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**TAX**  

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**REVIEW**  

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**2001-1**

**2001**  
**VOLUME 10**  
**ISSUE 1**

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Tel. (int.) +31 70 361 7070; Fax (int.) +31 70 364 6680

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ISSN 0928-2750

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*EC Tax Review* is available to *Intertax* subscribers only and is  
published quarterly by Kluwer Law International Ltd., Sterling  
House, 66 Wilton Road, London SW1V 1DE, USA.

US Mailing Agent: Mercury Airfreight International Ltd., 365 Blair  
Road, Avenel, NJ 07001.

Post masters: Please send all address corrections to: *EC Tax Review*,  
c/o Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ  
07001, USA.

*Distribution for the USA and Canada*, periodicals second-class postage  
paid at Rahway, NJ.

*Distribution for the rest of the world*, Kluwer Law International, c/o  
Kluwer Academic Publishers, Distribution Centre Dordrecht, tel.:  
+31 78 654 6454, fax: +31 78 654 6474

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Printed in The Netherlands.

# The Implementation of the Mergers Directive in Greece



Nestor Nikolopoulos\*, Athens, Greece

## 1. Introduction

The EC corporate tax Directives were introduced in 1990 aiming at the harmonization of direct taxation of companies within the Common Market. The Mergers Directive was, however, implemented in Greece with a significant delay in 1998. This delay is a result of lack of political will, as the application of the Directives would lead to a reduction in the state's revenue. Furthermore, the transposition of the Directives required a further reform of the Greek tax law system. Two years after the implementation of the Directives their application can be assessed as positive with regard to tax planning and the proper functioning of the Common Market.

## 2. Greek implementation of the Mergers Directive

### 2.1 Introduction to Greek corporate taxation

Law Decree 3843/1958 introduced the taxation of legal entities under Greek law. The Decree has been amended several times since its original enactment for reasons of public policy. The basic principles that it introduced, however, constitute the essential framework for the taxation of legal entities in Greece.

Law 2238/1994 introduced for the first time the Greek Income Tax Code. Articles 98 onwards cover taxation of legal entities. Article 101 of the Code provides an exhaustive list of legal entities subject to taxation. These are:

- the company limited by shares;<sup>1</sup>
- the limited liability company;<sup>2</sup>
- public, municipal and communal enterprises of profit-making scope;<sup>3</sup>
- co-operative partnerships;<sup>4</sup>
- foreign undertakings whatever the form of company under which they operate, and all types of foreign profit-making organizations;
- domestic and foreign legal entities that do not aim at an economic profit.

Legal entities are subject to corporate income tax. Companies are taxed on their total annual profits. Law 2065/1992 introduced a system that is based on the taxation of total annual income, both distributed and undistributed, at the corporate level. The profits are

taxed only at the company level and there are no income or withholding taxes on dividends or profits otherwise distributed by companies.

### 2.2. The Mergers Directive in relation to Greek law

There are certain rules and provisions in the Directive to which Greek law had to adapt. It is worth examining them separately. The Merger Directive should have been transposed into the Greek legal system by 1 January 1992.<sup>5</sup> The process of its transposition, however, has been very slow. The Mergers Directive was introduced in the Greek legal system through Law 2578 of 17 February 1998.

#### 2.2.1. The concept of merger in Art. 2 of the Directive

The concept of 'merger' as defined in Art. 2(a)<sup>6</sup> of the Mergers Directive does not differ from the correspond-

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<sup>1</sup> *Anonymos eteria*, AE [ανώνυμος εταιρία]. The translation in English can also be Public Company.

<sup>2</sup> *Eteria periorismenis efhinis*, EPE [εταιρία περιορισμένης ευθύνης].

<sup>3</sup> *Dimosies, dimotikes kai kinotikes eteries kerdoskopikou haraktira* [Δημόσιες, δημοτικές και κοινοτικές εταιρίες κερδοσκοπικού χαρακτήρα].

<sup>4</sup> *Sineterismoι* [Συνεταιρισμοί].

<sup>5</sup> Art. 12(1).

<sup>6</sup> Art. 2(a) provides that: 'For the purposes of this Directive: "merger" shall mean an operation whereby:

- one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for their 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 nominal value, of the accounting par value of those securities;
- two or more companies, on being dissolved without going to 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;
- a company, on being dissolved without going to liquidation, transfers all its assets and liabilities to the company holding all the securities representing all its capital.'

<sup>7</sup> Issue of securities to the shareholders of the transferring company or cash payments, formation of new company, transfer of assets and liabilities to the company holding all the securities.

ing one in Greek law. As a result, the forms of merger described in this Article<sup>7</sup> exist in Greek company law, and therefore there is no need for major changes. Regarding the concept of 'division',<sup>8</sup> which was introduced in Greek law in 1987<sup>9</sup> when the 6th Company Law Directive was implemented, it does not differ from the corresponding one, defined in Art. 2(b) of the Merger Directive.

Conversely, problems arise concerning the concept of 'exchange of shares',<sup>10</sup> since no specific provisions exist in Greek company and tax law.<sup>11</sup> Therefore, new legislation should provide the appropriate legal framework that will regulate the exchange of shares. The remaining concepts mentioned in Art. 2 have similar or equivalent definitions in Greek law, which does not cause significant problems for the implementation of the Directive.

### 2.2.2. Greek companies falling within the scope of the Directive

The combination of Art. 3(a) and 3(c) together with the Annex to the Directive indicate that only public companies are expressly covered by the scope of the Directive. All other legal forms of company existing under Greek law are excluded from the benefits. This results in internal discrimination between legal entities.

The provisions relating to the field of application of the Directive raise certain practical issues because of their wording. According to Art. 2, only the forms of company that are listed in the Annex fall within the field of application of the Directive. An additional requirement is that one of the national taxes, mentioned in the Annex, has to be imposed on the companies that fall within the scope of the Directive. In the Greek implementation law,<sup>12</sup> it is stated that companies that fall within the scope of the law have to be subject to any of the corporate taxes mentioned in Annex B or its equivalent amendments. In Greece, the field of application of the imposed taxes is restricted to the income taxation of profit-making entities.

The practical approach to this requirement is that when for instance a Dutch company, whether as transferring or receiving company, merges with a Greek company that does not fall within the scope of the Directive tax-wise or form-wise (a limited company, for example), the Dutch company cannot claim the tax relief benefits deriving from the Directive from the Dutch tax authorities, even though the merger takes place within the EU.

Another issue that may arise is what happens if a Member State decides to impose a certain, already existing, tax, mentioned in the Directive, on a form of company that is not included in the Annex to the Mergers Directive. The provisions of Art. 2 were based on the national laws at the time of the drafting of the Directive. This caused certain confusion in terms of Greek law. The Annex does not mention the limited liability company, municipal companies for profit or partnerships under Greek law.<sup>13</sup>

The reason why these forms of Greek companies were not included in the Annex is that none of these forms of company was, at the period of the negotiation

and drafting of the Directive, subject to legal entity income tax in Greece. The only corporate form expressly covered by the Directive is the public company under Greek law. Furthermore, Art. 2(c) referring to 'the capital of the receiving company' as well as to 'exchange of shares', implicitly restricts the field of application of the Directive, since under Greek law only public companies could fulfil these requirements.

Law 2065/92, however, introduced major implications for the implementation of the Directive, because the income tax on legal persons with profit making objectives was to be imposed on Greek limited liability companies as well. This was a step towards approximation of laws. Limited liability companies under German, French and Spanish law are also subject to that kind of taxation and are mentioned in the Annex of the Directive. Given the fact that, after the legislative intervention, Greek limited liability companies are subject to exactly the same type of tax, the issue depends on interpretation. Greek limited liability companies are subject to the same taxes, mentioned in Annex B, as their equivalent European legal entities, fulfilling the requirements for application of the Directive.

Greece should request the extension of the field of application of the Directive and amendment of the Annexes. This would be expected since the Greek limited liability companies have the same legal treatment as public companies with regards to domestic mergers. The restriction of the field of application of the Directive only to Greek public companies is not consistent with the current trend in taxation of mergers, which is mostly based on the financial analysis of the corporation and not on its legal form.<sup>14</sup>

<sup>8</sup> Art. 2(b) provides that: 'For the purposes of this Directive "division" shall mean an operation whereby a company, on being dissolved without going to 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 capital receiving the assets and liabilities, and if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of nominal value, of the accounting par value, of those securities.'

<sup>9</sup> Presidential Decree 498/87, amending the Act 2190/20.

<sup>10</sup> Art. 2(d) provides that for the purposes of this Directive 'exchange of shares' will mean 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 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 per cent of the nominal value, and, in absence of a nominal value, of the accounting par value of the securities issued in exchange.

<sup>11</sup> The existing general provision concerning transfer of shares is different from the concept of exchange of shares provided from the Directive.

<sup>12</sup> Art. 1(β) under 'Scope and field of application'.

<sup>13</sup> Art. 3 of Law Decree 3843/58 and Art. 2 of the Greek implementing law.

<sup>14</sup> S. Mouzoulas, [Μούζοις, Σ.] 'Η Κοινοτική Οδηγία για το φορολογικό καθεστώς των συγχωνεύσεων, διασπάσεων, ενοποιήσεων, ενοχητικών και ανταλλαγών μετοχών εταιριών' [The Directive for the common system of taxation applicable to mergers, divisions, transfers of assets and exchange of shares] ΔΦΝ [Tax Law Review], 1991, p. 1223.

Consequently, it could be argued that the Directive could cover Greek limited liability companies. This is in accordance with the principle of equal treatment of equal legal entities under the same circumstances within the Common Market. This legal approach to the provisions of the Directive would also be very practical, given that a new amending Directive that would clarify such legal issues has not yet been introduced and it seems improbable that it will happen in the near future. It is uncertain, however, what the real practical effect of such an interpretation will be. Tax case law coming from national courts as well as from the ECJ<sup>15</sup> shows that the direct literal interpretation is mainly applicable to tax issues.

The basic legal argument for the justification of the existing provisions relating to the legal form of companies covered by the Directive is that the existing legal provisions of the Member States are different, especially in the issue of the distinction between 'personal' and 'capital-based' companies. This distinction derives from the differences that exist between the companies that have legal personality and those that do not, which is the case under German law. This creates differences in the approach to the two forms of companies, since in companies having legal personality the company itself is obliged to pay the tax. In the case of companies that have not acquired legal personality the shareholders have to pay the tax individually. On the other hand, in the case of 'capital-based' companies, tax is withheld at company level, so the shareholder is not subject to any company income tax.

Another factor that hinders the extended interpretation of these provisions is the different approach that Member States seem to adopt concerning issues of management of corporate matters. This particular criterion was included to provide a solid legal basis for the different tax treatment between personal and capital-based companies, since they both have legal personality in certain legal systems, such as the Greek and the French. According to the Greek view,<sup>16</sup> the contribution and influence of the shareholder in the management of corporate affairs is much more effective and direct in 'personal' companies than in 'capital-based' companies. In 'capital-based' companies the decisions are made by the managers of the public company and not by the shareholders.

Presumably, the mere existence of discriminatory provisions for the tax treatment of 'personal' and 'capital-based companies' as well as the difficulties that would occur if the scope of the Merger Directive were extended, were sufficient reasons for its application mostly to 'capital-based' companies. It is also of importance to note that these legal arguments apply in the case of interpretation and implementation of the Parent-Subsidiary Directive in Greece.

### 2.2.3. Problems of inconsistency between the English and the Greek translation of the Directive

The Greek version of the text of the Directive may cause serious problems to the transposition and implementation of the Mergers Directive into Greek law because certain terms in the English text have not

been successfully translated into Greek. An example is the translation of the phrase 'transfer of assets and liabilities'<sup>17</sup> and of the terms 'securities'<sup>18</sup> and 'issue of shares' in Art. 2(a). The latter has been translated as 'transfer of shares'.<sup>19</sup> There is a legal theoretical background behind this translation. It derives from the French corporate theory,<sup>20</sup> which states that in cases of mergers and divisions the offering companies do not cease to exist legally:<sup>21</sup> what happens is that they continue to exist while their articles of association cease to be in effect. There is a parallel theory, which states that, with regard to financial issues, the merging companies continue to exist as long as they continue their commercial and financial activities within a new corporate environment after the merger. Therefore, the profits resulting from mergers are not taxed according to the provisions of the Directive,<sup>22</sup> but they continue being taxed according to the domestic tax system. This is of course inconsistent with the provisions of the Directive.

Furthermore, the term 'effectively connected' in Art. 4(1)(2) has become 'annexed' in the Greek version.<sup>23</sup> Finally, the term 'tax evasion' in Art. 11.1(a) has been translated as 'tax fraud',<sup>24</sup> although tax fraud is one of the methods of tax evasion.

### 2.3. The application of the rules of the Mergers Directive in Greece

The basic rule of the Merger Directive, that is the exemption from taxation of the gains accruing on a merger, a division or a transfer of assets of companies from different Member States, is provided for in Art. 3 and a similar provision exists under Greek law.<sup>25</sup> The problem, however, lies in the fact that the rule in the existing Greek tax law applies only to mergers, divisions and transfers of assets taking place between Greek companies.<sup>26</sup> The tax treatment of mergers of Greek public companies lay within the provisions of

<sup>15</sup> For example, ECJ Case 126/78, decided on 12/6/1979.

<sup>16</sup> Loukas Theoharopoulos, [Θεοχαρόπουλος Λουκάς], *Στοιχεία Δημόσιας Οικονομικής*, [Elements of Public Finance], (Sakkoulas, Thessaloniki, 1975), p. 67.

<sup>17</sup> The term used in the Greek text of Art. 2(a) is: '... μεταβιβάζουν ... το σύνολο των περιουσιακών τους στοιχείων, ενεργητικού και παθητικού, ...'.

<sup>18</sup> The Greek term is 'συμψηφιστικό ποσό'.

<sup>19</sup> The Greek text uses the term '... έναντι παροχής παραστατικών τίτλων του εταιρικού κεφαλαίου της άλλης εταιρίας ...'.

<sup>20</sup> Ripert-Roblot, *Traite elementaire de droit commercial*, vol. 1, no. 686, p. 498, no. 1591, pp. 1058, 1597 and 1065.

<sup>21</sup> This view is not accepted by all the Greek scholars. See K. Pamboukis, [Παμπούκης, Κ.], *Δίκαιο της Ανώνυμης Εταιρίας* [Public Company Law], (Sakkoulas, Thessaloniki 1989), pp. 160 and 174 and the bibliography mentioned there.

<sup>22</sup> Mouzoulas, see note 14 above, p. 1224.

<sup>23</sup> The Greek term is *προσαρτώνται* [prostartonte].

<sup>24</sup> The Greek term is *φοροπάτη* [foropati].

<sup>25</sup> Art. 32 of the Act 3323/55 as it was inserted by the Act 1297/72.

<sup>26</sup> Nikolaos Barbas, [Νικόλαος Μπάρμπας], 'Εξελίξεις στην εναρμόνιση των άμεσων φόρων των Κρατών της ΕΟΚ προς το Ευρωπαϊκό Κοινωνικό Δίκαιο', [The recent developments in harmonisation of direct taxes of EU Member States with EU law], *ΕΕΕυρ.Δ* [Greek Review of European Law], (1992), p. 42.

Law Decree 1297/1972,<sup>27</sup> as amended in 1990. The application of this Law Decree covers the process of transformation of companies irrespective of their corporate legal form. Both personal and capital companies of any legal form fall within the field of application of the Law Decree. The only inconsistency between the existing Law Decree and the Mergers Directive is that only Greek companies fall within its scope, excluding cross-border mergers. In view of that, it is obvious that there is a need for an extension of the scope of the rule in question so as to cover the cases of mergers between Greek companies and companies from other Member States. This means that only Greek companies can benefit from the application of the Law Decree in cases of domestic mergers.

A second point that might need clarification in the process of transposition refers to the concept of 'permanent establishment'.<sup>28</sup> According to this Article the assets of the transferring company in a Member State become part of the 'permanent establishment' of the receiving company, assuming all the rights and obligations of the former transferring company.<sup>29</sup> The same provisions also exist under Greek civil and commercial law. Assuming that the transferring company is Greek, the concept of 'permanent establishment' will be defined according to Greek law,<sup>30</sup> which may not coincide with the definition of permanent establishment given by the law of the Member State of the receiving company.

Although the Greek provision defining the concept of permanent establishment is influenced by the definition of permanent establishment<sup>31</sup> included in the OECD Model Convention, the possibility of misinterpretation or disagreement cannot be excluded. A common definition of the concept of permanent establishment should be given at the European Union level. Moreover, Arts. 5, 6, 7 and 8 of the Mergers Directive should be fully and directly transposed into Greek law, since they provide rules which do not exist in Greek law.

Finally, Greek law must incorporate a provision that will give effect to the provisions of Art. 10 of the Directive. Such a provision would prevent the Greek tax authorities from imposing tax on permanent establishments, which are situated within Greek territory, on gains or profits resulting from the transfer of those permanent establishments when the transferring and the receiving companies are not situated in Greece but in some other Member State. Since Greece applies a system of taxing worldwide profits, the exemption provision of Art. 10.2 applies. Indeed, in cases where the transferring company is Greek, the Greek tax authorities have the right to tax any profits or capital gains of the permanent establishment resulting from the merger. This rule applies on the condition that Greece gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the state where the permanent establishment is situated. The taxation would be imposed in the same way and in the same amount as it would have been if the tax had actually been charged and paid. Consequently, it is a matter of political decision whether the Greek

authorities will retain such a right by fulfilling the condition mentioned above when implementing the Merger Directive.<sup>32</sup>

### 2.3.1. *The tax treatment of permanent establishments in Greece*

Article 99 of Law 2238/1994 provides that Greek legal persons<sup>33</sup> are subject to taxation on their total net income that accrues either within the Greek territory or abroad. The existing Greek legislation does not use the terms limited or unlimited tax liability, although domestic legal persons obviously have unlimited tax liability.

Article 100 of Law 2238/1994 provides that foreign legal companies are subject to taxation on:

- their net profits<sup>34</sup> that are attributable to a permanent establishment in Greece; and
- their net income from a source situated within the Greek territory.<sup>35</sup>

Foreign companies or institutions are considered to have a 'permanent establishment'<sup>36</sup> in Greece when:

- they maintain in Greece one or more establishments, agencies, branches, offices, warehouses, plants or laboratories and establishments for exploitation of natural resources;
- they are involved in exploitation of natural resources or manufacturing of agricultural products;
- they maintain a stock of merchandise through which they intend to fulfil their contractual obligations;

<sup>27</sup> The provisions lay under the title 'Tax incentives for the merger or transformation of companies into enterprises'. Other relevant provisions lay in Circular 25/73 and ΝΣΚ (Legal Council of State) Opinion 437/75. This Law was amended by Law 1882/90.

<sup>28</sup> Art. 4(1) of the Mergers Directive.

<sup>29</sup> Arts. 5 and 6 of the Mergers Directive. Also Art. 1(3) of the implementing Greek Law.

<sup>30</sup> Art. 5 of Act 3843/58. Under Greek law the concept of permanent establishment does not coincide with that of branch mentioned in Art. 2(c) of the Mergers Directive.

<sup>31</sup> Art. 5 of the OECD Model Convention.

<sup>32</sup> George Mavraganis, 'Greece: The implementation of the Mergers and the Parent-Subsidiary Directives and the ratification of the Arbitration Convention', *Intertax* 1994, p. 130.

<sup>33</sup> With the exception of banks and insurance corporations according to Arts. 99.1(a) and 105(3), (4), (5) of Law 2238/1994. See G. Mavraganis, 'The 1994 tax reform', *European Taxation* 1994, p. 219, C. Kypris, 'Greece-Tax reform', *European Taxation* 1993, p. 30.

<sup>34</sup> There is a working definition of what constitutes the net profits in Art. 99(12) of Law 2459/1997.

<sup>35</sup> See the landmark judgment 843/1984 of the Council of State which altered the court's approach to the above-mentioned Article. It has been acknowledged that these are two different cases of taxation of income of foreign legal entities and not just two conditions that have to be met concurrently. Thus, from the domestic law point of view locally sourced income can be taxed even if the foreign corporation has no permanent establishment in Greece. Consequently, even profits from a single, isolated business transaction in Greece will be subject to taxation. Also see Har. Anagnostopoulos, 'Tax treatment of income or profits of foreign enterprises derived from Greek sources', *European Taxation* 1987, p. 259. (The actual rates and figures are outdated.)

<sup>36</sup> Art. 100 of Law 2238/94.

- they participate in a partnership or in a limited liability company whose seat is situated in Greece;
- they conduct operations or provide services in Greece through an agent authorized and empowered to negotiate and conclude contracts on behalf of the legal person, as well as when such operations are conducted or services are rendered without an agent provided that they involve the composition of a study or plan, or generally involve the conduct of research programs or other activities of a technical or scientific nature.

Permanent establishments of foreign legal persons in Greece are treated as separate corporate entities dealing at arm's length for determining income tax liability.<sup>37</sup> They are only subject to taxation on their net profits that are attributable to their commercial, trading and industrial activity in Greece.<sup>38</sup> Thus to determine its taxable profits, a foreign legal person must establish a separate set of accounting records, in compliance with the 'Code of Books and Records',<sup>39</sup> for activities conducted within Greece's jurisdiction. The profits reflected by these accounting records would be deemed to constitute the legal person's net profits for activities conducted within the jurisdiction of Greece.<sup>40</sup>

## 2.4. The general anti-abuse provision of the Merger Directive

### 2.4.1. Introduction

Article 11.1(a) enables Member States to withdraw the benefit of all or part of the provisions of the Directive where it appears that a merger, division, transfer of assets or exchange of shares has tax evasion or tax avoidance as one of its principal objectives. This provision causes two problems in the process of its transposition in Greece.

First, the transposition of the safeguard provision must not lead to an abusive use of it by Member States in order to preserve the amount of their national tax revenue. This could result in the undermining of the scope and the meaning of the Directive. Secondly, Member States do not share the same views with regard to the interpretation of the term 'tax avoidance' mentioned in the safeguard provision. In Greece the concept of tax avoidance is not legally defined and, therefore, what falls within the meaning of tax avoidance in a Member State may be a lawful activity according to Greek law. This, of course, will cause a great deal of confusion in cases of mergers between Greek companies and companies of other states.

In the field of direct taxation, the development of a workable definition that encompasses transactions constituting 'abuse' is one of the major obstacles to achieving harmonization of taxation within the European Community. The concept of abuse is of major practical value since the anti-abuse provision of the Directive allows the Member States to withhold the application of the Directive.

### 2.4.2. The concept of abuse in the Merger Directive

It is often hard to distinguish between tax planning

and abuse.<sup>41</sup> One could interpret abuse in a broad sense, i.e. when one acts in defiance of the purpose and tenor of the Directive. The specific purposes of the Merger and the Parent-Subsidiary Directives are to eliminate restrictions, disadvantages or distortions that result from tax provisions. This should be seen as a broader attempt to simplify the regrouping of companies and to enable enterprises to adapt to the requirements of the Common Market, to increase the productivity and to improve their productivity at the international level.<sup>42</sup> The Merger Directive has as its underlying objective the elimination of the obstacles that exist in setting up multinational companies and groups.<sup>43</sup> These are commercial objectives and it would not be surprising if the ECJ introduced a commercial purpose test that can be traced back to the objectives that have been set for it.<sup>44</sup> It is a matter of abuse, then, when it is a matter of artificial arrangements.

This is made clear in the anti-abuse clause of the Merger Directive which states that 'when the merger is not carried out for valid commercial purposes such as the restructuring or the rationalisation of the activities of companies', the assumption may arise that the operation has tax evasion or tax avoidance as its principal objective or one of its principal objectives. When it is indeed a matter of valid commercial reasons, then abuse is out of the question.<sup>45</sup> Therefore, the motive of the transaction, i.e. commercial reasons and the question whether the transaction is in accordance with the purpose and tenor of the Directive or not, seem to match.

<sup>37</sup> See Art. 55 of Law 1041/80 concerning Greece's transfer pricing regulations.

<sup>38</sup> Loukas Theoharopoulos, [Θεοχαρόπουλος Λουκάς], *Ειδικό Φορολογικό Δίκαιο [Special Tax Law]*, (Sakkoulas, Thessaloniki 1994), p. 222.

<sup>39</sup> The 'Code of Books and Records' is the official Code that deals with all the substantive and procedural tax law issues with regards to definition and assessment of corporate tax base. All corporate and legal entities have to keep records of their transactions in order to prove and justify their tax base and net profits.

<sup>40</sup> This is the separate accounting principle. There are also provisions for a non-accounting assessment in cases where foreign legal persons do not keep accounts abiding with the Code of Books and Records.

<sup>41</sup> J. Albert Radler, 'Do national anti-abuse clauses distort the Internal Market?', *European Taxation* 1994, p. 311.

<sup>42</sup> This stated in both the Preamble of the Mergers and the Parent-Subsidiary Directives, first consideration.

<sup>43</sup> P. Farmer and R. Lyal, *EC Tax Law*, Oxford European Community Law Series (Clarendon Press, Oxford, 1994), p. 246.

<sup>44</sup> *Ibid.*, p. 260.

<sup>45</sup> In *Direct Cosmetics II* case (joint cases 138/86, 1988, ECR 3937), on the other hand, the European Court ruled that the concept of tax avoidance under Art. 27(1) of the Sixth VAT Directive can be interpreted in such a way that it also allows the Member States certain measures '... even where the taxable person carries on business, not with any intention of obtaining a tax advantage but for commercial reasons'. But the fact that when the behaviour of the taxpayer is based on commercial reasons it may well be a matter of tax avoidance, is based on the mere fact that VAT system is principally concerned with objective effects, whatever the intentions of the taxable person may be. The purpose of the Mergers and the Parent-Subsidiary Directives, however, is the stimulation of the economic objectives, so that, in principle, commercial reasons exist, tax avoidance is out of the question.

### 2.4.3. Supporting case law - the ECJ interpretation in the *Leur-Bloem* case

On 17 July 1997 the ECJ gave its first ruling on the interpretation of the Mergers Directive<sup>46</sup> in the context of a preliminary ruling initiated by the Dutch *Gerechtshof te Amsterdam* regarding the implementation of the Mergers Directive into Dutch Tax Law.<sup>47</sup>

Beyond ruling on the actual case put before it by the Dutch Court, the Court's decision in *Leur-Bloem* provides valuable guidelines for interpretation when considering a transaction for the purposes of the Mergers Directive. Furthermore, the decision contains a number of statements given by the Court on the interpretation of the anti-abuse clause of the Mergers Directive in general and may, therefore, also positively affect the application of the Parent-Subsidiary Directive in practice.

In the *Leur-Bloem* case, the Court of Amsterdam asked preliminary questions on the anti-abuse clause of the Mergers Directive. In this case, the taxpayer desired a tax-free exchange of shares, so that after the merger, he would be able to create a fiscal unity in order to make horizontal setting-off of losses possible. This means that the taxpayer tried to arrange his fiscal liabilities in such a way that all his corporate assets would be deemed as a single economic unit for tax purposes. The question presented is whether this is a sufficiently commercial reason with regard to Art. 11 of the Mergers Directive. Consolidation of losses is basically a fiscal objective. The tax planning which is the result cannot easily be characterized as a commercial objective, otherwise tax-saving constructions would no longer be a matter of abuse. On the other hand, one must realize that fiscal unity<sup>48</sup> is a provision offered by the Dutch fiscal legislation, and the fact that this results in a tax saving is inherent in such a provision. Using a provision that is offered by the law, should, in itself, be a valid commercial reason. Nothing forbids a taxpayer from making a favourable choice, as long as it is not in defiance of the law.

These considerations should be taken into account when investigating the extent to which commercial reasons are required on an application of the Directive at the European level. The application of the Directive and the benefits deriving can be, therefore, withheld, according to this clause, when the merger aims at tax avoidance or evasion to some extent. The fact that the text speaks of 'a principal objective' indicates that the Directive can also be withheld when other objectives exist, such as minor commercial considerations. The fact that the text also speaks of 'one of its principal objectives' seems to imply that, even when commercial motives carry as much weight as the abuse motive, the Directive can still prevail. Apparently it does not even have to be a matter of preponderant tax motives for the Directive to be excluded.

### 2.4.4. Tax evasion under Greek law

Greek law does not recognize a distinction between 'tax avoidance' and 'tax evasion'. Tax evasion is the only term used in the tax statutes.<sup>49</sup> Tax evasion is regarded as an offence against the state and public

interest, therefore a series of sanctions and penalties are imposed on the offenders. Sanctions may vary from those of an administrative nature, such as fines, to criminal prosecution and deprivation of certain civil or professional rights. The variation between administrative and penal sanctions should not lead to the conclusion that different types of criminal evasion behaviour are recognized. Tax evasion is the only offence under Greek law and the sanction imposed depends on the way it was committed.

### 2.4.5. The practical approach to the anti-abuse clause

The question arising out of the practical approach and application of the anti-abuse clause is whether it requires a concrete abuse test on a per case basis, or whether a general exclusion should be granted. The concrete 'per case approach' is in accordance with the spirit of the Directive's provisions, i.e. as a result of this method the Directive's benefits are withheld only in cases of specific abuse. It has also been argued<sup>50</sup> that the text of the anti-abuse clause in Art. 11 of the Mergers Directive does not allow a general exclusion. This conclusion is based on the fact that Art. 11 states that a Member State can withhold the application of Art. 11 based simply on the suspicion that tax avoidance or evasion is one of the objectives of the transaction.

The use of the verb 'appears' in the English text of the Directive leads to a different legal assumption than the texts in other languages of the other Member States.<sup>51</sup> The concept underlying this verb does not reassure the application of a discovery procedure for the verification of an alleged tax evasion. However, Community law has its own terminology that prevails, as even when the different language versions are identical, they do not necessarily have the same effect, since they apply in different legal systems. The different language versions are equally authentic and an interpretation of a provision of Community law thus involves a comparison of the different language

<sup>46</sup> Judgment of the Court of the 17 July 1997, Case C-28/95, *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondermingen Amsterdam 2* (Hof Amsterdam 26 January 1995).

<sup>47</sup> Otmar Thommes, 'European Court of Justice decides *Leur-Bloem*: The first case regarding the implementation of the EC Merger Directive', *Intertax* 1997, p. 359.

<sup>48</sup> Weber, 'A closer look at the general anti-abuse clause', p. 65. The concept of fiscal unity is that the taxpayer arranges his tax liabilities in such a way that all his corporate assets are deemed as a sole economic unit and are taxed as such.

<sup>49</sup> The term in Greek is 'φοροδιαφυγή' (*forodiafigi*) meaning the act or process of avoiding the legal and moral obligation of paying taxes.

<sup>50</sup> Weber, 'A closer look at the general anti-abuse clause', p. 66 and footnote 27. See also the contradicting view of Wattel presented in footnote 28.

<sup>51</sup> The Greek implementation Law refers to 'διαπιστωθεί' [*diapistothi*] which means verified. The French version refers to 'lorsque l'opération', 'le fait'. Furthermore, the Dutch and German versions call for facts and not speculations for the Member State to withhold lawfully the application of the Directive in case of tax evasion or avoidance.



versions.<sup>52</sup> Apart from that, the European Court normally adopts a teleological interpretation instead of a literal interpretation.

When comparing the different language versions of the Directive, the English version, using the verb 'appears' does not seem to require any special onus of proof within the UK tax law, in contradistinction to the discovery procedure implied in the French, Greek, Dutch and German texts. These texts are using terminology that leads to the assumption that Member States can only withhold the application of the Directive in cases of defined and conclusively assessed tax evasion. The ECJ, however, has not yet come up with a binding discovery procedure. The same applies with regard to the concrete per case or general exclusion approach of the anti-abuse clause.<sup>53</sup> The fact that a general exclusion is in principle allowed does not mean that the Member States can exclude certain situations at will.<sup>54</sup> The Member States have to comply with the proportionality principle. This is the outcome of the combination of the text and the purpose of the clause.

It is therefore possible to conclude from the *Leur-Bloem* decision that neither of the two Directives permits an automatic exclusion of certain companies or transactions based on predetermined presumptions in Member States' implementation laws. The Member States cannot exclude themselves from their obligation to conduct a thorough analysis of each individual case based on all the relevant facts and criteria, regardless of whether or not specifically addressed in the applicable anti-avoidance provisions of their domestic tax law.<sup>55</sup>

### 2.5. The anti-abuse clause as implemented in Greek law

Article 7(1) and (2) of the Greek implementation law for the Mergers Directive introduces the anti-abuse clause in cases of verified tax evasion or tax fraud. It is a constitutionally protected right of the taxpayers and an obligation of the State of Greece to impose administrative sanctions only after an official administrative discovery procedure. Any other practice would be illegal and in breach of the Greek Constitution. The combination of the provisions of Art. 20(1)<sup>56</sup> and (2)<sup>57</sup> leads to this conclusion. The verification of the illegal transaction is the outcome of an administrative procedure, therefore, the taxpayer is entitled to a prior hearing before any administrative action is taken. The Greek Constitution stands at the top of the legal hierarchy of the Greek legal system and all its provisions are absolutely binding. Any law or procedure that is not in compliance with its provisions is deemed as illegal and any result deriving from them is null and void.

The lack of a prior hearing would also be in breach of Art. 6 of the European Convention on Human Rights<sup>58</sup> that Greece has ratified. This Article provides supranational procedural rules that are applicable in civil cases. Apart from the established pieces of evidence gathered through the administrative discovery procedure, relevant facts, such as financial assess-

ments, can and will be used as auxiliary evidence in cases of tax fraud<sup>59</sup> or tax evasion.

In conclusion, it should be noted that the Greek implementation law with regard to the anti-abuse clause follows the way of clear and solid legal assessment of the facts that could constitute tax evasion. This administrative discovery procedure is a fair and conclusive method to investigate cases of abusive application of the Merger Directive aiming at a quick and speculative profit in compliance with the framework set out from the relevant judgments of the Court.

### 3. Conclusion

The implementation of the Mergers Directive in Greece has given rise to the issues illustrated above. In a future amendment of the Directive, Greece should negotiate the amendment of the Appendices so that their provisions are compatible with the current Greek tax law provisions. Furthermore, domestic legislation should adapt to the provisions of the Directive concerning the concept of 'exchange of shares', since no specific provisions exist under Greek law. Finally, Greece should introduce specific provisions concerning the discovery procedure with regards to the anti-abuse provision laid down in Art. 7(1) and (2) of the Directive. The Mergers Directive regulates the very delicate issue of direct corporate taxation removing all possible obstacles in the process of achieving the goal of the Common Market. It introduces a beneficial regime for the expansion of European companies within the Common Market, therefore its application is essential in order to prohibit any action that constitutes discrimination.

<sup>52</sup> Case 283/81 (*CILFIT*) (1982) ECR 3415, considerations 18 and 19.

<sup>53</sup> In para. 40 of the *Leur-Bloem* case the Court held that 'However, in order to determine whether the planned operation has such an objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to general examination. According to established case law, such an examination must be open to judicial review'. At this last point the Court made reference to its judgment of the 31 March 1993 in Case C-19/92, *Kraus* (1993), ECR 1663, para. 40.

<sup>54</sup> This derives from para. 44 of the Court's judgment on *Leur-Bloem*.

<sup>55</sup> Typical examples of anti-directive-shopping provisions are the implementation laws of Germany, France, Italy and Spain. The requirements set out there will be probably proved inapplicable with regard to the *Leur-Bloem* judgment. According to these provisions, the mere fact of a majority ownership by a non-EU holding company leads to the irrefutable presumption of an abusive transaction. This excludes the local subsidiary from the withholding tax relief under the Parent-Subsidiary Directive.

<sup>56</sup> 'Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law.'

<sup>57</sup> 'The right of a person to prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests.'

<sup>58</sup> 'In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing.'

<sup>59</sup> For the issue of tax fraud see 2.4.4. of this article.