

Frederik Boulogne, *Shortcomings in the EU Merger Directive*. Alphen aan den Rijn: Kluwer, 2016. 432 pages. ISBN: 9789041167132. EUR 165.

The main research questions of Boulogne's book consider whether and when the Merger Directive falls short of attaining its stated objective and how these shortcomings can be solved. The full title of the Merger Directive is Council Directive 2009/133 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States – which indicates its subject matter. The book is a doctoral thesis defended at the *Vrije Universiteit* Amsterdam in January 2016. Despite its title, the book is not just a critical analysis of the Merger Directive, but also contains a very detailed, in depth, descriptive analysis of Articles 1–15 of the Directive.

The book has seven chapters following the introduction. The first two are on the personal and material scope, respectively. Chapter 3 deals with carry-over of balance sheet values, provisions, reserves and losses. The next chapter covers combatting tax avoidance under the Directive; and Chapter 5 deals with the avoidance of double taxation. Chapter 6 offers a proposal for the amendment of the Directive, and the last chapter gives overall conclusions. This structure means that the articles of the Directive are not discussed in numerical order, but are instead somewhat jumbled up; for example, Article 1 includes both the personal and the material scope of the Directive, so it is discussed in both Chapters 1 and 2.

The author applies literal, schematic and teleological methods to interpret the Directive. When applying the schematic approach, other areas of law are taken into account, such as corporate law, securities law, capital duty law, value-added tax law, tax treaty law and security law, as well as primary EU law such as the freedom of establishment and the freedom of capital. The main finding is that the Merger Directive needs to be amended to achieve its objective of removing tax obstacles to cross-border restructuring operations while safeguarding the financial interests of the Member States. The author provides the readers with a draft proposal of an amended Merger Directive where the entire Directive is rewritten in accordance with the shortcomings that have been identified in the book.

A large number of both major and minor shortcomings are identified. The major shortcomings concern the vague objective of the Directive, the fact that it does not address domestic restructuring operations, that a minimum level of harmonization does not lead to a common tax system, that exhaustive lists exclude newly introduced legal forms, the

complicated relationship between primary and secondary EU law, the lack of coherence with corporate law, and that the Directive is silent on the procedural requirements that Member States are allowed to impose. To give an example, the term “company” is criticized, since it may have very different connotations in different legal systems and hence may be confusing. According to the author, it is rational to interpret the term as encompassing all entities that have access to the freedom of establishment pursuant to Article 54 TFEU. In light of the Directive’s objective, the term “company” should cover all entities that can carry out cross-border restructuring operations. Therefore, the suggestion is that either the concept of company as it is defined in Article 3(1)(b) of the OECD Model Convention should be used, or that “company” is replaced by the term “entity”.

The book has a broad scope, since it includes not only the Merger Directive but also many other areas of law. My impression is that the author prefers the application of one consistent set of rules for the restructuring of companies in corporate law and tax law, including tax treaty law. Several of the proposed improvements for the Directive are put forward with reference to the OECD Model Convention. The book contains a rather deep analysis of issues such as tax treaty override, the cross-border takeover of losses under the Marks & Spencer and A Oy regimes, the free movement of capital, the principle of proportionality and exit taxation under the National Grid and DMC regimes.

From a structural perspective, it would have been preferable if the author had provided more guidance at the beginning of each chapter, detailing, for example, the issues covered in each chapter. As it is, the reader may be surprised to come across an overview of the UCITS IV Directive in Chapter 1 regarding the personal scope of the Merger Directive, for example. After descriptions of other fields of law or at the end of each chapter, these excursions into other fields are finally explained, but it would be easier to grasp the common thread straight away if the structure and the overall content were explained already in the introduction to each chapter.

The scientific quality of the work could have been improved if some methodological issues had been discussed more thoroughly. In the introductory chapter, there is a good discussion about the methods of interpretation of the ECJ and how these methods influence the methods of interpretation applied in this book. I would, however, have liked to have seen more of the following in the introductory chapter. The author uses the objective of the Merger Directive as a benchmark for his evaluation of the Directive. In his final conclusions, the author criticizes this objective. Which other benchmarks could have been used for the critical analysis of the Directive, and of its objectives? Why were those other benchmarks not chosen? The fiscal sovereignty of the Member States and the principle of subsidiarity are touched upon in the book. The author might, however, have elaborated more clearly on how this influences the possibility of fully achieving the objectives set out in the Directive, and whether, in the opinion of the author, the proposed amendment might be too far-reaching taking fiscal sovereignty and the principle of subsidiarity into consideration. The fact that not all Member States are members of the OECD is relevant, since the author proposes a certain degree of harmonization between the Merger Directive and the OECD Model Convention. From a practical point of view, I agree with the author that this might be a good and simple solution. Bringing OECD soft law into EU law is not a very controversial issue either, since this already occurs with, for example, the BEPS project. From a scientific point of view, however, this raises methodological considerations that are worth mentioning. The author’s legal background, coming from a continental European legal system, is visible in the proposed amendment and the entire approach to the Directive. When proposing amendments to an EU directive that applies not only to continental European legal systems, but also common law legal systems such as that in England and Wales and mixed legal systems such as those in Scandinavia and Scotland, it might be worth considering that the law-making techniques are different in different parts of the EU. Perhaps it would have been a good idea to pay some attention to the author’s preconceptions in the introductory chapter. The reason for the selection of other areas of law as subject for comparison and as a source of inspiration for the proposals *de lege ferenda* could have been described. Why are certain areas of law, but not others (such as labour law, which might be relevant for the branch of activity discussion) included in the study? Moreover, as regards structure, it is not easy to obtain an

overview of the proposed amendment of the entire Merger Directive. It would be preferable to have the original text and the proposed amendments aligned side by side to facilitate comparison. An index would also have improved the accessibility of the book.

This book is an impressive and solid piece of work. Each provision in the Merger Directive is analysed in depth. The proposed amendments are very detailed and the fact that the book ends with an actual proposed amended Directive proves that the author's intention was to leave no stone unturned before the work was completed. The author aimed high and achieved his ambitious goals. The analysis is both in-depth and wide. The author shows sound knowledge of the topic chosen and for international tax law in general. The author also shows creativity and the ability to think outside the box, making the book an interesting reading experience, though this could have been improved if the author had taken the reader figuratively by the hand and guided him/her through the text in a more distinct way. More methodological lines of reasoning would have enhanced the scientific standard of the book. The author has, however, succeeded in writing a book that will most likely become a standard volume on the Merger Directive and I warmly recommend practitioners of tax law and M&A as well as academics to read it.

Eleonor Kristoffersson
Örebro