, hence, transferring that business to a newly formed company within the same group. Yet again, this subsidiary can subsequently be transferred to an acquirer by either the method of merger whereas the acquiring company engulfs the company being acquired or, by the method of majority takeover whereas the majority of the voting rights in the company being acquired are transferred to the acquiring company.

The same type of corporate approach is expected to take place in case several business units, with related business activities, belonging to different companies within the group, are subject to sale. It is anticipated that these business units would be collected into encompassment of a single company belonging to this group. The acquirer can subsequently acquire control over this company by either the method of merger or by the method of majority takeover.

Can M&A methods be applied in liquidation of a group?

A group of companies can either expand or decrease in its size. Decreasing the size of a group implies decreasing the number of participating companies. The process of decreasing can potentially lead to the liquidation of a group by merging several group-related companies into a single company. This is obviously a process best suitable to smaller groups with companies that conduct corporate activities in somewhat similar areas of business. The latter is, however, not an imperative condition. It is not mandatory for companies to comprise business units that conduct related business activities; hence, a company can consist of business divisions with completely unrelated business activities, as long as these activities are covered by the articles of incorporation.

6.5. HOLDING-STRUCTURE ISSUES

There is no explicit definition of a holding company to be found in the legislation.[262] However, for accounting purposes a holding company is defined as a company that a) owns shares (equity investments) in other capital legal entities and, b) exercises substantial influence over operating and/or financial management of one or several of these entities. It must not go unnoticed that the influence is defined as *substantial* but not decisive.

Holding companies as legal vehicles are widely used and accepted. The reason for this is that a holding company in corporate legal perspective does not differ from any other limited liability company, although, with the exception of its purpose or objectives. And as we recall from the earlier included discussion, the objectives of a company, existing or missing alike, cannot result in nullity of the company in

[262] Erik Werlauff, Selskabsret, Karnov Group, 9th ed., 2013, p. 642.

question unless, “the objects of the company are unlawful or contrary to public policy”[263] cf. case *C-106/89, Marleasing.*

Legal dictionary plainly and clearly provides the following definition: “Holding company is a corporation organized to hold the stock of other corporations.”[264] Hence, ownership of the stock of other corporations without having any other activities is a lawful purpose of a holding company.

A holding company is, thus, *a* shareholder of an operating company. Or the holding company is *the* shareholder if all or the majority of the operating company’s shares are in that holding company’s possession. Correspondingly, a physical person who owns shares in a company is also either *a* shareholder or *the* shareholder respectively. Whereas shareholding levels discontinue at the level of the physical shareholder, they at the same time continue with every level where a limited liability company, as a legal entity which cannot exist without having at least one shareholder, possesses shares in another company.

Holding structure of a group, which exists per default because of the structural link between at least two legal entities, can have two basic formations: a) one holding company can own one or more operating companies, which again can be parent companies of other subsidiaries and, b) a single operating company is owned by several holding companies.

An entrepreneur who decides to conduct business activities within any area of commerce is often interested in focusing his attention and resources on the business itself rather than on the legal framework that encompasses the business. In spite of that he is advised to consider structuring his business as a holding structure, as this can have a direct effect on particularities for corporate purposes, for the purposes of duties and levies, and for tax purposes. In order to avoid recurrence of argumentation in these respects, I refer to the text of section *What are the Advantages of a Holding Structure?* above.

If for whatever reason incorporation of the business did not occur along with the simultaneous formation of a holding structure, *i.e.*, incorporation of an additional company - the holding company, such structure can be created at a later point of time as well. Nonetheless, formation of a holding structure alongside the primary

[263] Directive 68/151/EEC, art. 11, 2 (b) replaced by Directive 2009/101/EC.

[264] Steven H. Gifis, Law Dictionary, Barron’s, 2010.

incorporation of the business seems to be the simplest approach and should be considered when appropriate. Otherwise, almost like a universal remedy, M&A methods become useful.

A company can restructure itself and become the holding company by transferring its business activities to a newly formed subsidiary: the so-called drop-down approach in the course of *transfer of business* method. That subsidiary is formed for the very purpose of becoming the receiving entity of the business in question. The receiving company pays for the business with its own shares. Since under application of transfer of business method, which is contrary to the other four methods of M&A, the transferring company is also the receiver of consideration. Hence, its business is now replaced with shares in the receiving company of the equivalent financial value. The shareholders that own the transferring company are not directly affected by this transaction. Their ownership of the company remains the same. Only now they do not own the operating company directly but through the ownership of the holding company that yet again owns the operating company. The transaction can be conducted tax neutrally in accordance to Directive 90/434/EEC, which is now replaced by Directive 2009/133/EC.

A holding structure can also be formed in the course of *majority takeover* method. The shareholders of the operating company can incorporate another legal entity and let the latter acquire all the shares of the operating company from its shareholders hence, acquiring control over it and thus, forming the holding structure. A noteworthy recent example of such restructuring is the incorporation of *Alphabet,* the newly formed holding company of *Google.* The example is an upside-down turning of the *Google's* structure. Prior to transaction *Google* is a large operating company encompassing a number of businesses and with a number of subsidiaries as well; after the transaction *Google* becomes the largest company among several companies that is owned by a single holding company – *Alphabet.* In accordance to *Google* this is done in order to create clarity for investors, but also to separate businesses that "aren't very related" into different legal entities, hence, allowing *Google* to focus on its core activities *i.e.,* search engine enterprise. Simultaneously, this creates a separation of assets of different businesses as well; creating a web of independent enterprises that would not impose adverse effects on each other in case one of the businesses is in distress.

It is, however, not a requirement that the holding company in this procedure is newly incorporated. It can be an already existing company under the control of the same shareholders. What is essential in this respect is that the holding company is drained of business activities creating a forum for its predominant purpose *i.e.,* to own shares in the operating company. This transaction too can be conducted tax neutrally in accordance to Directive 90/434/EEC, which is now replaced by Directive 2009/133/EC.

In case *C-321/05, Kofoed*, the question arose whether collection of dividends by the acquiring company from the company being acquired *i.e.,* the new subsidiary must be regarded as consideration in cash, which in itself is subject to taxation. In this case two shareholders that each owned 50 % of both the company C and the company D let their shares in company C to be purchased by company D. Company D's consideration to the shareholders was in form of its own shares. As the result of this transaction the company D became the sole shareholder of the company C. A few days after the transaction D collected a substantial dividend from C. The general meeting of D then decided to distribute dividends to its two shareholders equally. Tax authorities reacted by stating that the dividends must be considered to be a consideration in cash, which triggers imposition of tax. The European Court of Justice ruled against this assumption stating that "in circumstances such as those in the main proceedings, a dividend, such as that paid, is not to be included in the calculation of the cash payment' provided for in Article 2(d) of Directive 90/434 and that, accordingly, an exchange of shares such as that in issue constitutes an 'exchange of shares' within the meaning of Article 2(d) of that directive."[265]

As mentioned earlier under the section of *What are the Advantages of a Holding Structure?*, possibly existing clauses on change of control must be observed.

As a starting point, the obligations with the link to the transferred business remain the transferring company's obligations. Transferring company cannot transfer its obligations to another party even though, this party remains under the control of the transferring entity as its subsidiary. Such transfer would imply a change of debtor, which legitimately can occur either due to creditor's consent or in the course of a mandatory *i.e.,* law-bound accept of change of debtor. The latter does not exist for the purposes of the transfer of business method; hence, in order for the obligation to be transferred creditor's consent is required.

In addition to disunification of assets and liabilities in the transfer of business transaction whereas liabilities remain with the transferor, one must be aware of the existing ongoing contracts between the transferor and third parties. Such contracts do not discontinue merely because a transfer of business has taken place unless the contracts address a possibility of transfer by prescribing the course of actions *e.g.,* through assignment clauses or anti-assignment clauses respectively.

In the case of majority takeover no change of debtor takes place as the legal form of the obligee company remains the same; however, the transfer can bring the existing change-of-control clauses into action cf. earlier cited cases: *Baxter Pharm. v. ESI Lederle,* 1999 WL 160148 at 5 (Del. Ch. 1999) where the ruling court found that no assignment took place as the debtor company remained the same and, a similar

[265] Case C-321/05, Kofoed, premise 48.

judgment was passed in *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, C.A. No. 5589-VCP, 2013 WL 911118 (Del. Ch. Feb. 22, 2013, rev. Mar. 8, 2013); In *SQL Solutions, Inc. v. Oracle Corp*., 1991 WL 626458 (N.D. Cal. Dec. 18, 1991) the ruling court came to the opposite conclusion.[266]

Besides the above-mentioned simple application of transfer of business and majority takeover methods a holding structure can also be created in a more complex operation where either a merger or a division takes place.

Two or more companies, unrelated or group connected alike, can amalgamate into a single continuing company simultaneously creating a holding structure by incorporating a new legal entity to be the holding company in the holding group organization. In a single operation with multiple transactions, shareholders of the amalgamating companies transfer all their shares to the newly formed holding company in exchange for its shares. Hence, the holding company takes possession of the shares in the amalgamated company when the shareholders concurrently take possession of the holding company’s shares.

A company can likewise divide itself completely or where appropriate partially and subsequently the shareholders of the companies that emerge following the division can transfer all their shares to the newly formed holding company receiving shares in that company in return. Here as well, a holding structure is formed in a single operation encompassing several transactions.

Inverted pyramid structures and tax avoidance

Finally, the matter of *inverted pyramid*[267] *holding structures* must be mentioned in this context. In Denmark, for example, the concept is referred to as “inverted Christmas trees”. Notwithstanding the differences in the linguistic expressions the essence of the matter corresponds.

A simple holding structure where the operating company is owned by a holding company does not give rise for concerns for corporate purposes or for corporate tax purposes. The same applies where a single operating company is owned by several holding companies *i.e.*, when its shareholders own it indirectly through ownership

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[266] Although similarities are observed in the material circumstances of the referred cases it must be remembered that the cases are dealt with in different jurisdictions *i.e.*, Delaware and California, both of which having its own corporate law. Albeit, the laws have substantial similarities, they are nonetheless different.

[267] Danish: omvendte juletræer.

of shares in the respective holding companies. The question arises on whether it is also legitimate to let a holding company be owned by another holding company. The answer to the question is in the affirmative presumed that the structure reflects commercial reality and is not an expression of a purely artificial arrangements, cf. right below.

In accordance to Directive 2011/96/EU, which replaced Directive 90/435/EEC on taxation of parent companies and their subsidiaries, profits received by a parent company from its subsidiary are tax-free cf. art 4 of the directive. It is, however, required that a company owns more than 10 % of another company's share capital to be considered a parent company cf. art. 3. A number of shareholders who each owns less than the required 10 % of the holding company cannot receive tax-free profits paid by that company. It could, therefore, seem like an appealing approach pulling together their individual resources into a new holding company with the purpose of comprising their combined share contributions, which collectively will exceed the 10 % threshold. But can this be considered tax avoidance?

In its national legislation Denmark, for example, has enacted measures, which on abstract basis intend to prevent abuse and fraud. By applying a number of *general* measuring criteria,[268] an intermediate holding company can be regarded as transparent with the consequence of tax imposition on the profits in the hands of the shareholders. In spite of its legitimate purpose of tackling abuse this approach, however, can be in conflict with the European law on the matter as in concert with the practice of the European Court of Justice every investigation of abuse or fraud in connection to artificial arrangements designed to bypass legislation must be considered based on individual case relevant circumstances.[269]

Directive 2011/96/EU has been amended several times since its enactment and now encompassing the latest – at the time of writing – amendment by Directive 2015/121/EU whereby clarification of abuse provisions is offered in art. 1 (2) and (3). Hence, the benefits of the directive should not be granted to an arrangement, which is created for the purpose of obtaining a tax advantage; an arrangement shall be regarded as not genuine to the extent that it is not put into place for valid commercial reasons, which reflect economic reality.[270] Consequently, in the

[268] Gitte Søgaard & Erik Werlauff, Koncernretten, Werlauff Publishing, 1st ed., 2015, p. 280 and Erik Werlauff, Selskabsskatteret 2014/15, Karnov Group, 16th ed., 2014, p. 228 ff.

[269] See Commission Communication of 10 December 2007 to the Council, the European Parliament and the European Economic and Social Committee entitled "The application of anti-abuse measures in the area of direct taxation - within the EU and in relation to third countries" COM (2007) 0785.

[270] Directive 2011/96/EU, art. 1 (2) and (3) as amended by Directive 2015/121/EU.

evaluation of the structure created by a number of shareholders in the example right above the relevant authorities must, in accordance to the provisions of the directive, examine whether the structure is created for valid commercial reasons, which reflect economic reality or it is created for the purpose of avoidance of tax. The relevant outcome will follow accordingly.

Under specific circumstances, a situation can occur where parts of an arrangement or a structure can be regarded as not genuine, whereas other parts can have valid commercial grounds. The clauses precluding tax evasion or circumvention must be flexible in order to facilitate differentiation of what is genuine and what is not, so that the lawful parts of a structure are not impacted by consequences imposed on the parts of the same structure without genuine commercial grounds. This will lead to the most efficient application of the provisions in accordance with their purpose.

Proportionality and shared burden of proof

When tax authorities in a member state are to determine whether or not an arrangement of interest is of artificial character investigation of certain reasonable presumptive general criteria can take place, hence, targeting the situations where "probability of abuse is highest".[271]

"However, in order to ensure that genuine establishments and transactions are not unduly sanctioned it is imperative that where the existence of a purely artificial arrangement is presumed, the taxpayer is given the opportunity, without being subject to undue administrative constraints, to produce evidence of any commercial justification that there may be for that arrangement. The extent to which the onus to demonstrate that their transactions served bona fide business purposes can be placed on the taxpayer can only be determined on a case-by-case basis.

In this regard the Commission considers that burden of proof should not lie solely with the taxpayer and that the general compliance capacity of the taxpayer and the type of the arrangement in question should be taken into account. It is equally vital in the interest of proportionality that the result of the relevant assessment by the tax authority can be made subject to an independent judicial review.

[271] Commission Communication of 10 December 2007 to the Council, the European Parliament and the European Economic and Social Committee entitled "The application of anti-abuse measures in the area of direct taxation - within the EU and in relation to third countries" COM (2007) 0785, sec. 2.

Moreover, the adjustments to the taxable income as a result of the application of the anti-abuse rules should be limited to the extent that is attributable to the purely artificial arrangement. With regard to intra-group transactions that means adherence to the arm's length principle, i.e. the commercial terms as would have been agreed upon between unrelated parties."[272]

Holding structures on a larger scale are equally covered by the scope of the directive. Investigating the true commercial nature of a holding structure, where a holding company is the owner of another holding company, the spotlight will be focused on the real beneficial owner *i.e.*, the recipient of the profits, which in accordance to the directive are tax-free: Is it the recipient company itself or, is the recipient company merely a channel company. A certain definition of "a beneficial owner" is provided by Directive 2003/49/EC in art. 1 (4): "A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorized signatory, for some other person." Consequently, if the recipient company does not have the individual power to dispose of the received profits because that power in reality is in the hands of its owners it must be considered an intermediary and not the beneficial owner.

Likewise, for the purposes of Double Taxation Conventions, DTC, under the OECD auspice, there is a clear consensus that similar clauses against artificial structures created with the purpose of tax evasion or avoidance must be adopted in the future agreements and in the national legislation of the participating states alike.

6.6. EMPLOYEES

In the foregoing introductory section on employees, a number of European federal acts aiming at protection of various rights of employees originating from their employment and otherwise were mentioned. The number of these legal acts witness of the importance of the subject for the European legislator. However, in the context of this study the main attention will be placed on the protection of the employees' rights in connection to change of employer due to the transfer of control

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[272] Commission Communication of 10 December 2007 to the Council, the European Parliament and the European Economic and Social Committee entitled "The application of anti-abuse measures in the area of direct taxation - within the EU and in relation to third countries" COM (2007) 0785.

over the employing entity. Directive 2001/23/EC,[273] enacting protection of those rights, is the principal legal act to that regard.

Directive 2001/23/EC on protection of employees' rights in the event of transfer

In accordance to the directive itself due to frequent changes in the structure of businesses and enterprises by methods of M&A, it is necessary to provide for the protection of employees' rights.[274] In stating that, the directive does not differentiate between structural changes in businesses within a group of companies, on the one hand, and non-group-related enterprises, on the other hand. Consequently, the provisions of the directive apply in both instances cf. case *C-234/98, Amalgamated Construction*, where the Court states that "It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard."[275]

A merger, a division, or a business transfer triggers provisions on the protection of rights of employees offered by the directive. In the directive's own terminology, it concerns "any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger."[276]Naturally, a definition of "a business" is required, which the directive defines as: "an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."[277]

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[273] The directive replaces Directive 77/187/EEC .

[274] Premise 2 & 3.

[275] Case C-234/98, Amalgamated Construction, premise 17.

[276] Directive 2001/23/EC art. 1 (a).

[277] Ibid. art. 1 (b).

Succession in respect to matters of employment

Let us assume that in the course of a business transfer an economic entity, which comprises a number of tangible and intangible assets, and a number of employees, is transferred. Hence, these employees now have a new employer. Provisions of the directive address this newly emerged employment relationship by establishing that its starting point must be the same as under the former employer. In accordance with art. 3 (1) “the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.” Thus, the transferee enters into the transferor’s position in regard to rights and obligations in respect to the employees. In other words, the directive enacts employment-related succession.

When earlier in this study succession was addressed in connection to the methods of *merger* and *division* it was characterized as *universal* succession. This is in concert with the relevant provisions enacting universal succession: Directive 2005/56/EC art. 2 (2) in regards to the method of merger and Directive 82/891/EEC art. 2 (1) in regards to the method of division. For the purposes of both methods, *all* rights and obligations are transferred from the transferor to the transferee, including the issues of employment. Hence, in regards to the methods of merger and division Directive 2001/23/EC does not contribute with anything new. However, it reminds us of the extent of universal succession for the purposes of the two methods and provides us with guidelines for the course of actions in respect to employees.

Conversely, in respect to the method of *business transfer* it is concluded that no law-bound corporate succession exists. Hence, in the course of this method of M&A only rights can be transferred as obligations of the transferor remain on his part. From the previous discussion to this respect it must be recalled that transfer of obligations *i.e.,* change of debtor can occur either due to mandatory law-bound obligation imposed on the creditor to that regard or, due to consent from creditor where he accepts the entry of a new debtor into the former debtor’s place. The new factor, which Directive 2001/23/EC offers, is that succession in relation to matters of employment stretches to enclose also the method of business transfer. Thus, this method of M&A is subject to partial succession.

The question arises on whether the method of *majority takeover* is also covered by the scope of the directive. Although, no change in corporate personality of the employer, *i.e.,* the company, takes place, often, due to change of ownership of the company there can occur changes in its management as well. However, this does not qualify the method of majority takeover to be covered by the scope of the directive. The provisions emphasize that *change of employer* entails application of the directive. This is also solidified by abundant case law on the matter.

In case *C-234/98, Amalgamated Construction,* the Court ruled that "The Directive is therefore applicable where, following a legal transfer or merger, there is a change in the natural or legal person responsible for carrying on the business who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred."[278]

In case *C-287/86, Ny Mølle Kro,* the Court concluded that "the purpose of the directive is to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor."[279] This applies also in respects to return of a leased business undertaking by the lessee back to the lessor. "The lessee ceases to be the employer and the owner reacquires that status".[280]

In case *C-324/86, Daddy's Dance Hall*, the Court states: "It follows that where, upon the expiry of the lease, the lessee ceases to be the employer and a third party becomes the employer under a new lease concluded with the owner the resulting operation can fall within the scope of the directive as defined in article 1 (1). The fact that in such a case the transfer is effected in two stages, in that the undertaking is first retransferred from the original lessee to the owner and the latter then transfers it to the new lessee, does not prevent the directive from applying, provided that the economic unit in question retains its identity; that is so in particular when, as in this case, the business is carried on without interruption by the new lessee with the same staff as were employed in the business before the transfer."[281]

An employee's accept of change of employer

One of the basic and paramount principles of the law of obligations is that the original debtor cannot transfer his obligations and liabilities to a new debtor without creditor's consent thereto. This main rule is modified by the law-bound exception, which implies that the creditor must accept entry of a new debtor into the original debtor's place if this occurs in the course of a merger or a division. However, the creditor can waive this mandatory accept of change of debtor if the issue is addressed in the contract which binds the parties. Utilization of a so-called change-

[278] Case C-234/98, Amalgamated Construction, premise 16.

[279] Case C-287/86, Ny Mølle Kro, premise 12.

[280] Ibid. premise 14.

[281] Case C-324/86, Daddy's Dance Hall, premise 10.

of-control clause can lead to termination of the contract, which will per default allow the creditor to avoid accepting the change of debtor. If no change-of-control clause is to be found in the parties' contract the creditor will be obliged to honor transfer of his original debtor's obligations to a new debtor in connection to a merger or a division.

In the context of employment matters, the mandatory accept of obligations of the transferor towards his employees is imposed on the transferee. Hence, the transferee, *i.e.*, the new employer, is obliged to honor his predecessor's obligations towards the employees cf. art. 3 (1): "the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee." The new employer *i.e.*, the debtor in money must assume the former employer's obligations towards the employees *i.e.*, the creditors in money. However, on the other hand, because the directive does not impose equal obligations on employees (debtors in kind), they are not obliged to honor change of their debtor in money *i.e.*, the employer. Moreover, they cannot waive their right to object to the transfer of their employment by signing a clause to that regard. The European Court of Justice in case *C-324/86, Daddy's Dance Hall* found that the purpose of the directive "is a matter of public policy and therefore independent of the will of the parties to the contract of employment." "The rules of the directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavorable to employees." "It follows that employees are not entitled to waive the rights conferred on them by the directive and that those rights cannot be restricted even with their consent."[282]

Consequently, an employee can oppose against the transfer of his employment to another employer. This does not surprise, as the aim of the directive, as its name suggests, is to safeguard the rights of employees "in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor."[283] It is not the aim of the directive to safeguard the rights of the new employer who may wish to maintain a particular employment relationship.

In *Case C-132/91, Grigorios Katsikas*, the Court found that the directive cannot be "interpreted as obliging the employee to continue his employment relationship with the transferee."[284] In this case, the national employment laws of the member states

[282] Case C-324/86, Daddy's Dance Hall, premise 14 and 15.

[283] Case C-132/91, Grigorios Katsikas, premise 21.

[284] Ibid. premise 31.

must decide the fate of such an employment contract or relationship, as the directive does not address this issue. “The Member States may, in particular, provide that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or relationship should be maintained with the transferor.”[285] The Court came to the same conclusion in case *C-51/00, Temco Service Industries SA.*

Establishing existence of a transfer of an economic entity

In accordance to art. 1 of the directive, its applicability depends *inter alia* on the condition that a transfer has taken place. In its considerations on the matter, the European Court of Justice emphasizes the transferred entity’s ability to retain its identity by continuing its operations in the same manner as prior to the transfer.

Moreover, a number of different factors must be taken into consideration under an overall assessment: “the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not essential staff are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities are suspended” cf., case *C-234/98, Amalgamated Construction*.[286] The Court solidified the same in case *C-51/00, Temco Service Industries SA*, premise 24 and also in case *C-13/95, Ayse Süzen*, premise 14.

In case *C-392/92, Christel Schmidt,* Christel Schmidt, a single cleaning employee of *Savings Bank* was responsible for cleaning of one of its branches. Cleaning of the rest of the branches was undertaken by another business entity, – *Spiegelblank. Savings Bank* dismissed the employee as the cleaning of that particular location was now assigned to *Spiegelblank. Spiegelblank* has offered to employ Christel Schmidt. She refused the offer because she concluded that in spite of an increase in wages, which *Spiegelblank* was offering her, she had to clean a larger area. This meant that her hourly pay would decrease. The Court was asked to answer two questions: 1) can transfer of an undertaking's cleaning operations, if they are transferred by contract to a different firm, be treated as part of a business within the meaning of the directive, and 2) does that also apply if the cleaning operations are undertaken by a single employee?" The Court’s answer to both questions is in the

[285] Ibid. premise 36.

[286] Case C-234/98, Amalgamated Construction, premise 26.

affirmative. Hence, when an enterprise or a company transfers a part of its business activities, albeit of minor significance in comparison to the rest of the business, to another enterprise or a company, which acquires the position of an employer towards the employees who naturally follow along with the business, this transfer falls under the scope of the directive. It is irrelevant in this respect that the transferred undertaking is of subordinate importance to the transferor entity. The number of employees that are transferred along with the business is likewise irrelevant. Hence, in accordance to this judgment, even the transfer of a single employee along with the business activates the provisions of the directive.

It must be pointed out that this judgment is *no longer* an expression of valid EU law,[287] as the ECJ abandoned this practice. The judgment has spawned severe criticism. It came so far that German judges declared that they will submit no further requests on preliminary rulings to the ECJ until the ECJ had reversed its controversial ruling in case *C-392/92, Christel Schmidt.* Thus, the Luxembourg justices had no other choice than to abandon the *Christel Schmidt* approach, and this happened with case *C-13/95, Ayse Süzen* cf. right below.

In case *C-13/95*, *Ayse Süzen,* with somewhat similar factual circumstances to the case right above, the Court came to the opposite conclusion. In this case, Ayse Süzen was employed by a cleaning company Z, who in accordance to a contract with a school A was undertaking cleaning operations of the latter performed by Ayse Süzen and several other employees. A terminated the contract with Z and assigned cleaning operations of its premises to another entrant L. As a result of this event Z dismissed Ayse Süzen and the rest of the cleaning personnel, who performed cleaning operations of A's premises. The Court concluded that "the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract."

In search for the lowest threshold for application of Directive 2001/23/EC the ECJ is leaning towards the approach that is already established by the German *Bundesarbeitsgericht*, - the Federal Labor Court: requirements on employees'

[287] Cf. Alf Ross' deliberations on what is valid law.

protection are not applicable if no staff is transferred in the course of the transaction; Cf. ZIP 1998.872 BAG and ZIP 1998.924 BAG.[288]

In joined cases *C-127/96, C-229/96, and C-74/97, Francisco Hernández Vidal SA,* the Court addressed the question on the structural organization of an economic entity. One of the conditions, which make the directive applicable, is that “the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract.” “The term `entity' thus refers to an organised grouping of persons and of assets enabling an economic activity which pursues a specific objective to be exercised.” “Whilst such an entity must be sufficiently structured and autonomous, it will not necessarily have significant assets, tangible or intangible. Indeed, in certain sectors, such as cleaning, these assets are often reduced to their most basic and the activity is essentially based on manpower. Thus, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity.”[289]

It is to a certain degree unclear how important a role of transfer of “tangible and intangible assets” along with “major part of the workforce” plays in determination of whether a transfer of an economic entity has taken place. However, because the ECJ in its judgments on the matter repeatedly states that all available factors must be taken into account in determination of whether a transfer of an economic entity has taken place, this must be considered as the main guideline.

Actions of the management

In accordance to the provisions of the directive, the respective managements of the transferor company and the transferee company alike are required to inform the employees of both entities about the transfer. In addition to informing the employees about the transfer itself, emphasis must be placed on legal, financial, and social implications of the transfer for the employees. If the respective managements consider implementing any measures in relation to employees, which emerge as a result of the transfer, consultation to that regard with employees or their representatives must take place.

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[288] Peer Schaumburg-Müller & Erik Werlauff, Udlicitering og Medarbejdere: ret og pligt i forhold til lønmodtagere ved offentlig udlicitering og privat outsourcing., 5th ed. Jurist- og Økonomforbundets Forlag, 2011, p. 88 ff.

[289] Joined cases C-127/96, C-229/96, and C-74/97, Francisco Hernández Vidal SA, premise 26 and 27.

The directive requires information and consultation to take place prior to completion of the transfer. However, there is no requirement to do so prior to the decision on transfer has been taken. Hence, the decision making process can be conducted in complete secrecy and revealed to the employees after the negotiations are completed and the decision is taken.

The main aim of the directive is to ensure that in connection to a transfer of a business the personnel whose employment is linked to that entity are transferred to the new employer and can carry on with their employment on the same conditions as prior to the transfer. It is irrelevant if the decision on transfer is taken by an entity controlling the employer because the employer could be a subsidiary of a controlling parent company. Regardless where within a group structure the decision has been made, when that decision results in change of employer from the employee perspective, the provisions of the directive are activated providing the affected employees with the intended protection.

Lawful cause for dismissal

The transfer of a business entity itself must not result in dismissal of its employees; that is the core intention of the directive. However, the directive does not preclude an employer from dismissing his employees based on economic grounds, technical grounds, or for organizational reasons entailing changes in the workforce. This concerns the transferor's actions prior to the transfer and the transferee's actions subsequent to the transfer. Hence, it is of paramount importance that possible redundancies are based on other grounds than the transfer itself and that the dismissing employer is able to lift the burden of proof to that regard. It is not unthinkable that the transferor dismisses employees prior to the transfer in *e.g.*, attempt to reorganize the business for the purpose of cutting the financial expenses and bettering the condition of the business. Upon failing in achieving the intended results, the option of a sale of the business can appear sustainable. Likewise, the transferee can find it more appropriate to reorganize the structure of the acquired business after the transfer. At that point, his assessment of the business in connection with the implementation process is most likely clearer and he may have to dismiss employees due to *e.g.*, economic and organizational reasons. Neither one of the stated simplified scenarios seem to imply dismissals due to the transfer itself; however, the employer must keep in mind that in case his reasons are questioned he must be able to prove that dismissals are not in violation of the applicable law implementing the provisions of the directive.

6.7. STOCK EXCHANGE LISTED COMPANIES

With some exceptions, the applicable rules and regulations in respect to mergers and acquisitions are the same regardless whether the participating company's shares are admitted to trading on a regulated market or not. For example, a takeover bid initiated with the purpose of acquiring control over a target company by acquiring its securities carrying voting rights is subject to special provisions laid down by Directive 2004/25/EC. The directive applies when all or some of the target company's securities are admitted to trading on a regulated market cf. art. 1. In the same manner, when participating in amalgamating transactions, stock exchange listed companies must consider the impact on competition that these transactions may entail. In order to secure that amalgamation of enterprises does not impose restrictions on competition the European federal legislature has enacted Regulation 139/2004, - the so-called Merger Regulation. The scope of application of this legal act is measured by financial dimensions of companies that participate in amalgamating transactions[290] and not by the presence of their stock on regulated markets. However, many stock exchange listed companies due to their significant size often meet the economic thresholds that require them to comply with the provisions of the regulation. Although, both takeover bids and matters of competition are excluded from further investigation in the context of this study, it seems appropriate to mention them as examples of legislation fully or partially reserved to stock exchange listed companies.

As a starting point listed companies and none-listed companies are considered to be equal legal entities for corporate purposes. However, listed companies due to their significant size, enhanced supervision, and regulation of their activities by the authorities possess some attributes that none-listed companies do not have.[291] One of the predominant attributes of exchange market listing is the company's extended access to capital; it is often easier for a listed company to raise capital. Furthermore,

[290] The regulation operates with the concept of ”concentration”, which includes merger, acquisition, and other forms of combination of control over enterprises cf. art. 3.

[291] For example: Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities; Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading; Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

besides the greater exposure on the market and the prestige[292] that accompanies listed companies, being listed on a regulated market has a direct impact on the value of the company's shares. Extended requirements in regards to disclosure and transparency contribute to the shareholders' increased confidence. It is also often easier to sell listed stock than none-listed stock if a shareholder decides to exit. Finally, established shares can be considered as good and as valuable as cash, which is of paramount importance in the context of mergers and acquisition. The listed company can use its shares to purchase businesses and acquire other companies without paying any cash. This makes stock exchange listed companies strong M&A players.

Listed Company is a Buyer

As it is indicated earlier a stock exchange listed company must abide by the same rules as a none-listed company when acting as the acquirer in the M&A context. Therefore, this section is meant to draw attention solely to the strength of the stock of the regulated market listed acquirer when it is utilized as the method of payment when acquiring another company or a business.

When a company, upon being dissolved, transfers all its assets and liabilities to the acquiring company, its shareholders must receive their purchase price from the buyer. While the relevant directives[293] enacting provisions regulating the method of merger prescribe that the purchase price must consist of shares in the acquiring company and a cash payment not exceeding 10 % of the purchase price, the member states are simultaneously permitted to deviate from this way of price composition. An acquirer is permitted to pay a higher fraction of the purchase price in cash and correspondingly a lower fraction of the purchase price in shares. On the one hand, it could be a desirable approach from the acquirer's perspective because this limits the new shareholders' participation in the acquiring company, while at the same time this potentially imposes an obstacle of raising the necessary cash. On

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[292] The mentioned prestige does not only relate to the financial dominance of listed companies but it also identifies affiliation with the ”good fellowship” in respects to *e.g.*, sustainability, corporate governance, etc. Cf. Commission Recommendation 2004/913/EC on fostering an appropriate regime for the remuneration of directors of listed companies; 2005/162/EC on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board; 2009/385/EC complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies.

[293] Directive 2011/35/EU on domestic mergers and Directive 2005/56/EC on cross-border mergers.

the other hand, from the selling shareholders' point of view any consideration in cash triggers imposition of tax, while at the same time they lose a chance of participation in the acquiring company.

A listed company's stock is characterized by its liquidity: it is as good as cash. And the selling shareholders who receive their consideration in shares have straightforward access to the regulated market if they desire to exit by selling their stock possessions.

The higher market price of shares in comparison to the net asset value of the company, the capital of which they represent, is used by that listed company when acquiring the target. In fact, the high price/NAV ratio allows the acquirer to acquire the target "for free", as it only translates into tangible values when the shares are either sold or utilized as a method of payment.

In this context it is of less importance whether the method of acquisition is a carefully contemplated merger, an acquisition of an isolated business or, an acquisition of *snip shares* representing majority of the voting rights in the target company. In regard to the latter, the target company as a whole may not necessarily be the object of interest for the acquirer. However, the target may contain isolated assets of interest, which after the acquisition can be separated and utilized outside of the framework of the target.

Listed Company is a Seller

Listed companies can similarly to none-listed companies be subject to size reduction through division and spin-off and through transfer of business methods; cf. the earlier used example where in 2008 the listed company *Danisco A/S* carved out its sugar enterprise, *Danisco Sugar*, which was subsequently sold by a transfer of business method to a buyer who paid mainly with cash. Another example of such a transfer of business is the 2014 sale of *Devices and Services* business by *Nokia* to *Microsoft* in a € 5,44 billion transaction.

When the shareholders sell a part of their company through the method of division or, when the company itself sells a part of its business activities through the business transfer method, in both instances the demanded price can be pushed upwards due to the company's listing on the stock exchange market. The listing, for the most part, represents a *stamp of quality* of the company's undertakings. This is, however, not an exception free rule. The bankruptcy of *OW Bunker A/S,*[294] which was filed only seven months after the company's shares were admitted to trading on the regulated market witness thereof.

Division of a stock exchange listed company is subject to the same requirements and is governed by the same provisions, as a division of a none-listed company would be. Likewise, when a listed company transfers one of its businesses to a third-party buyer, the transaction requires similar considerations in respect to *inter alia* contract law, employment law, tax law, and the law of obligations.

Restructuring a Listed Company

The stock of a company, which is admitted to trading on a regulated market, can be facing an equal need for restructuring as any other none-listed company. That necessity can be grounded in various reasons. It could *e.g.*, be beneficial for one of a company's businesses to acquire a greater deal of autonomy in order to be able to unfold itself to larger merits; it could be necessary to separate a business for the purposes of protection of the rest of the company's assets due to that particular business' perilous undertakings; restructuring can also be a part of an asset grooming planning for the purposes of a subsequent sale. The reasons for restructuring can also be of a more sinister nature: financial hardships may require restructuring for the purposes of obtaining capital injections; large liabilities may be overshadowing the future economic viability; non-existent or shallow options for rescheduling of debt, etc. Regardless of the background reasons initial restructuring can be conducted through M&A methods of *division* and *business transfer.* In this context, it is presumed that restructuring is called upon due to corporate structural reasons and not due to financial distress.

For the purposes of restructuring an operating company into a holding company by the method of *majority takeover* the reader is referred to the section *Holding-structure Issues* above, hereunder the noteworthy example of restructuring of *Google* group with *Alphabet* as a holding company on the top of the group structure.

Both methods are equal alternatives for the purposes of separation of a business unit from the rest of the asset volume of the company to be restructured. If restructuring

[294] *OW Bunker A/S* was a Danish based marine fuel company, which at the present moment is under bankruptcy proceedings. The company's stock was admitted to trading on the regulated market on March 28, 2014. The company filed for bankruptcy on November 7, 2014.

occurs by the method of *division*, the company in question will shrink, as the shareholders receive the consideration equivalent to the value of the business unit transferred. If restructuring occurs by the method of *business transfer*, the company in question will retain its financial volume even after the transfer of the business, as it is merely replaced with consideration of equivalent value.

Notwithstanding the choice of method, which entails achievement of two different structures, the business will remain under the domain of the same shareholders. *Division* of the company in question, presumed that the division is partial, will result in the creation of an affiliated company yet under the control of the same shareholders. *Transfer of business* will likewise result in incorporation of a new legal entity; however, the emerging structure is different. The new company will become a subsidiary of the restructured company. Yet again, both companies will remain under the ownership of the same shareholders.

It would be considered an exception rather than a rule if the listed company, which is subject to restructuring, were a single standing company and not a part of a group. If it were an operating company, which companies that are subject to restructuring regularly are, it would be owned by a holding company or, even by another operating company further down within the same group structure. Either way, restructuring such a company would not impose changes in shareholder ownership on the holding level even if changes in direct ownership may occur.

Finally, it must be borne in mind that a stock exchange listed company, in comparison to a none-listed company, is subject to more extensive obligations on, including, but not limited to: financial reports, corporate governance, communication with shareholders, market reporting, etc. The company must continuously disclose all relevant information on those topics cf. Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

Changes in a company’s corporate formation due to restructuring must be considered market relevant information and disclosed without any delays. The European federal legislature confers great significance to market integrity hereunder smooth functioning of securities markets and public confidence in markets. This is explicitly mentioned in Directive 2003/6/EC on insider dealing and market manipulation: “An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth."[295]

In case *C-19/11, Daimler*,[296] the management of *Daimler AG* issued a notice to the stock exchange market informing, that the chairman of the board would be stepping down. Following this information, the price for the company's stock rose sharply. A number of investors brought an action before a court of law "seeking compensation for what they considered to be a late ad hoc announcement". The investors held that they would not sell their stock if the announcement were made earlier; *Daimler* was made aware of the chairman's considerations about leaving the position more than three months prior to the announcement. The Court held that: "in the case of a protracted process intended to bring about a particular circumstance or to generate a particular event, not only may that future circumstance or future event be regarded as *precise information* within the meaning of those provisions,[297] but also the intermediate steps of that process which are connected with bringing about that future circumstance or event." Furthermore, the Court states that: "the notion of 'a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so'[298] refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a *realistic prospect* that they will come into existence or occur. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration."[299] [*My italics*]

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[295] Directive 2003/6/EC, preamble, para 2.

[296] See to that regard Erik Werlauff, Important Lessons to be Learnt from 'Daimler', European Company Law, 2014, vol. 11, issue 1.

[297] Article 1 of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) and Article 1(1) of Commission Directive 2003/124/EC implementing Directive 2003/6 as regards the definition and public disclosure of inside information and the definition of market manipulation.

[298] Article 1(1) of Directive 2003/124/EC implementing Directive 2003/6/EC as regards the definition and public disclosure of inside information and the definition of market manipulation.

[299] Judgment of the Court in C-19/11, Daimler.

6.8. CORPORATE NATIONALITY

Initial incorporation of a company under a specific jurisdiction is often driven by reasons of practical character: originators of the company are probably local residents; there is an easier access to capital; there might already exist a portfolio of potential clients and cooperative partners, etc. But when this national company, for whatever reason, fancies moving into a jurisdiction of another member state without prior liquidation and re-incorporation, it is facing a lack of legislation facilitating such a transaction. Even though one of the purposes of federal legislation is to decrease the extent and magnitude of national legislations on this particular matter the European federal legislature fails to do so.[300]

A national company exists and is governed by virtue of national law, which determines its incorporation and functioning cf. case *C-81/87, Daily Mail.* The company can choose to be liquidated and subsequently re-incorporate itself within the territory of the member state of choice. The originators have this Treaty secured right of establishment cf. TFEU art. 49 & 54. This approach, however, is accompanied by all the consequences of liquidation: taxation upon liquidation, termination of contracts, etc.

The previously mentioned "suction-cup method"[301] offers a technique, which, if followed, leads to achievement of the desired change of corporate nationality. The method creatively combines the right of establishment[302] with provisions on the cross-border merger.[303] Through a reverse vertical merger with its subsidiary as a continuing company, which is incorporated within the jurisdiction of preference, the parent company as a legal vehicle ceases to exist. Yet, its enterprise is maintained but merely within the new legal entity.

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[300] An exception to this regard is European Company, SE. Its supranational nature allows it to move between various jurisdictions of the member states.

[301] See section "The Importance of Distinguishing Between the Four Methods of Takeover" above. Cf. Erik Werlauff, "Relocating a Company within the EU" European Company Law, 2008, Vol. 5, Issue 3, pp. 136–139.

[302] TFEU art. 49 & 54.

[303] Directive 2005/56/EC.

USA & Canada

In the United States, the “suction-cup” method is the *only* method of relocation between the states. It must be remembered that there is no federal Companies Act to be found in the US federal legislation, as corporate legislation is the prerogative of the participating states. Thus, there are 50 different corporate acts in the United States of America. An amalgamation between companies from different states is permitted. However, change of domicile, as for example in Canada, cf. right below, is not an option granted to the American companies.

Canada is, like the USA, a federal state. It consists of ten provinces and three territories. Each one of them has its own corporate legislation. But unlike the United States, Canada has also a federal Companies Act. For a Canadian citizen or permanent resident, the choice of corporate jurisdiction is free. Hence, when incorporating and thus, choosing the corporate nationality of the new legal entity the originators can freely decide whether the new company is to be governed by federal corporate laws or by domestic corporate laws of a province or a territory of preference. Subsequently, if a change of jurisdiction is desired the company, provided it is incorporated under the federal set of rules, can freely move from one jurisdiction to another jurisdiction. This resembles the abilities a European Company, SE, is equipped with. On the other hand, if the company is incorporated domestically, it can make use of the rules on *continuance,* which exist in all the domestic corporate acts. These provisions allow companies to move from one jurisdiction to another jurisdiction without prior liquidation and re-incorporation. However, it is a requirement that the operation is monitored by the relevant authorities in order to establish that the operation does not impose infringements on the rights of creditors, employees, and other stakeholders.[304]

When companies are subject to M&A transactions on a larger scale than what is indicated by the example right above, consideration of corporate nationality must be included in the deliberation process. New corporate vehicles may be emerging following the transaction: the jurisdiction of their incorporation must be determined. Already existing corporate vehicles may be granted a chance of nationality change in the course of the transaction. Either way the choice of

[304] More on this matter: J. Anthony VanDuzer, The Law of Partnerships and Corporations. 3rd ed. Toronto [Ont.]: Irwin Law, 2009.

Christopher C. Nicholls, Mergers, Acquisitions, and Other Changes of Corporate Control. Toronto: Irwin Law, 2012.

corporate nationality will play a role in the company's future prospects and possibilities.

Corporate nationality planning through M&A

When two companies combine all their assets and liabilities in a *merger* transaction, an operation concomitant question arises: is the transaction to be conducted as a regular merger or as an irregular merger? From the previously identified follows that: a regular merger[305] is an operation whereby two (or more) companies amalgamate into one newly formed continuing company, whereas both amalgamating companies cease to exist;[306] an irregular merger[307] is an operation whereby one already existing company, becoming the continuing company, acquires all assets and liabilities of the other company (or companies), whereas the acquired entity(ies) cease(s) to exist.[308]

Furthermore, when a merger by absorption is chosen the participating companies must determine, which one of them is to become the continuing company. Among numerous aspects, which are subject to consideration in a merger context the matter of corporate nationality should be investigated. For obvious reasons, the continuing company, which is incorporated under the laws of a member state A will not be subject to change of its corporate nationality due to the transaction. But the parties should consider whether it is more beneficial for the continuing company to be subject to laws of the member state B, which is the state of incorporation of the company that ceases to exist. If that is settled, the continuing company should be that of the member state B.

In addition, the parties may conclude that neither one of the jurisdictions of incorporation of the participating parties is to be preferred as the jurisdiction of the continuing company. Consequently, a third jurisdiction must be chosen and the operation must be conducted as a merger by combination, *i.e.,* regular merger. The parties will have to incorporate a new vehicle in that state and conduct amalgamation of their companies within the framework of that legal entity; hence, replacing the shareholders' stock possessions with the shares of the new company.

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[305] Merger by combination.

[306] Directive 2005/56/EC art. 2, (2)(b).

[307] Merger by absorption.

[308] Directive 2005/56/EC art. 2, (2)(a).

These reflections are valid for group-related companies as well. When, for group restructuring purposes, the method of merger is chosen in order to decrease the number of participating companies, corresponding considerations of corporate nationality of the emerging new company or the already existing continuing company must take place.

Moreover, the continuing company, newly incorporated and already existing alike, is governed by national law of the member state under the jurisdiction of which it is registered. Its corporate nationality is definitive; the laws of that member state govern its incorporation and functioning cf. the judgment of the Court in case *C-81/87, Daily Mail.* Although, a company utilizing its right of establishment[309] may move its place of administration (its management, board of directors, etc.) to a different member state than the member state of incorporation, that in itself does not impact its corporate nationality and it continues to be governed by the laws of the member state of incorporation. The same applies if a company conducts all its business activities - through for example a branch - in another member state than its member state of incorporation cf. the judgment of the Court in case *C-212/97, Centros*. In this case, a UK incorporated company wished to register a branch in Denmark for the purpose of conducting all its business operations there. The Danish authorities claimed that the only reason behind the UK registration was the owners' intention to circumvent the more strict incorporation criteria in the Danish corporate legislation. The request was denied. The Court ruled that it is contrary to the TFEU provisions on right of establishment to deny such registration of a branch of a company registered under the law of another member state, unless this can be justified by prevention or penalizing fraud, which was not the case here. Hence, the jurisdiction where the operations of the company are conducted does not define the company's corporate nationality. The company's corporate nationality is determined by the jurisdiction of incorporation.

In this context the *real seat* (German: die Sitztheorie; French: siège réel) doctrine must be mentioned, albeit briefly. The core of the doctrine is that national affiliation of a company *i.e.,* its corporate nationality is determined by the jurisdictional affiliation of its administration (its management, the board of directors, etc.). The company should be registered within the same jurisdiction. In accordance to the doctrine, the company's place of registration and the address of its *real* administrative office must correspond. The magnitude and scale of the doctrine's application are, however, declining and its application is relevant under extraordinary circumstances when *e.g.,* protection of creditors, employees, minority shareholders etc. is required.[310] This is in concert with the European Court of Justice's position cf. case *C-208/00, Überseering,* where the Court held that a

[309] Cf. TFEU art. 49 & 54.

[310] Erik Werlauff, Selskabsret, Karnov Group, 2013, p. 58.

member state must acknowledge legal personality of a company formed under the law of another member state regardless of where its actual center of administration is situated. Correspondingly in case *C-167/01, Inspire Art,* the Court held that Dutch imposition of additional requirements on a branch of a foreign company was contrary to TFEU provisions on freedom of establishment; even when all of the company's commercial operations are conducted through that branch.

If the member state of incorporation permits change of nationality, then the company has this right in accordance to its governing law. However, this has a material effect on the company's affairs only when the corporate law of the member state to where the company desires to move accepts such change of nationality. In case *C-378/10, VALE,* registration of the company in question was deleted from the Italian companies' registry in accordance to the company's request thereof. The registry noted that the company is to continue under Hungarian law. Subsequently, the Hungarian authorities received a request to register a company with the (now removed from the registry) Italian company as a *predecessor in law.* The request was denied. It was argued that although such registration is permitted under Hungarian law, only Hungarian national companies could enjoy this right. The Court ruled that "Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company."[311]Thus, in this case, the Court rules from discrimination ban perspective. Yet again, this underlines that companies are governed by the relevant national law of incorporation, which also determines their corporate nationality.

In connection to a cross-border merger, participants should consider making use of European Company, SE, as the continuing vehicle in the context of their merger. In accordance with Regulation 2157/2001/EC on the Statute for a European Company (SE) art. 17 an SE can be formed by means of irregular merger *i.e.,* merger by absorption or, by means of regular merger *i.e.,* merger by combination. In the case of the former the acquiring company converts itself into an SE in the context of the merger. In connection to corporate nationality issue, it must be observed that an SE is equipped with the law-bound capacity to freely transfer its registered office between member states.[312] It is not required to wind up and reincorporate, as a national company would be. Hence, this provides an SE with a different and higher degree of freedom to move within the Community.

[311] Cf. The judgment in case C-378/10, VALE.

[312] Regulation 2157/2001/EC art. 8.

Also in connection to the application of the method of *division* reflections on the corporate nationality of the acquiring company and long-term consequences thereof must take place. The present state of Community law in respect to corporate nationality is rigid cf. above. However, application of the method of division, as well as the method of merger, presents an opportunity to speculate in the question of corporate nationality of the acquiring company.

In a transnational context when companies from different member states consider division of one of them, whereas the other company or companies are assuming the role of the acquirer, the preliminary question to be answered is whether the laws of the member state of incorporation of the company subject to (potential) division permit division of companies at all. Directive 82/891/EEC concerning the division of public limited liability companies does not require member states to permit the operation. However, if the laws of a member state permit the transaction, the relevant provisions must be adopted to reflect the provisions and the principles of the directive cf. the directive's art. 26.[313]

The following question of interest is whether *cross-border* divisions are permitted. The directive itself does not provide an explicit option of cross-border divisions. However, the directive does not impose obstructions to that regard either. When implementing the provisions of the directive in their respective national laws member states may expand its scope to encompass cross-border divisions as well. Denmark, for example, took this approach.

When the above-stated questions are answered affirmatively, thus, accommodating a cross-border division of the target company, it must be established whether the target will be subject to partial division or to complete division?

For the purposes of a complete division, in accordance to art. 2 (1) of Directive 82/891/EEC, the target company ceases to exist as it transfers all its assets and liabilities to several receiving companies. Hence, it is up to the receiving companies to establish what corporate nationality shall the acquiring entities achieve or maintain respectively. If already existing companies are the receiving entities, their corporate nationality will remain the same within the jurisdiction of their incorporation. However, if an alternative corporate nationality is desired, the acquiring company could make use of a newly formed subsidiary incorporated in the jurisdiction of preference. Even though the acquiring company will not achieve direct ownership over the acquired enterprise, the extent of its control over the

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[313] Directive 82/891/EEC concerning the division of public limited liability companies art. 26 (1): "The Member States shall bring into force … the laws, regulations, and administrative provisions necessary from them to comply with this Directive provided that … they permit the operations to which this Directive applies."

enterprise in question will not suffer per default. It can exercise full control over the enterprise in spite of its encompassment in the subsidiary of the acquirer. The favorable element in this *modus operandi* is the option of speculation and planning in respect to the corporate nationality of the acquiring entity.

In the context of the method of division, the target company's participating shareholders transfer their company divided into units to the receiving companies. In return, they receive shares representing ownership of an equivalent fraction in the receiving companies. The earlier stated utterance must be recalled: a company is a shell and its business is the core. Shareholders of the target may want to retain a part of the enterprise of the target even though it is subject to complete division. The target ceases to exist, but the existence of its enterprises is independent of that particular legal entity and can carry on within the framework of another legal entity. Hence, the shareholders can incorporate a new vehicle for the purpose of acquisition of the desired enterprise unit. And the incorporation can occur in the jurisdiction of preference, which can be other than the jurisdiction of the target company.

For the purposes of a partial division, in accordance to art. 25 of Directive 82/891/EEC, the target company retains its existence, merely in a decreased format. The *modus operandi* of the acquiring companies is the same as the previously mentioned. The receiving companies can be already existing companies or newly formed companies, which can speculate in the issue of corporate nationality by incorporating in any member state of preference. The remaining fraction of the target company will naturally carry on in the same jurisdiction, as the transaction will have no impact on its corporate nationality. If desired to obtain a different corporate nationality, the modified company could make use of the "suction-cup" method cf. above: incorporating a subsidiary in the member state of inclination and subsequently merging with it through a reverse vertical merger.

For the purposes of internal group restructuring hence, increasing the number of participating legal entities and, corporate nationality planning the above-addressed is equally applicable.

In the context of the *business transfer* method, the transferring company is not subject to amendments of its corporate structure. Although, the transferred business is carved out of the overall volume of the company's assets, it is simultaneously replaced by shares, cash, or a combination thereof of the equivalent economic value. This has no impact on the transferring company's corporate nationality.

However, the receiving or acquiring company must consider corporate affiliation of the acquired business. Shall the acquiring company incorporated under the laws of a member state other than the member state of the transferring company be the acquirer? In this case, the business in question will be operated through a branch of the acquiring company situated in that member state. This option is Treaty based cf. art. 49 and 54, and the branch will be subject to requirements and regulation in accordance to Directive 89/666/EEC.[314] Alternatively, a newly formed subsidiary in either the member state of the transferring company or a third member state can be designated to assume the role of the acquirer. This way, the parent company will shelter its own enterprise from the enterprise of the transferred business as it is being injected into a legal entity with own rights and liabilities.

In the context of a *majority takeover* operation, the target company's corporate structure remains the same, and so does its corporate nationality. It is the ownership of the company that is subject to change, as its shareholders exchange their shares with shares in the acquiring company.

The buyer could be facing the question on whether the acquisition should be conducted as the direct acquisition of control or indirect acquisition of control. Direct acquisition implies that the acquirer offers the consideration to the target's shareholders consisting of its own shares. Indirect acquisition implies that the acquisition is conducted by a subsidiary of the actual acquirer. The latter can be beneficial for the purposes of corporate nationality planning. The acquiring vehicle could purposely be placed in a member state of interest, whereas after the majority takeover the two companies could merge into a single continuing company.

[314] Directive 89/666/EEC concerning disclosure requirements in respect of branches opened in a member state by certain types of companies governed by the law of another member state.

CHAPTER 7. CONCLUSIONS: ADVISER'S CHOICE – *THE SOLUTION*

The main purpose of the present project is to raise awareness of the relevant aspects of valid European federal legal provisions, which apply to the few, among numerous, elements within the scope of this study.

Consideration of these elements, including their influence on the choice of method and their post-transaction consequences, must accompany any M&A operation whereby control over a business or a company, which is target for acquisition, is transferred.

The paramount responsibility of an advisor in respect to the choice of method is to provide an adequate and plausible counsel based on analysis of available and relevant information, intended outcome, and valid law.

It is beyond the need to argue that an adviser's counsel can have either positive or adverse far-reaching and extensive consequences for the company receiving his advice. Simultaneously, an inadequate counsel can likewise have adverse consequences for the adviser himself, who is subject to enhanced professional liability.

For example, in case *In re Rural/Metro Corp. S'holders Litig.,* 88 A.3d 54 (Del. Ch. 2014)[315] The Delaware Court of Chancery ordered US $75.8 million in damages against the defendant, who is an investment bank for aiding and abetting a breach of fiduciary duties of the company that commissioned the bank's counsel.

From the Danish case law: UfR 2000.2176 H, where the emission bank was found liable for losses occurred due to the bank's incorrect information issued in a stock-exchange notice.

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[315] Se the opinion to that regard in "In the Court of Chancery of the State of Delaware" Opinion, Vice Chancellor Laster;

http://courts.delaware.gov/opinions/download.aspx?ID=213250

In UfR 2000.595 H, however, the defendant – an auditing company – was acquitted because the court found no causality between the provided counsel and the investors' losses.

Of a paramount importance in the adviser's duties is his ability to predict the outcome of a chosen transaction; hence, constructing a counsel on whether the outcome is in concert with what is desired on the participants' behalf. Predicting this requires adequate knowledge of valid law with relevance to M&A methods and transactions.

When addressing *the problem* in the adviser's choice earlier in this study the attention is drawn to Alf Ross' *Theory of Prediction* and his invaluable reflections on valid law. Valid law is the correspondence of the system of norms with the social reality established by the courts when they combine *ius et facto.*[316] These considerations of valid law must be present at the very dawn of an adviser's undertaking and accompany his work throughout the process. It is of primary importance that his final counsel on the choice of method is likewise based on considerations of *valid law.* Yet again, the difference between applicable law and valid law respectively must be observed; Applicable law becomes valid law when the courts, in fact, utilize it in accordance to its purpose established by the legislator.

The quality of an adviser's counsel undoubtedly depends on his or her understanding of relevant legal provisions and his or her awareness of the courts' application thereof.

National law or European federal law

Incorporation and functioning of a national company formed in any of the various jurisdictions within the European Community are governed by the laws of the state of incorporation. Operational processes and requirements imposed on participants in any M&A transaction originate from the relevant national law of the participating entities. When a company from a member state A merges with a company from a member state B in a regular merger, whereas the continuing company is a newly incorporated entity in a member state C, - three different jurisdictions are involved in the transaction, which govern M&A relevant procedural undertakings of the participating companies respectively. Within the European Community, this is made possible due to Directive 2005/56/EC on cross-border mergers. Moreover, it is not merely the option of merger of companies from different jurisdictions within

[316] Latin: rules and facts.

the European Community that is made possible; the laws of the member states on the matter in question are harmonized in order to facilitate similar operational proceedings and requirements notwithstanding jurisdictional varieties.

However, the adviser must not forget that interpretation and application of national law must take place with the European federal law in mind. Although all linguistic versions of European federal acts *i.e.,* the Treaties, directives, regulations, etc. are legally valid and binding upon the addressees, some nuances may occur, hence, imposing material differences in perception.

If the laws of a member state, which are subject to mandatory harmonization due to *e.g.,* a directive, regulating the area of law in question, do not correspond with the provisions of that directive, the law must be interpreted in light of the directive and against the conflicting national law. The same applies when linguistic digression or ambiguity leading to a deviation from the objective of the legislature is observed.

For obvious reasons successful operation in this junction of various sets of law requires knowledge of both: the national law and the relevant European federal law.

In case *C-106/89, Marleasing,* the relevant provisions of Spanish law in respect to reasons of nullity of a company was contrary to exhaustive reasons to that regard listed in Directive 68/151/EEC (art. 12) later replaced by Directive 2009/101/EC on disclosure of information. The Court ruled that a national court must "interpret its national law in the light of the wording and the purpose of that directive", cf. the judgment of the Court.

In case *C-19/11, Daimler,* the Court disregarded the German provisions on *hinreichende Wahrscheinlichkeit* (sufficient probability)[317] and focused on *Zwischenschritte* (intermediate steps) in regard to occurring events with relevance to the stock exchange marked and its potential reaction on those events. The Court found that the German provisions implementing the German version of the directive is in conflict with the European legislature's intent as the German linguistic version deviates from all the other linguistic versions of the same directive.[318] Moreover, the Court states that - if maintained - the formulation of the German provision "would undermine the objectives … [of the directive], namely to protect the integrity of the European Union financial markets and to enhance investor confidence in those markets. In such a scenario, insiders would be able to derive undue benefit from

[317] Gesetz über den Wertpapierhandel § 13(1). English: the Law on Securities Trading § 13 (1).

[318] Directive 2003/6/EC on insider dealing and market manipulation (market abuse) and Directive 2003/124/EC implementing Directive 2003/6 as regards the definition and public disclosure of inside information and the definition of market manipulation.

certain information which, under such a restrictive interpretation, would be held not to be precise, to the detriment of others who are unaware of it."[319] [my clarification]

In case *C-445/09, IMC Securities BV,* the Court points out that the European federal legislation cannot be examined in a single-language version. "According to settled case-law, the need for uniform application and, accordingly, for uniform interpretation of an EU measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim which the latter seeks to achieve, in the light, in particular, of the versions in all languages."[320] In this context the Court refers to numerous previously passed judgments, as examples are legion: *Case C-29/69, Stauder* [1969] ECR 419, paragraph 3; Joined Cases *C‑261/08 and C‑348/08, Zurita García and Choque Cabrera* [2009] ECR I‑10143, paragraph 54; *Case C‑473/08, Eulitz* [2010] ECR I‑0000, paragraph 22.

The intersection of the methods and the elements

Having regard to the notion that the subject of interest of the acquirer in the vast majority of takeovers is not the company itself but the business that it encompasses – the company is the shell and the business it operates is the core - the following reflections emerge.

Naturally, the focus of the acquirer can likewise be firmly fixed on the company as *the shell* and not merely on its business or its assets because of the value that the name or the brand of the company represents and the goodwill that is attached to it. Clearly, this too has a direct connection to the business that the company conducts. Acquiring the target company as a whole implies acquisition of the business too.

Merger, as the method of takeover, should be chosen when the acquirer is willing to take on all rights and obligations of the company being acquired. For the acquirer this is not an option but a law-bound obligation. Hence, the method must be rejected if the acquirer does not wish to be subject to law-bound universal succession.

The law-bound universal succession entitles the acquirer to enter into the acquired company's stead in respect to its creditors without prior consent thereto from the

[319] Case C-19/11, Daimler, paragraph 47.

[320] Case C-445/09, IMC Securities BV, paragraph 25.

latter. Thereby the legislation deviates from the essential principle of the law of obligations: change of debtor requires creditor's consent. However, the acquiring company must not fail to bear in mind that the new debtor's right to enter into his predecessor position can be waived by the creditor through a contractual change-of-debtor clause. The clause implies that change of control over the contracting party results in termination of the contract or renegotiation of its conditions and particularities.

Regardless of the number of companies, which participate in a merger only one of them, either newly incorporated or already existing, will remain and become the continuing company encompassing all the rights and obligations of the rest of the participating companies as they cease to exist. A different method must be chosen when winding up of participating companies is undesirable.

The method of merger requires that the consideration to the shareholders of the company being acquired, who are the sellers in this context, must consist of shares in the acquiring company. Hence, they become shareholders of the continuing company. The acquiring company has an option of paying a part of the consideration in cash. However, the transferring shareholders will be subject to taxation on the part of consideration in cash, which in itself can trigger their reluctant position.

For tax purposes, a merger transaction can be conducted tax-neutrally: the transaction triggers no immediate taxation. This requires fiscal succession and continuation, *i.e.,* the acquiring party's succession into the acquired party's obligations for tax purposes. However, carry-forward of accumulated losses may be lost, if it is not utilized prior to the transaction.

For group-restructuring purposes the method of merger is functional when the number of participating companies is desired decreased. Likewise, the method is applicable if liquidation of a group is desired. Merging the group-participating companies into a single continuing company results in the collapse of the group structure and, hence, concentration of all of the group's activities within a single legal entity.

When merging a group participating company with a non-participating company the group has the advantage to choose the acquiring company and thus the structural placement of the target within the group *i.e.,* through a forward triangular merger or, through a reverse triangular merger where the target is designated to be the continuing company.

If a holding structure is absent and, for example, two individual companies merge together, such structure can be established when in the course of the merger transaction an additional operation is activated where the participants' shares in the emerging company are immediately exchanged with the shares in a holding company.

The universal succession, which accompanies the method of merger, implies the protection of the employees of the company being acquired. The acquirer, as the new employer, is subject to the obligation to take on the personnel of the target company without amending the conditions of their employment. Naturally, employees may represent a valuable asset in the running of a business and their onward employment with the acquiring company may be highly desired. However, in the course of change of employer there are no obligations imposed on employees to continue their employment.

The acquiring company, the stock of which is traded on a regulated marked may have an advantage of its valuable stock when exchanging it for the stock of the company being acquired. The acquirer's positive price/NAV ratio can be applied as the instrument of payment hence, remunerating the shareholders of the target company with the reflection of goodwill that the market perceives the shares of the acquiring company to have.

For the purposes of change of corporate nationality the method of cross-border merger is applicable. Two or more previously unrelated companies from different jurisdictions within the European Community can merge together into a single continuing company registered in the jurisdiction of preference. Likewise, through the "suction-cup" method, a company can change its corporate nationality by merging with a subsidiary incorporated in the jurisdiction of preference through a reverse vertical merge *i.e.*, with the subsidiary as the continuing company.

Division, as the method of takeover, should be chosen when a limited liability company wishes to split its activities into business units, which are transferred to more than one receiving company. Depending on the national laws of the state of incorporation of the company in question, the division can be conducted as partial *i.e.*, that the company does not cease to exist as the result of the operation but carries on with its commercial activities merely in an amended and decreased form. If the business volume of the company is desired decreased without decreasing the overall value of the company the method of division must be rejected.

The shareholders in the company being divided are the sellers in the context of the method of division. They sell a part of their company and in return they receive shares in the receiving company as consideration. Notwithstanding that as a starting point the shareholders' sale of the company is a taxable event, it is exempted from tax insofar the consideration received consists of shares.

The receiving company is subject to universal succession in respect to the rights and obligations, which are connected to the part of the company that is acquired. If the acquiring company wishes to avoid succession into the obligations of the business of interest the method of division must be rejected.

The method of division implies change of debtor for the purposes of contractual obligations that the company being divided is a party to. The method of division is accompanied by the mandatory requirement imposed on the creditor by the legislation to accept change of debtor in the course of this transaction. Although, this is contrary to the essential principle of the law of obligations, this corresponds with the approach taken by the legislature in regards to the method of merger. However, this does not disregard the parties' contractual agreements. Therein, a change-of-debtor clause can secure the creditor's right to terminate the contract or at least demand re-negotiations of the contract's details.

If qualified thereto in accordance to the relevant national law the transaction can be conducted tax-neutrally. However, this may result in loss of accumulated carry-forward. Thus, if the participating companies have significant carry-forward accumulations, an option of immediate taxation may be more beneficial whereas tax-neutrality should be abandoned.

By application of the method of division a group of companies can be created. The original operating company can divide its business into a number of business units, which are transferred to the newly formed receiving companies under the control of the same shareholders as the original company. Their possessions of stock in the receiving companies can subsequently be injected into the remaining part of the original company assuming that the division is partial, hence, elevating that legal entity to the level of parent company. If the division is complete and the divided company ceases to exist the shareholders have an option of incorporating a holding company; transferring their possessions of stock in the receiving companies to the newly formed holding company in exchange for shares in the latter a holding structure is established.

In connection to the method of division the rights of employees must be observed. The acquiring entity is obliged to take on the personnel of the acquired business unit on unchanged conditions. This is a consequence of universal succession, which the method of merger is likewise subject to.

Whereas through the method of merger a company as a whole can change its national affiliation by merging into a company incorporated in a different member state within the European Community, by the way of division a part of a company can acquire different national affiliation by being acquired by a company incorporated in a different jurisdiction.

Business transfer, as the method of takeover, should be chosen when the acquirer wishes to purchase a volume of assets that together constitute a business unit with potential of conducting commercial activities. The method is characterized by absence of law-bound universal succession where creditors are required to accept change of debtor, which occurs in the course of the transaction. Thus, the object of transfer is assets and thereto-attached rights. Obligations and liabilities with connection to these assets remain the responsibility of the transferor unless agreed otherwise. The transaction is governed by a contract entered into by the participating parties; the so-called Asset Purchase Agreement, APA. In some instances the acquirer may be interested in taking on the contracts that the business may have with third parties. Entering into the original debtor's place requires, however, creditor's consent as the law of obligations prescribes.

If the acquirer wishes to pay his consideration for the business mostly or fully in cash this method of M&A is the most suitable to facilitate it. However, this approach will preclude the participants from conducting the transaction tax-neutrally, as for fiscal purposes the succession and continuation will not occur.

The method is suitable for the purposes of group creation and group restructuring. An operating company can transfer a part of its business to a newly incorporated legal entity by drop-down operation while receiving shares in that company and, hence, becoming its parent company; in the context of business transfer method the seller is the company itself and not its shareholders.

Likewise, a group can restructure itself by transferring business activities from several companies to a newly formed company or, by "plucking" a business out of the framework of one company and placing it into the framework of another company.

Holding structure can emerge through application of the same method. An operating company can transfer its business as a whole to a newly incorporated subsidiary while simultaneously receiving shares in that subsidiary as the consideration for the business transferred. The previously operating company becomes the holding company as the newly incorporated subsidiary becomes the operating company owned by the holding company.

Moreover, the method can be used in change-of-control planning when assets are being groomed for subsequent sale. The relevant business is being transferred to a newly formed legal entity, which subsequently will be attempted sold by *e.g.* the method of majority takeover.

The business unit, which is transferred by the method of business transfer, can in some occasions employ personnel. The employees' rights are protected by the relevant legislation, which implies that they are entitled to maintain their employment under the same conditions as prior to the transfer. There is, however, no obligation imposed on employees to accept change of employer. Hence, an employee can terminate his or hers contract of employment in connection to the transfer.

If amendments to corporate national affiliation of the business are required, in the course of the corporate planning the receiving company, prior to the transfer of business operation, may be formed in a different jurisdiction then the original jurisdiction of the business.

Majority takeover, as the method of acquisition, must be chosen when the object of takeover is control over the target company as a whole, and where no structural amendments of the target occur in the context of the operation.

Although the operation can be conducted either as a friendly takeover or as a hostile takeover, which in its simplicity reflects the involvement of the management of the target company in the process, the friendly approach is often appears to be the beneficial one for the both parties.

The shareholders, as the owners of the target company, transfer control over it to the acquiring company by exchanging their shares in the former with the shares in the latter. The transaction can be conducted tax-neutrally presuming that legal provisions to that regard are complied with.

Since no changes to legal personality occur as a result of the transaction the participating companies naturally carry on with their respective rights and obligations. Hence, succession, as it appears in the other three M&A methods, takes here a different shape. The acquiring company does not enter into the rights or obligations of the company being acquired, however, the acquiring company obtains access to the rights and assets of the target company without simultaneously undertaking its obligations or parts thereof. This constitutes a more advanced and often desired form of succession for the acquiring entity.

For the purposes of the target's contractual ties with third parties no direct change of debtor occurs merely because the ownership of the company has changed. However, it must be borne in mind that contracts may be equipped with none-assignability clauses, which, if activated, can result in renegotiations or even termination of a contract.

The method can be applied to create a group where a single operating company acquires control over another company. In instances where a group of companies already exists, there is an option of speculating where in the group structure the target company fits best. Hence, allowing a particular group-affiliated company to be the acquirer.

In the context of this method of M&A the relationship between the target company, as the employer, and the personnel remains unaltered. Hence, no provisions involving protection of employees’ rights are activated.

Acquisition of the majority of a company’s voting capital does not affect the target’s corporate national affiliation, as it remains registered in the state of incorporation.

Although the methods of takeover are characterized by undoubtedly different and distinct sets of rules dealing with the countless elements and details in each transaction, the essence of all M&A methods remains the same: *Mille viae ducunt homines per saecula Romam*, which in this context implies acquisition of control.

LIST OF TOPIC-RELEVANT PROVISIONS

Directive 68/151/EEC on disclosure (original)

Directive 77/91/EEC on capital (original)

Directive 78/660/EEC on annual accounts (original)

Directive 82/891/EEC on divisions

Directive 83/349/EEC on consolidated accounts (original)

Directive 84/253/EEC on statutory audits (original)

Directive 89/666/EEC on branches

Directive 90/434/EEC on merger taxation (original)

Directive 90/435/EEC taxation of parent companies and their subsidiaries of different member states (original)

Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities

Directive 2003/6/EC on insider dealing and market manipulation

Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different member states

Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading

Directive 2004/25/EC on takeover bids

Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

Directive 2005/56/EC on cross border mergers

Directive 2005/19/EC amending Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States

Directive 2009/101/EC on disclosure (current)

Directive 2009/102/EC on single-member company

Directive 2009/133/EC on merger taxation (current)

Directive 2011/35/EU on domestic mergers

Directive 2011/96/EU taxation of parent companies and their subsidiaries of different member states (current)

Directive 2012/30/EU on capital (current)

Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (current)

Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises

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Regulation 139/2004/EC on the control of concentrations between undertakings (Merger Regulation)

Regulation 2157/2001/EC on the Statute for a European company (SE)

The Treaty on European Union, TEU

The Treaty on the Functioning of the European Union, TFEU

International Financial Reporting Standard 10: Consolidated Financial Statements, IFRS 10

International Accounting Standard 27: Consolidated and Separate Financial Statements, IAS 27

UNIDROIT Principles of International Commercial Contracts

COM (2003) 284 final, 21.5.2003, Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward

Commission Recommendation 2004/913/EC on fostering an appropriate regime for the remuneration of directors of listed companies

Commission Recommendation 2005/162/EC on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board

Commission Recommendation 2009/385/EC complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies

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C-343/13, Modelo Continente Hipermercados SA

C-352/08, Modehuis A. Zwijnenburg BV

C-367/96, Alexandros Kefalas

C-378/10, VALE

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SUMMARY

This dissertation is a legal dogmatic thesis, the goal of which is to describe and analyze the current state of law in Europe in regard to some relevant selected elements related to mergers and acquisitions, and the adviser's counsel in this regard. Having regard to the topic of the dissertation the focus is aimed and maintained at application and functioning of provisions of European federal corporate law and internationally accepted principles of the law of obligations. This study, however, is not about clarification of the reasons that urge for M&A operations, nor is it about judging the results of the transactions. This study is about synthesizing, on the one hand, the methods of M&A, and, on the other hand, several selected key elements, which any participating party, as well as their respective advisers, must be aware of, prior, throughout, and after the transaction: consideration, succession, taxes and fiscal neutrality, group-related issues, holding-structure issues, employees, stock exchange listing issues, and corporate nationality.

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