CROSS-BORDER MERGERS – – THE CONCEPT AND ITS IMPLEMENTATION INTO THE LEGAL ORDER OF THE SLOVAK REPUBLIC

CEZHRANIČNÉ ZLÚČENIE ALEBO SPLYNUTIE – – POJEM A JEHO IMPLEMENTÁCIA DO PRÁVNEHO PORIADKU SLOVENSKEJ REPUBLIKY

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I. Introduction

Legal regulation of cross-border mergers is contained in the Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (hereinafter referred to as the „Directive“). The reason for the adoption of this Directive is stated in the first recital of its Preamble which provides that *“as regards cross-border mergers of limited liability companies, they encounter many legislative and administrative difficulties in the Community. It is therefore necessary, with a view to the completion and functioning of the single market, to lay down Community provisions to facilitate the carrying-out of cross-border mergers between various types of limited liability company governed by the laws of different Member States.”*

On the basis of the Directive Member States have been obliged to adopt national legislation on cross-border mergers reflecting the objectives set out in the Directive. Individual Member States have dealt with this task differently. In Austria, France and Hungary specific law exclusively governing the issue of cross-border mergers have been adopted. On the contrary, in the Czech Republic and Germany the Directive has been implemented in the form of an act regulating not only cross-border mergers, but also domestic mergers and issues such as split of a company, transfer of capital and change of a legal form of a company. In addition, the Czech legislation also includes legal regulation of cross-border transfer of the registered office.

The Slovak lawmaker did not take inspiration from any of

Abstract (EN)

Cross-border mergers are regulated by the Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. This article deals with the issue of cross-border mergers of limited liability companies within the internal market of the European Union, more precisely it analyzes the question of the concept of a cross-border merger under the European Union law and its implementation into the national legal order of the Slovak Republic. The legal definition of a cross-border merger under the European Union law comprises three key conditions that must be met cumulatively: cross-border merger is applicable only for a business company formed in accordance with the law of an EU Member State, having its registered office, central administration or principal place of business within the Community, and at the same time business company must be in an eligible legal form and a cross-border element must be given.

Abstrakt (SK)

Cezhraničné zlúčenía alebo splynutia sú primárne regulované Smernicou Európskeho Parlamentu a Rady 2005/56/EC z 26. októbra 2005 o cezhraničných zlúčeníach alebo splynutiach kapitálových spoločností. Príspevok sa zaoberá problematikou cezhraničného zlúčenia alebo splynutia kapitálových spoločností v rámci vnútorného trhu Európskej únie s dôrazom kladeným na otázku cezhraničného zlúčenia alebo splynutia v práve EÚ a jeho implementácie do právneho poriadku Slovenskej republiky. Právna definícia cezhraničného zlúčenia alebo splynutia, podľa práva Európskej únie, obsahuje tri kľúčové podmienky, ktoré musia byť kumulatívne splnené a to: cezhraničné zlúčenie alebo splynutie sa vzťahuje len na tie kapitálové spoločnosti, ktoré boli založené podľa práva členského štátu a ktoré majú svoje sídlo, ústredie alebo hlavné miesto podnikateľskej činnosti na území Únie, zároveň musí ísť o spôsobilú právnu formu kapitálovej spoločnosti a je tu daný cezhraničný prvok.

Keywords (EN)

cross-border merger, limited liability company, cross-border element

Kľúčové slová (SK)

cezhraničné zlúčenie alebo splynutie, kapitálová spoločnosť, cezhraničný prvok

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the above mentioned approaches. In the Slovak Republic, the Directive is implemented in several provisions of the Commercial Code no. 513/1991 Coll. (hereinafter referred to as the "Commercial Code"). The basis for the legal regulation of cross-border mergers represents the provision of Section 69aa of the Commercial Code. The provision in questions consists of ten paragraphs and governs the general issues of cross-border mergers common to all types of business companies that may participate in it. One part of the Directive has been implemented into provisions of Sections 218b, 218c, 218ja, 218jb, 218k and Sections 218la to 218lk of the Commercial Code. These provisions govern the issue of domestic mergers of public limited liability companies and are applicable to domestic mergers of private limited liability companies accordingly (provision of Section 152a of the Commercial Code). Where the lawmaker recognized a distinction between domestic and cross-border mergers, specific regulation of cross-border mergers has been incorporated to the particular provision governing the domestic mergers. On the one hand, this approach allows to prevent the split of the Commercial Code, on the other hand, however, legislation which is too strict may result in a number of unanswered questions relating to the already highly complicated legal regulation of mergers of business companies.

II. Objective and Methodology

The issue of cross-border mergers is very broad. The article pays attention to one of the problems of cross-border mergers which is the very concept of a cross-border merger and its definition in national legislations of selected EU Member States.

The aim of the article is to analyze the concept of a cross-border merger in the EU law and the national law of the Slovak Republic and to compare the implementation of this concept into the national legislations of other Member States. Legal definition of a cross-border merger under the EU law contains three key conditions that must be met cumulatively. The article analyzes whether these conditions have been reflected in the national legislation of the Slovak Republic to the extent required by the EU law.

For the purpose of this article, literary sources available on this subject, the EU law as well as national laws, explanatory memoranda and the case law of the Court of Justice of the European Union (hereinafter referred to as the „Court“) was used. Basic methods of legal science such as legal analysis and horizontal comparison were used.

III. The concept of a cross-border merger

Legal definition of a cross-border merger is included in the Directive and at the same time, in individual national laws of the EU Member States in which the directive has been implemented.

Under Article 1 of the Directive, the cross-border merger is a *“merger of limited liability companies formed in accordance with the law of a Member State and having their registered of-*

fice, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different Member States.” Three basic conditions of the cross-border merger are intrinsic to the aforementioned definition, which must be met cumulatively:

- participating company has been formed in accordance with the law of a Member State and has its registered office, central administration or principal place of business within the Community
- company must be of an eligible type
- a cross-border element must be given, otherwise national rules on merger of companies would apply.

IV. The relation between business company and the law of a Member State

According to the Directive, cross-border mergers shall only be applicable to companies meeting these two criteria:

- companies are formed in accordance with the law of an EU Member State and
- have their registered office, central administration or principal place of business within the Community.

The second condition implies that the Directive does not oblige company to have the real seat established within the territory of the European Union and it is sufficient for the company to have its registered office (i.e. an address registered under the business register of a Member State) within the EU. Otherwise, alternatives included in the second condition would be obsolete.

In vast majority of cases applies that if the first condition is satisfied, one of the alternatives of the second condition is met, too. Currently, no EU law nor an international treaty allowing to relocate the registered office of a company to another Member State (i.e. to remove it from a business register of one Member State and to register it within business register of another Member State without the loss of its legal subjectivity and with the possibility to operate under the law of the state of establishment) exists. Therefore, it has been left up to individual Member States' discretion whether to allow such a transboundary relocation or not. For example, in the Slovak Republic the Commercial Code allows the relocation of a registered office of a company formed under law of a foreign country to the Slovak Republic and vice versa, only if this is possible according to the law of the EU or according to an international treaty (pursuant to Section 26 of the Commercial Code).

Moreover, the Directive does not require the status of a company to be governed by the law of a Member State in which the company has its registered office, central administration or principal place of business. The provision in question accommodates states endorsing the incorporation theory (according to which law of the state of registration in Business Register is applicable) as well as states which prefer the real seat theory (according to which applicable is the law of a state in which management of a company actually resides). For example, the Czech Act no. 125/2008 Coll. on

transformation of business companies and cooperative societies allows transboundary relocation of a registered office of a Czech business company or a cooperative society, while the status of a company and its legal form are still governed by Czech law, unless otherwise provided by law of the Member State to which the company is moved (pursuant to Section 384f). On the other side, however, this does not apply for cases of relocation of a foreign business company to the Czech Republic. In this case, company is to be governed by the Commercial Code of the Czech Republic (according to Section 384a).

The lawmaker in the Slovak Republic reflected these conditions, although not completely, in Section 69aa (1) b) and c) of the Commercial Code, which provide that *“the Slovak participating company is a company having its registered office in the Slovak Republic”* and *“the foreign participating company is a company with its registered office in another EU Member State.”* However, the condition of establishment under the law of an EU Member State, is absent. As the Slovak lawmaker only recognized the condition of a registered office within the European Union and has not reflected the alternative criteria such as central administration or principal place of business in a Member State, in principle, the possibility that a company incorporated under law of a non-member State has a right to participate in cross-border merger within the European Union's internal market, has been excluded. It is unlikely, though not entirely impossible, that a company established under law of a non-member state would relocate its registered office to a Member State of the European Union, as even the Court has repeatedly emphasized that there is still no EU law nor an international treaty governing the transboundary relocation of registered office of a company.⁽¹⁾ Nevertheless, if such a situation occurs (e.g. because such transfer is allowed by national law of a Member State), the condition for a cross-border merger under law of the Slovak Republic would be met, but at the same time, it would not meet the criteria for cross-border merger under the EU law, nor the criteria set up in legislations of neighbouring EU Member States. In this regard, the Slovak lawmaker has limited the possibility of participation in cross-border mergers in a greater extent than the Directive, thus excluded the possibility of cross-border merger of some companies to which, on the contrary, the Directive this possibility grants.

V. Legal form of the companies involved in cross-border merger

After defining the concept of a company of a Member State, attention should be paid to the question which legal forms (types) of companies of the EU Member States may be involved in cross-border merger.

⁽¹⁾ E.g. Judgment of the Court of 27 September 1988 in Case 81/87, *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*; Judgment of the Court of 16 December 2008 in Case 210/06, *CARTESIO Oktató és Szolgáltató* bt.

According to the aforementioned definition of cross-border merger, only limited liability companies are allowed to engage in cross-border merger. Article 2 of the Directive defines what is to be understood under the term “limited liability company”. Limited liability company is:

- a) a company as referred to in Article 1 of Directive 68/151/EEC, or
- b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others.

It follows that Article 2 of the Directive defines limited liability company in two ways, namely:

- by a reference to the enumeration of all legal forms of business companies in individual Member States which constitutes a part of the Directive 2009/101/EC. In Slovakia, public limited liability company and private limited liability company have a character of a limited liability company. In most Member States this is the case of the legal forms similar to public and private limited liability company under Slovak national law and also the case of partnership limited by shares in Member States where such form is recognized by law (e.g. Poland, Belgium, Denmark, Germany, Spain).
- by a general definition according to which limited liability company is a company which
 - has share capital;
 - has legal personality;
 - possess separate assets which alone serve to cover its debts;
 - subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others. This condition implies the obligation of registration of company in a relevant public register (registration in the Business Register in case of the Slovak Republic).

The aforementioned general definition implies that even a cooperative society may be subsumed under the term of a limited liability company within the meaning of the Directive, although cooperative society is not considered a business company under the Slovak law. The Directive in Article 3.2 grants Member States the possibility to exclude a cooperative society from the participation in cross-border merger. Example of a Member State making use of this option is Austria. On the other side, the Slovak Republic and the Czech Republic have not excluded cooperative societies from participation in cross-border merger.

In addition, Directive in Article 3.3 explicitly excluded from its application *“cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company”* (e.g. supplementary pension fund management companies in the Slovak Republic).

The Slovak lawmaker, however, has not confined the pos-

sibility to engage in cross-border merger to limited liability companies and has not excluded it in case of cooperative societies, a company under the Article 3.3 of the Directive, or a partnerships, either. This means that under Slovak law any legal form of business company may engage in cross-border merger. This may implicitly be derived from the provision of Section 69aa (6) of the Commercial Code, which stands as follow: *"In case of business company non-obliged to have share capital, draft agreement on cross-border merger must be unanimously approved by all partners."* On the other side, one may find an explicit confirmation of this assumption in the explanatory report to the Commercial Code⁽²⁾, more precisely in the assertion that in relation to formulation of individual provisions of the draft law, Slovak lawmaker decided to incorporate the essence of interpretation made by the Court in the decision of the SEVIC systems case⁽³⁾. In the decision, issued prior to the adoption of the Directive, the Court acknowledged the freedom of establishment of all legal forms of business companies, not restricting it to limited liability companies, stating that *"Articles 43 EC and 48 EC (current Articles 49 and 54 of the Treaty on the Functioning of the European Union – note from the authors) 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."* According to Article 48 of the Treaty establishing the European Community (current Article 54 of the Treaty on the Functioning of the European Union – note from the authors) companies to which freedom of establishment applies are *"companies or firms constituted under civil or commercial law including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making"*. Explanatory memorandum further provides that the aforementioned decision of the Court extended the scope of Article 43 of the Treaty establishing the European Community (current Article 49 of the Treaty on the Functioning of the European Union – note from the authors) to partnership and limited partnership and the provision of Article 3 of the Directive under which cross-border mergers may not be allowed for some forms of limited liability companies have become obsolete.⁽⁴⁾ For the moment, we are leaving aside considerations on whether the Court by its decision, in which it does interpret and apply the law but does not create it, may cause obsolescence of a legally binding European Union legislation, such as directive. However, if the lawmaker intended to exceed the scope of mandatory harmonization, applicable only to a limited liability company

(as obvious from the title of the Directive), it had been equally necessary to regulate the procedure of merger involving other legal forms of business companies (e.g. the Czech legislation provides for a specific regulation of merger for each individual type of business company). Provisions on merger of public limited liability companies can hardly, if ever, be applied to partnerships or limited partnerships. However, it is important to add that merger of partnerships or limited partnerships is highly unlikely, either because of the absence of an type of business company in another Member State to carry out the merger (since most Member States restrict cross-border mergers to public limited liability companies, private limited liability companies, occasionally also to partnership limited by shares) or because of the fact that cross-border merger of a partnership or a limited partnership is difficult to rationally economically justify.

In this context, the question arises whether transnational legal forms of business may participate in cross-border merger. The Directive does not explicitly mention the possibility of participation of these in cross-border merger, nor it does prohibit it explicitly. Article 1 of the Directive only recognizes this possibility in relation to companies established under the law of a Member State, not under supranational law of the European Union. Slovak lawmaker in this context provided solely for the condition of having the registered office within the EU, which transnational companies may meet as well. As the Directive is only a minimum standard to be respected, we believe that participation of transnational companies in cross-border merger is essentially not excluded. It is necessary to consider, however, whether their legal form is eligible to merge. The European company may participate in cross-border mergers, because it meets the criteria of a limited liability company. Jurisprudence is of the opinion that *"although the Directive on cross-border mergers has not set explicitly so, European company with registered office in any of the Member States may participate in cross-border merger. This follows in particular from Article 10 of the Council Regulation on the Statute for a European company under which the European company is to share the national legal regime of a public limited liability company with registered office within that particular Member State."*⁽⁵⁾

In case of the European Cooperative Society situation is more complicated. The possibility of a European Cooperative Society to merge depends on whether the Member States concerned excluded the possibility of a cooperative society to participate in cross-border merger or not.

The most complicated situation occurs in relation to the European Economic Interest Grouping. Jurisprudence advocates the opinion that in the case of Slovakia, the cross-border merger with this legal form of business is possible, as under the provisions of Section 56 (2) of the Commercial Code, business companies formed under the EU law have the same status as companies formed under the Commercial Code.⁽⁶⁾ The Council Regulation on the European Economic Interest Grouping itself in Article 35 does not presuppose winding

⁽²⁾ Explanatory Report to the Act No. 657/2007 Coll., that amends and supplements the Act No. 513/1991 Coll. Commercial Code as amended by later regulations

⁽³⁾ Judgment of the Court of 13 December 2005 in Case C-411/036, Sevic Systems AG.

⁽⁴⁾ Explanatory Report to the Act No. 657/2007 Coll., that amends and supplements the Act No. 513/1991 Coll. Commercial Code as amended by later regulations.

⁽⁵⁾ Pala, R. – Palová, I. – Leontiev, A. Cezhraničné fúzie. Praha: C. H. Beck, 2010. P. 17.

⁽⁶⁾ Pala, R. – Palová, I. – Leontiev, A. Cezhraničné fúzie. Praha: C. H. Beck, 2010. P. 18.

up of this legal form without liquidation, stating that “the winding up of a grouping shall entail its liquidation”. Therefore, we believe that this legal form of business is not eligible for cross-border merger, not even in case of such a broad implementation of the Directive as performed in Slovakia.

Having defined the legal forms of business companies eligible for participation in mergers under national laws of Member States, last question remain unanswered, namely, which legal forms may merge together. Member States had not been able to reach a common agreement in this issue thus Article 4 of the Directive became a compromise solution. Article 4 includes a choice of law provision, according to which “cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States.” This means that cross-border mergers are permitted only between those legal types of companies which may be involved in merger under national law of the relevant Member States. Thus, for each individual merger, it will be necessary to assess whether the combination of types of companies in question is permissible in view of national laws of all relevant Member States. In terms of the provision of the Section 69 (2) of the Commercial Code, in Slovakia only merger of companies of the same legal form is admitted, unless the law provides otherwise. Exception is set up in the Section 218l (1) of the Commercial Code, according to which “merger of a private limited liability company and a public limited liability company in which the private limited liability company winds up and its assets are transferred to the public limited company, is accepted.”

The issue of an adequate legal form to a merger also occurs in case of acceptance of the possibility of transnational legal forms of business to merge. In this case, we believe that the counterpart for the European Company would be the public limited liability company under national law of the Member States and for the European Cooperative Society this would probably be the cooperative society under national law of the Member States. However, this is much more difficult when it comes to the European Economic Interest Grouping, provided it may merge. It is important to emphasize that analogous legal form of business under Slovak national law is absent.

VI. Cross-border element

For the Directive on cross-border mergers to be applicable there must be some kind of a cross-border element given. According to the Article 1 “this Directive shall apply to mergers of limited liability companies (...) provided at least two of them are governed by the laws of different Member States”. The wording of this provision implies that there is a cross-border element if at least one of the companies participating in a merger is governed by law of a different Member State than the rest of them.

A similar definition of a cross-border merger have been adopted by some of the Member States. For example, the German Reorganization Act (Umwandlungsgesetz) in its provision of the Section 122a establishes that „cross-border merger is a merger in which at least one participating company is subject to the law of another Member State of the EU or EEA.”⁽⁷⁾

⁽⁷⁾ § 122a Umwandlungsgesetz: Eine grenzüberschreitende Ver-

From the legal definition of a cross-border merger under the Directive and under German law it follows that the requirement of a cross-border element is met either in situation when the companies being acquired are subject to laws of different Member States and also in a situation when these companies are governed by law of the same Member State and the acquiring company is formed under law of a different Member State.

However, it is important to add that there are some doubts whether the European lawmaker actually reflected the latter situation in relation to cross-border merger. These doubts stem from the second recital of the Directive's Preamble, according to which “the laws of the Member States are to allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of company”. This wording implies that a cross-border merger is a cross-border merger within the meaning of this Directive only if at least one of the companies being acquired is governed by law of a different Member State. In cases of merger within the meaning of the Article 2.2 (a) of the Directive, this condition will always be satisfied as no new entity is being created. However, in cases of mergers in terms of Article 2.2 (b) such interpretation is capable of excluding a high number of mergers from the application of the Directive if acquiring company is formed under law of a different Member State but companies being acquired are be governed by law of the same Member State. The legal definition of cross-border merger within the meaning of Article 1 of the Directive itself offers scope for a wider interpretation and application of cross-border mergers on all possible combinations of companies with cross-border element.

Some Member States have dealt with this problem by establishing an explicit definition of a cross-border merger within their national laws. Under the provision of Section 3 of the Austrian EU Mergers Act, „public limited liability company, private limited liability company and limited liability companies formed under the law of different Member States, having their registered office, central administration or principal place of business within the EU and in accordance with the provisions of this Federal Law, may engage in cross-border merges, or may result from mergers of limited liability companies formed under the law of different Member States.”⁽⁸⁾ The Czech lawmaker in the provision of Section 180 of the Act no. 125/2008 Coll. on transformation of commercial companies and cooperative

schmelzung ist eine Verschmelzung, bei der mindestens eine der beteiligten Gesellschaften dem Recht eines anderen Mitgliedstaats der Europäischen Union oder eines anderen Vertragsstaats des Abkommens über den Europäischen Wirtschaftsraum unterliegt.

⁽⁸⁾ § 3 EU-Verschmelzungsgesetz: Aktiengesellschaften und Gesellschaften mit beschränkter Haftung können sich mit Kapitalgesellschaften, die nach dem Recht eines anderen Mitgliedstaats gegründet worden sind und ihren satzungsmäßigen Sitz, ihre Hauptverwaltung oder ihre Hauptniederlassung in der Gemeinschaft haben, nach den Bestimmungen dieses Bundesgesetzes grenzüberschreitend verschmelzen beziehungsweise aus einer Verschmelzung von Kapitalgesellschaften, die nach dem Recht eines anderen Mitgliedstaats gegründet worden sind, hervorgehen.

societies indicates that a cross-border merger means „merger of one or more Czech business companies or cooperative societies with one or more foreign legal persons or merger of two or more foreign legal persons, provided that the acquiring company or cooperative society have its registered office in the Czech Republic.“ The Greek Act no. 3777/2009 Coll. on cross-border mergers⁽⁹⁾ establishes that the cross-border merger is a joint of one or more Greek business companies with one or more limited liability companies formed under the law of an EU Member State, having their registered office, central administration or principal place of business in the European Union or if a business company resulting from cross-border merger of companies from different EU Member States has its registered office within the territory of Greece.⁽¹⁰⁾

Jurisprudence believes that although it is not explicitly stated in the Directive, mergers in which the acquiring company is formed under law of a different Member State but companies being acquired are governed by law of the same Member State should also be considered cross-border mergers.⁽¹¹⁾ „Slovak legislation is (...) narrower than the corresponding regulation contained in the Directive on cross-border mergers and does not address all factual situations of mergers with cross-border elements on which the Directive is to be applicable.“⁽¹²⁾ In accordance with the provision of the Section 69aa (1) e) of the Commercial Code, cross-border merger is a merger of one or more Slovak business companies with one or more foreign business companies. In terms of this provision it is quite clear that under Slovak law, merger of two or more companies from the same Member State does not constitute a cross-border merger, even if the acquiring company is formed under law of a different Member State.

It should be emphasized that under Slovak legislation certain methods of cross-border mergers are excluded, but at the same time, from the current wording of relevant EU directives it is not clear whether such methods are recognized by the directives themselves. Hopefully, the Court will offer an answer and is expected to incline to extensive interpretation of the Directive in order to develop the EU internal market.

VII. Methods of cross-border mergers and the registered office of the successor company

In terms of Article 2.2 of the Directive, cross-border merger is an operation whereby

- one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company;
- two or more companies, on being dissolved without go-

ing into liquidation, transfer all their assets and liabilities to a company that they form; or

- a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

In the last of the methods mentioned, no transfer of assets is involved, therefore, certain actions in the process of merger itself (the requirement of an expert report), are omitted.

The Directive does not provide for restrictions in relation to registered office of the acquiring company, in other words, it does not provide for a condition within the meaning of which the acquiring company is obliged to have its registered office in the same Member State as at least one of the companies being acquired. We believe, however, that the acquiring company can actually have its office registered in a Member State other than the company acquired only in case when two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form. In situation described in the Article 2.2 (a) one or more companies, on being dissolved without going into liquidation transfer all their assets and liabilities to another company which already exists under the law of a Member State and is not expected to switch the State of its registration right after the process of merger.

Legislation of any of the EU Member States nor the EU legislation or any of international treaties still do not provide for the possibility of relocation of a registered office of a legal person formed under the law of a Member State while retaining at least the possibility to be governed by the law of the State of establishment (see for example the provision of Section 384a of the Czech Act no. 125/2008 Coll.). In the new Member State the acquiring company is to be governed by the law of that State, thus considered a wholly new entity under its legislation, thus the differences between situations described in Article 2.2 (a) and (b) are blurred. This interpretation, we believe, is supported by the establishment of the third method of cross-border mergers under Article 2.2 (c), which does not recognize the process of transfer of shares, what supposedly would not be possible in a situation in which share capital of a company would not be sufficient to meet the minimum requirement prescribed by law of a Member State of a new registered office of the acquiring company.

Although Member States in their national legislation have addressed the possibility of the acquiring company to have its registered office in another Member State, since they use the umbrella term „cross-border merger“ for all three methods of merging, it is not clear whether these States recognize the option of transfer of registered office for each of these or for the first one only.

VIII. Final Conclusions

The issue of cross-border mergers is much broader and goes beyond the possibilities of this article. The article refers to a few selected issues related to the implementation of the legal definition of a cross-border merger while offering an overview of solutions by comparison of foreign national leg-

⁽⁹⁾ Greek Government Gazette Issue A, no. 127 of 28 July 2009.

⁽¹⁰⁾ Van Gerven, Dirk. Cross-Border Mergers in Europe. Volume II. Cambridge: Cambridge University Press, 2011. P. 30.

⁽¹¹⁾ Vermeylen, J. - Vande Velde, I. European Cross-Border Mergers and Reorganisations. 2012, Oxford: Oxford University Press. P. 10.

⁽¹²⁾ Pala, R. - Palová, I. - Leontiev, A. Cezhraničné fúzie. Praha: C. H. Beck, 2010. P. 30.

isations. In this regard, legislation of the Czech Republic is particularly inspiring one, however, we believe, that in the case of Slovak legislation, regulation of domestic and cross-border merger in a separate part of the Commercial Code would be more appropriate. This would surely contribute to clearer and more comprehensive legislation and it would help avoid the split of commercial law in the Slovak Republic at the same time.

References

- (1) PALA, R. - PALOVÁ, I. - LEONTIEV, A., 2010, Cross - border fusion. Cezhraničné fúzie. Praha: C.H.Beck, 2010. 241 p. ISBN 978-80-7400-171-0
- (2) VAN GERVEN, D., 2011, Cross-Border Mergers in Europe. Volume II. Cambridge: Cambridge University Press, 2011, s. 30
- (3) VERMEYLEN, J. - VANDE VELDE, I., 2012, European Cross-Border Mergers and Reorganisations. 2012, Oxford: Oxford University Press, s. 10

Laws and judgments

- (1) Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.
- (2) Law no. 513/1991 Coll. Commercial Code.
- (3) Explanatory report to the law no. 657/2007 Coll. that amends

and supplements the Act No. 513/1991 Coll. Commercial Code as amended by later regulations.

- (4) German Law on the Transformation. Umwandlungsgesetz (UmwG) z 28.10.1994, BGBl I 1994, 3210.
- (5) Austrian Law on the cross border merger within the EU. EU-Verschmelzungsgesetz (EU-VerschG) BGBl. I Nr. 72/2007.
- (6) Greek Government Gazette Issue A, no. 127 of 28 July 2009.
- (7) Judgment of the Court of 27 September 1988. Case 81/87. The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.
- (8) Judgment of the Court of 16 December 2008. Case 210/06. CARTESIO Oktató és Szolgáltató bt.
- (9) Judgment of the Court of 13 December 2005. Case 411/036. Sevic Systems AG.

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