MASTER THESIS

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„Analysis of Financial and Legal Aspects/Obstacles in Merger and Acquisition and *Societas Europaea*"

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ABSTRACT

English

Mergers and acquisitions (M&As) between companies became a good tool for improving the financial situation of the company over many years. The process of merger can create a synergy with other companies, improve their financial situation, and produce new and different goods, giving them a stronger position in the market. Despite the advantages of M&As, there could also be obstacles that can interfere with a successful deal. In addition, the new form of the European Company, Societas Europaea (SE), was adopted in 2001 and has become popular in the European Union in the last few years due to its unique benefits, which other legal forms do not have. Either M&A or SE still has its own financial and legal aspects and obstacles that are identified, analyzed, and evaluated in this paper.

Keywords: Merger, Acquisition, *Societas Europaea (SE)*, Finance, Tax, Law, Aspects, Obstacles.

Deutch

Fusionen und Übernahmen (M&A) zwischen Unternehmen wurden über viele Jahre hinweg zu einem guten Werkzeug zur Verbesserung der finanziellen Situation des Unternehmens. Der Prozess der Fusion kann eine Synergie mit anderen Unternehmen schaffen, ihre finanzielle Situation verbessern und neue und unterschiedliche Waren produzieren, was ihnen eine stärkere Position auf dem Markt verleiht. Trotz der Vorteile von M&A kann es auch Hindernisse geben, die einen erfolgreichen Deal behindern können. Darüber hinaus wurde die neue Form der europäischen Gesellschaft, *Societas Europaea* (SE), im Jahr 2001 angenommen und ist in den letzten Jahren in der Europäischen Union aufgrund seiner einzigartigen Vorteile beliebt geworden, die andere Rechtsformen nicht haben. Entweder M&A oder SE hat immer noch ihre eigenen finanziellen und rechtlichen Aspekte und Hindernisse, die in diesem Papier identifiziert, analysiert und ausgewertet werden.

Schlüsselwörter: Fusion, Übernahme, *Societas Europaea (SE)*, Finanzen, Steuern, Recht, Aspekte, Hindernisse.

LIST OF ABBREVIATIONS

EU	European Union
M&A	Merger and Acquisition
Merger Directive	Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law
OECD MC	Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital
PE	Permanent Establishment
SE Regulation	Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
Tax Directive	Council Directive 2009/133/EC of 19 October 2009 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

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INTRODUCTION

Our world cannot exist without businesses. So, in this regard, in order to improve the financial situation of the companies, many businesses merge with other companies because they can have more benefits than disadvantages. It should be noted that mergers and acquisitions are closely connected, so that in our life we often see the abbreviation of merger and acquisition - "M&A", which includes by itself both reorganization processes.

It is considered that mergers and acquisitions have a positive impact on business activity because when two companies create synergy and combine their own knowledge that has been accumulated over many years, they can increase the income of the company and develop new products that will contribute to its growth and success[1]. However, shall be stated that around 60% of the companies are not satisfied with the result of merger[2]. It can be caused by many unexpected obstacles that can arise in the process of the merger. For instance, if the due diligence process was not carried out properly before the deal, the financial results of the company were already not so good. As a result, the many expectations of the merger cannot be justified.

Additionally, it should be stated that the process of the merger and acquisition may also have many obstacles that can interfere with a successful deal. Many obstacles to the M&A deal are related to the ban on government bodies. Mostly of them are opposed on the grounds of the public and state interests or if there are assumptions of the market distortion. For instance, the competition council of the state where the companies are or will be located can prohibit a merger if, at its discretion, it violates the provisions of the internal market[3]. As a result, the companies after the merger or acquisition may have a dominant position on the market, which will have negative consequences for the market.

Despite the possibility of opposition from government bodies, it is important to note that before the state bodies review each case, shareholders must adopt the decision of the merger or acquisition and prepare all necessary documents[4]. This aspect can also be challenging because not all shareholders can support the ideas of other shareholders. Especially if there are many shareholders in the company. In this regard, it can appear that a solution of

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[1] M. Ikhwan Maulana Haeruddin 'Mergers and Acquisitions: Quo Vadis?' [2017] Management, Vol. 7 No. 2, 84.
[2] *Ibid.*, 85.
[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1, Article 8.
[4] *Ibid.*

protection should be provided for those who are not supporting the idea of mergers and acquisitions in order to propose an adequate level of protection for minority shareholders[5].

In addition, the merger and acquisition might also have some obstacles that can hinder the M&A process, for instance, the law of which member state of the EU will be applicable to the company if there are issues with real seat theory or incorporation theory[6].

Regarding the *Societas Europaea* many decisions about the merger or acquisition depend on the common decision of the general meeting. As well as, the necessary steps for the cross-border merger and establishment of *Societas Europaea* is very similar. As well as there is a slight difference on legal, financial and tax aspects. For instance, shareholders have the right to establish *Societas Europaea*, which is considered a new European company with many benefits that are discussed further in master thesis.

Before introducing some brief aspects of the *Societas Europaea*, it is mostly known by its abbreviation “SE" that abbreviation have to be used in the company names if the company has reorganized to SE[7]. It is worth noting that decisions for the *Societas Europaea* activities have to be made by the general meeting of the company[8]. For example, regarding the establishment of the SE, the transfer of the legal address to another contracting state and other aspects.

It is worth noting that the *Societas Europaea* can be established by four methods in accordance with the European Union’s Regulation No. 2157/2001[9]. Mostly, it can be established by the merger, but the SE formation process by the merger is not failing under the scope of the directive that is regulating mergers, even if the SE formation process is very similar[10]. One of the best advantages of the SE is that the company has the possibility of changing its legal address by moving its seat[11]. Despite this advantage, there are also cases when the issue of real seat theory and incorporation theory arises because the European Union’s member states have different aspects in their domestic legislation. Moreover, knowing that

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[5] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/1, Article 121(2).
[6] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 10-11.
[7] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 11(1).
[8] *Ibid*., Article 53.
[9] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 2.
[10] Jérôme Vermeylen, Ivo Vande Velde, *European cross-border mergers and reorganizations* (Oxford University Press, 2012) 61.
[11] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 8.

mergers and acquisitions deals are governed by the national laws, even in the case of cross-border mergers between both EU countries or in case of SE formation, there can be differences in the legislation, so that there can appear situations where one government institution can oppose the creation of the SE, for instance, if the creation of the SE is considered against public and state interests[12].

Generally, this paper will review the different financial, tax and legal aspects of the merged company and *Societas Europaea*. As well as, as obstacles that can occure in both type of companies. Considering that both types of company reorganizations, whether it is merger and acquisition or established *Societas Europaea*, have their strong and weak sides, it will be further examined. Considering that the aim of this master's thesis is to analyze the legal and financial aspects and obstacles of M&A and *Societas Europaea*, a more detailed description of these aspects is found in the next pages of this master thesis.

[12] *Ibid*., Article 8(14).

CHAPTER I – FINANCIAL, TAX AND LEGAL ANALYSIS OF ASPECTS OF MERGER AND ACQUISITION

1.1. WHAT IS A MERGER AND ACQUISITION?

1.1.1. Understanding the Merger and Acquisition

Mergers and acquisitions are, were, and will be a good tool for increasing the financial situation of the companies if there is a good strategy, a good team, and other important elements for a successful business. Overall, the merger is the combination of two companies with the goal of connecting their own knowledge and experience and building one company that will operate in the market[13].

However, not always the process of M&A goes smoothly, and owners have to deal with many issues, especially when it is a cross-border merger and different national law provisions apply to the deal. Having differences in the legislative acts stimulated at least some European Union' bodies to adopt a set of unified rules and procedures that at least partially facilitate the merger between member states of the EU. As a result, the first directive that dealt with cases of cross-border merger between EU countries was adopted on 26 October 2005 and was in force until July 19, 2017[14]. Later, this directive, which was previously aimed at mergers, was amended by the Directive (EU) 2017/1132 of 14 June 2017, relating to certain aspects of company law that include the provisions for mergers, divisions, and incorporation[15].

It shall be stated that the definition of M&A is usually used together to describe business reorganizations for both actions. However, it should be pointed out that the merger is considered a process when two or more enterprises combine into one, but the acquisition, when one company buys another company, can be considered a merger, especially if their business fields are similar[16].

The provisions of Directive (EU) 2017/1132 of 14 June 2017 have to be implemented into the national laws of member states because directives do not have the same direct effect as the regulation. As a result, when two companies are merged, national provisions of the country where the merged company will be located are applied to the process of merger or

[13] Stanley Foster Reed, Alexandra Reed Lajoux, and H. Peter Nesvold, *The art of M & A: a merger, acquisition, buyout guide* (4th ed, McGraw Hill, 2007) 3.
[14] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L 310/1.
[15] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/1.
[16] M. Ikhwan Maulana Haeruddin 'Mergers and Acquisitions: Quo Vadis?' [2017] Management, Vol. 7 No. 2, 84.

acquisition. Considering the fact that member states of the European Union have to transpose provisions of the directive into national legislation, they have differences and there are no unique law provisions even if they are transposed from the merger or tax directive.

The provisions of Directive (EU) 2017/1132 of 14 June 2017 have to be implemented into the national laws of member states because they do not have the same direct effect as the regulation. As a result, when two companies are merged, national provisions of the country where the merged company will be located that are transposed from the before-mentioned directive are applied to them[17]. The provisions of the directive are not applicable to cases when companies want to merge that are located in one country or in one of the countries[18]. It is worth noting that the directive that is aimed at the merger is not applicable to merger in order to establish *Societas Europaea*[19] because the formation of SE is regulated by the SE Regulation.

Duarte Brito the author of the book "Mergers and acquisitions: The industrial organization perspective" believes that the aim of a merger is to become powerful in the market by minimizing competitors in the market, the company might not receive any high incomes from the business activity if the merger company is located in a different member state than it was before[20]. The possible reason for that is that customers will look at other brands from other countries. Moreover, one of the reasons for mergers is to develop new unique products with synergy and other new ideas, but not only to get rid of competitors and be one in the market that can cause not only an increase in welfare but a decrease if the clients find other manufacturers because rarely do customers decide to buy typical products with a high price. Usually, this situation can be seen in the elastic market when products can be substituted.

With the process of merger, companies, by combining and sharing their own accumulated knowledge, can achieve very good results in their business activities. For example, after the merger, companies are not only limiting the competition on the market but also creating new goods and expanding the market. Additionally, mergers can achieve a decrease in manufacturing costs, which will result in profit growth[21].

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[17] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 4.
[18] *Ibid*., 5-6.
[19] *Ibid*., 7.
[20] Duarte Brito, Mergers and acquisitions: The industrial organization perspective (Kluwer Law International, 2006) 24.
[21] M. Ikhwan Maulana Haeruddin 'Mergers and Acquisitions: Quo Vadis?' [2017] Management, Vol. 7 No. 2, 85.

It was founded on the statistics that in 1985, there were 2676 M&A deals worldwide; in 1995, there were 20 278 cases; in 2005, there were 36 025, in 2015, there were 48 052 M&A deals and in 2022, there were 49 662. The very rapid growth of M&A occurred from 1985 until 2000. It was a time when new technologies were rapidly developing and the financial system was changing. For example, in Europe, 20 414 Merger and Acquisition deals were successfully completed in 2022, while in North America, 29 642 cases were registered in 2022, and Western Europe had 19 174 M&A deals in 2022. However, Eastern Europe in the 2022 year had a lower ratio of 2 384 cases, while Asia-Pacific in the 2022 year had 13 015 registered M&A deals[22].

One of the reasons why companies are merging is the change in the national law provision that will be applicable to their business[23]. Each country has its own domestic legislation that might differ from country to country, even if both countries are member states of the European Union, and to them are applicable provisions of directives. It shall be noted that directives almost always have provisions in which it is stated that some aspects are under the discretion of national legislation. For instance, some countries provide better shareholder or employee protection which exactly criteria are not provided by the directives or regulations.

Another aspect of why companies merge with another company located in a different state is to access better manufacturing resources. For instance, some countries have raw materials that are needed for goods production that are cheaper than those available in their home states[24]. Moreover, after the merger, new employees with big experience and talents with lower salaries can be hired that can help expand the business in the new market and increase profits of the company[25].

Organizations in the market that are close competitors with their goods and sector are brought together through the horizontal integration merger[26]. When businesses are comparable, some of their disparate assets can be complementary, horizontal firm merging can result in predicted performance benefits because horizontal integration lowers business expenses and minimizes the expenses of doing business activities[27].

[22] 'M&A Statistics', < https://imaa-institute.org/mergers-and-acquisitions-statistics/> accessed 16 May 2023.
[23] Stefan Grundmann, *European company law : organization, finance and capital markets* (2nd ed, Intersentia, 2012) 586.
[24] *Ibid*.
[25] *Ibid*.
[26] Kaspars Mucenieks 'Company Merger and Acquisitions Financial Result Evaluation' [2020] Humanities and Social Sciences: Latvia Volume 28, Issue 1, 48.
[27] *Ibid*.

In a merger, dynamic efficiency can arise when two companies merge, one working on improvement and expansion by developing new goods and the other providing skillfulness and knowledge[28]. As a result of synergy, companies can overperform their competitors by creating, expending, and creating goods and services for the national, European, or even global market.

There is an opinion that the twofold marginalization issue may be resolved via mergers, which would increase allocative efficiency. This can be considered an advantage because, due to the fact that each successful monopoly seeks to maximize its profit by limiting productivity in order to establish excessive costs, the end result constitutes a dual constraint on output[29].

A very interesting aspect was mentioned in the book of Alistar Lindsay, precisely if the deal is able to be considered to be establishing or consolidating a dominant position when, firstly, the combined group has a competitive advantage in a specific industry yet does not dominate in others, and its percentage of market share across all segments is less than the threshold typically considered to provide single company supremacy. As a result, two combining entities are going to be capable of successfully increasing prices after the deal despite having comparatively small combined market shares but being very similar in the availability of the distinct items[30].

1.1.2. Types of Mergers

Usually, for description of merger are used four definitions and options for mergers. Those types are horizontal, vertical, conglomerate, and congeneric[31].

A merger between companies is considered horizontal when two enterprises with similar fields of production or services decide to merge. This method has more benefits than issues. For instance, on the positive side, it should be mentioned that after the merger, companies can increase productivity and the number of clients, especially if the production is unique and there are no more competitors. However, it is worth noting that with the increase

[28] Jérôme Vermeylen, Ivo Vande Velde, *European cross-border mergers and reorganizations* (Oxford University Press, 2012) 61.
[29] *Ibid*., 12.
[30] Lindsay Alistair, *The EU merger regulation: substantive issues* (4th ed, Sweet & Maxwell, 2012) 44.
[31] Sandra Feldman, 'Companies buying companies: The different types and methods of mergers and acquisitions' (wolterskluwer.com, 7 November 2022) < https://www.wolterskluwer.com/en/expert-insights/the-different-types-and-methods-of-mergers-and-acquisitions> accessed on 18 June 2023.

in market share in the internal market, could be the reason for obstacles that are related to the competition law and a potential distortion of the market[32].

The next example of a merger is the vertical. The merger can be described as vertical when two or more organizations that by nature have different services or goods are merged, but they are both related to one type of goods, but the roles are different[33]. This can be seen as the merger between the producer of the goods and supplier because both parties are involved in different procedures, however their aim is to promote one product[34]. With this type of merger, there can be decreased costs because, for example, there will not be a need to pay money for logistics or marketing services, but it already has the possibility of being stronger in the market[35].

A conglomerate merger can appear when companies with absolutely different niches in the market merge[36]. With the conglomerate merger, companies can produce new goods that will be created by the knowledge of two different companies. As a result of which, with the synergy, they can have a better position in the market and a larger number of shares. However, most likely, this type of merger will not be considered to destroy the internal market.

The last type of merger is called a "Congeneric merger". It appears when two or more organizations have merged that have similar fields of service provision or goods production but provide differentiated goods even though they are in one field of production[37]. For instance, both companies produce drinks; one is aimed at soft drinks, and the other produces juices. The congeneric merger can help enterprises expand their business in new markets via new distribution options[38]. This practice will help to receive new shares in the market and provide new products.

It should be noted that not all mergers and acquisitions meet expectations regarding rapid growth of the company, decrease of raw material costs, and other expenses. According

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32 *Ibid.*

33 Abigail Hart, 'Merger' (dealroom.net) < https://dealroom.net/blog/definition-of-vertical-mergers-and-examples-of-vertical-m-a-deals#:~:text=Vertical%20mergers%20definition%20is%20the,goals%20of%20improving%20their%20company> accessed on 25 June 2023.

34 *Ibid.*

35 *Ibid.*

36 Will Kenton, 'Conglomerate Mergers: Definition, Purposes, and Examples' (Investopedia, 19 January 2021) <https://www.investopedia.com/terms/c/conlgomeratemerger.asp> accessed on 26 June 2026.

37 'Congeneric Mergers' (dealroom.net) <https://dealroom.net/faq/guide-to-congeneric-mergers#:~:text=information%20on%20that.-,What%20Is%20a%20congeneric%20merger%3F,or%20the%20process%20of%20production> accessed 26 June 2023.

38 *Ibid.*

to statistics from the 2014 year, more than 60% of the companies that merged did not achieve the expected results[39]. The reason is that mergers are sophisticated and complicated processes that require an investigation process in order to analyze all potential advantages, risks, and obstacles that might appear after and during the merger that can change the expected outcome.

It is also important to note that mergers and acquisitions can decrease competition in the internal market, which, on the one hand, is an advantage for businesses. On the other hand, with reduced free competition in the market, the price of the goods can be increased by the producers, which can negatively impact end users[40]. However, if we are looking at the positive aspects of mergers, then it should be stated that with the merger of similar products, companies can decrease their fixed costs that are not dependent on the produced amount, such as security services. As a result of that, the common earnings from business activities will grow, and the cost of raw materials will decrease[41].

1.2. FINANCIAL AND TAX ASPECTS OF MERGER AND ACQUISITION

1.2.1. Financial Aspects of the M&A

Additionally, to the legal review of documents that are related to the business activity of the target company, it is necessary to review indicators of the financial situation of the company. By reviewing the annual financial statements for historic periods before buying the company, can be seen the weak and strong sides of the company. For example, attention has to be focused on the indicators that show the liquidity of the company, rentability, and other financial indicators[42]. These factors can create the overall view of financial aspects in the potential company merger.

When there is an assumption that the merger between companies can lead to a dominant position in the market, then all aspects and factors shall be accessed by the competition council of other government bodies. Under its discretion, even a company acquisition or merger can strengthen its position on the market, but not always it is considered harmful because, in the case of *Coca-Cola Enterprises and Amalgamated Beverages,* the court found that the acquired company - *Amalgamated Beverages* will not change its already strong

[39] Ikhwan Maulana Haeruddin 'Mergers and Acquisitions: Quo Vadis?' [2017] Management, Vol. 7 No. 2, 85.
[40] Duarte Brito, *Mergers and acquisitions: The industrial organization perspective* (Kluwer Law International, 2006) 1.
[41] *Ibid*., 5.
[42] Kaspars Mucenieks 'Company Merger and Acquisitions Financial Result Evaluation' [2020] Humanities and Social Sciences: Latvia Volume 28, Issue 1, 53-56.

position in the market for *Coca-Cola*[43]. As well, if we are looking at the financial aspects of the merger and the possibility that the merger will increase prices after the merger. Then it has to be stated that the SSNIP test can be applied by the competition council of the country[44]. The SNNIP test is an indicator that shows if the potential merger, being in the form of a monopoly, can in the future increase prices by five to ten percentage points and how it will change the general view of company incomes[45].

For instance, if, after the SSNIP test, the real drop in revenue per unit exceeds the threshold of significant losses, it shall be pointed out that a rise in prices will be considered successful for company business activity[46]. It means that not always increasing prices will be profitable for the companies because consumers might find other goods that are similar and cheaper. However, if we are looking at increasing prices in monopolies after the company merger, then it shall be stated that they cannot establish very high prices as their activities are under the investigation of government bodies to make sure that the situation in the market does not have negative consequences from being in a dominant position.

Another example of an index that is used in the assessment of merger concentration is the Herfindahl Hirschman Index, known as the "HHI" index[47]. This index is an indicator for assessing the concentration of the market and is commonly used when two potential firms want to merge. Each company has an approximate number of market shares, and if after the merger, the total result of two companies reaches about 1800 or more, then this is considered almost a monopoly, which in some cases can lead the market to disruption, so it is assessed by the hosting state competition council whether to allow the merger. If the indicator is less than 1000, then after the merger the company will not lose its dominant position, which could have a bad effect on customers[48]. Taking all this into account, many state bodies, when assessing documents in specific potential merger cases, evaluate the indicators and make the final decision on allowing the merger or prohibiting it, because this can lead to a disruption of the internal market not only in a particular country but also in the whole European Union that can

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[43] Peter Verloop, *Merger control in the EU : a survey of European competition laws* (3rd rev. ed., Kluwer Law International, 1999) 27.
[44] Duarte Brito, *Mergers and acquisitions: The industrial organization perspective* (Kluwer Law International, 2006) 6.
[45] Andrea Amelio, Daniel Donath, 'Market definition in recent EC merger investigations: The role of empirical analysis' [2009] Law & Economics, Concurrences N° 3-2009, <https://ec.europa.eu/dgs/competition/economist/merger_investigations.pdf>, page 1 accessed on 5 June 2023.
[46] *Ibid*.
[47] Duarte Brito, *Mergers and acquisitions: The industrial organization perspective* (Kluwer Law International, 2006) 8.
[48] Ibid.

lead to bad financial consequences, because in the EU no barriers or restrictions to trade among the participating countries.

1.2.2. Tax Aspects of the M&A

Historically, all countries had their own different legislation for M&A deals, but with the establishment of Directive 90/434/EEC, the unified legal framework of tax provision for cross-border restructuring, such as mergers and divisions, the similar laws within whole European Union were established[49]. With the establishment of unified laws, the question of different tax systems in the member states was mostly resolved. However, now there are issues which the Tax Directive cannot solved. As a result, the reorganization process from tax perspectives became simpler for organizations and state enterprises to participate in because it included provisions for various requirements that all member states had to meet for minimizing obstacles.

Council Directive 2009/133/EC[50] has been in place to govern the tax aspects of cross-border M&A between contracting states of the European Union and aspects related to the *Societas Europaea*. Additionally, if there are cases of cross-border transactions, entities by itself for the idea of intention of merger are not subject to taxes[51]. However, if there is an issue of merger and acquisition within the territory of one member state of the EU, then the provisions of Directive 2011/35/EU are applicable[52]. Considering the aspect of taxation of any reorganization forms, it has to be stated that there is an opinion that the reorganization process is a good method to increase the amount of taxes paid to the government. Nevertheless, if we are looking at the example of national company restructuring, then it should be pointed out that companies after the reorganization do not immediately pay taxes to the state but only after a certain moment, when the assets that were applied to the organization begin to generate income for the enterprise, which can definitely be considered an advantage[53].

Furthermore, at the stage of company reorganizations in the European Union, it is important that the tax system be identical as more as possible not to create unfavorable

[49] Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, *Introduction to European tax law on direct taxation* (5th edition, Spiramus Press, 2018) 170.
[50] Council Directive 2009/133/EC of 19 October 2009 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 [2009] OJ L 310/1
[51] Terra, B. J. M., *European tax law. Volume 1, General topics and direct taxation* (7th edition, Wolters Kluwer, 2019) 280.
[52] *Ibid*.
[53] Ibid.

conditions for companies. Given the fact that the European Union considers the common internal market, and any barriers are prohibited, including the financial aspects of mergers, acquisitions, and other formats of reorganizations, it is important that the system is the same for all countries without any methods of discrimination[54].

From the perspective of a merger directive that covers tax aspects of mergers, transfers of assets, as well as division[55] and it provides that companies can pay taxes not right away after finishing the reorganization process but later. It is not considered an avoidance of paying taxes; it is considered a possibility to develop a business and later pay taxes, which is considered in the favor of entrepreneurs[56].

It is worth noting that only when the investors sell their company shares, as a result of which the concealed assets are ultimately recognized, can taxes be paid to the government. During the process of M&A and when shareholders receive their new shares, no taxes are paid[57]. Similarly, paying later taxes also applies to *Societas Europaea* when the company relocates its registered office to another contracting state of the European Union[58].

Another aspect is related to the taxation of capital gains, which involves the permanent establishment of an organization. For example, the country of the moving firm to another state eliminates its taxable right on the profits from capital corresponding to the assets and liabilities that are transmitted in a cross-border restructuring if such assets and liabilities fail to contribute to a permanent location within that country[59].

Considering the fact that there can be a situation of double taxation in the merger case between the companies, in the United States of America, companies might use the principle of leverage, in which the amount of money that has to be paid to lenders is usually not covered

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[54] Council Directive 2009/133/EC of 19 October 2009 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 [2009] OJ L 310/1, recital 2.
[55] *Ibid*.
[56] Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, *Introduction to European tax law on direct taxation* (5th edition, Spiramus Press, 2018) 175.
[57] Council Directive 2009/133/EC of 19 October 2009 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 [2009] OJ L 310/1, Article 4(1).
[58] *Ibid*., Article 12.
[59] *Ibid*., Article 10.

by taxes for the recipients[60]. As well, if we are looking at what is more beneficial for the seller, it is the share deal because they have to pay less taxes[61].

In addition to that, it shall be mentioned that the aspect of leveraged buyouts is not properly regulated by the legislative acts of the European Union, neither directives nor regulations[62]. Moreover, the national laws do not provide concrete laws for this issue; however, this principle can also be found in EU practice. Overall, the principle in the EU and USA is similar: dividends to stockholders cannot be paid if the company's net assets are smaller than the company's subscribed capital and reserves[63].

However, it should be stated that in some cases, European tax aspects are similar to those in the USA. For instance, the old owners of the acquired company will need to pay taxes when they sell their assets to the new owners of the company[64]. Moreover, there are situations in USA practice where the seller can have the possibility of prolonging the process of tax payment. Precisely, they should not pay taxes at the moment when they have received the money from selling shares but later, and it is not considered tax avoidance or aggressive planning[65].

It is worth noting that the amount of taxes paid depends on each country where the company will be established after the merger or before that[66]. Some countries have higher tax rates, and some countries have lower rates. For instance, if we are looking at the European Union's countries, the highest corporate income tax rate in 2023 is in Portugal in the amount of 31,5%[67], the lowest is in the Hungary in amount of 9%[68]. The practice of tax planning can also increase the incomes of companies doing business because they will not need to pay higher taxes to the state budget. So, this aspect is always taken into account by many companies as well as in the practice of *Societas Europaea* because, with the transfer of the seat, they can also change the tax system for their company.

[60] Stanley Foster Reed, Alexandra Reed Lajoux, and H. Peter Nesvold, *The art of M & A: a merger, acquisition, buyout guide* (4th ed, McGraw Hill, 2007) 308.
[61] *Ibid*., 319.
[62] Andrea Vicari, *European company law* (De Gruyter, 2021) 254.
[63] *Ibid*.
[64] Stanley Foster Reed, Alexandra Reed Lajoux, and H. Peter Nesvold, *The art of M & A: a merger, acquisition, buyout guide* (4th ed, McGraw Hill, 2007) 318.
[65] *Ibid*, 320.
[66] *Ibid*., 365.
[67] Sean Bray, '2023 Corporate Income Tax Rates in Europe' (txfoundation.net, 14 February 2023) < https://taxfoundation.org/corporate-tax-rates-europe-2023/#:~:text=On%20average%2C%20European%20OECD%20countries,was%2023.4%20percent%20in%202022> accessed 13 June 2023.
[68] *Ibid*.

Furthermore, if there are cases where two companies want to merge, the double tax residence is applicable. Moreover, if these companies are located in third countries, then the directive on mergers will not be applicable[69] because the Directive is aimed at the European Union's countries. Another aspect of the merger that will be highlighted is the exit tax of European Union countries. Based on this provision, it should be noted that the exit tax is more advantageous for the state because, in the case of a cross-border merger, the member state of the European Union has the possibility of receiving paid taxes from the company before it changes its jurisdiction[70]. As a result of which, if the merged companies are not located in one country, i.e., it is not a domestic merger, the state will not have the right to tax the income from the shares or gains on the assets, so the exit tax is applied in almost all states of the member states of the European Union[71].

1.3. LEGAL ASPECTS OF MERGER AND ACQUISITION

With the development of the Merger Directive, businesses have the option of abandoning the process of dissolving a firm with whom another corporation has chosen to combine. Instead of a liquidation procedure, they may simply sell all of their assets and other resources, halt all commercial operations, and go out of business[72]. This procedure helps to simplify the already rather complicated entire process of mergers and acquisitions, which can definitely be considered a plus and follows from the provisions of the Merger Directive.

It is necessary to mention that in the case of a merger, the national provisions of the country where the company will be operating after a merger may be, on the one hand, an advantage and, on the other hand, an obstacle to concluding a deal[73]. So, before making an M&A deal, examine the legislation of both countries.

If we are looking at examples of international practice, for instance, in the United States of America, it should be pointed out that when the company is merged with the assets, the new owner does not receive from the previous owner any liabilities or obligations that

[69] Harm van den Broek, 'Cross-Border Mergers within the EU: Proposals to Remove the Remaining Tax Obstacles' [2011] EUCOTAX Series on European Taxation, 33, page 9 <https://wkldigitalbooks-integra-co-in.uaccess.univie.ac.at/Customer/Home/BookDetails?TitleGUID=C4209735-FBAA-4791-813E-8043FBB9F4B2> accessed 28.06.2023.
[70] *Ibid.*, 13.
[71] *Ibid.*
[72] Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, Introduction to European tax law on direct taxation (5th edition, Spiramus Press, 2018) 171.
[73] Jérôme Vermeylen, Ivo Vande Velde, European cross-border mergers and reorganizations (Oxford University Press, 2012) 11.

might not be beneficial for the new owner[74].However, if we are looking at this situation from the clients and customers perspectives, the clients will not be satisfied if they cannot ask for compensation from the new owner. In this case, the customer has a right to seek remuneration from the old owner if he has acted in bad faith. However, this aspect has changed over the years because, in 1975, Howard L. Shecter stated that it is necessary to examine all perspectives of the company in order to avoid liability from the previous owners in the asset purchase deal[75].

Looking at the laws of the member states of the European Union, it shall be stated that a similar provision of liability for the new owner is also found in the domestic legislation. For instance, in accordance with the Commercial Code of the Federative Republic of Germany "Handelsgesetzbuch", Section 25(1), when the person has acquired an already existing business, he is responsible for any resulting damages[76] if the company existed before acquisition, even if the previous owner had acted in bad faith. In addition, with the liability, he shall be responsible for any occurred claims from the other people[77]. Similar provisions are found in Section 38(1) of the Commercial Code of Austria, which states that when a person acquires the company, he receives liability for the company's actions as well as any claims from third parties if the seller and buyer of the company have not agreed that for any claims that are related to the past activities of the company before acquisition, the previous owner is responsible[78].

The Directive (EU) 2017/1132 on mergers does not provide the provisions and requirements for the protection of the stockholders of the companies that are merging. The protection is subject to the domestic country's legislation where the company will be located[79]. For instance, shareholders might seek protection if their interests can be harmed by a merger by asking to reimburse the amount of money that is proportionate to their shares or ask for remuneration if the value of their stock has decreased[80]. The protection of the creditors and any third parties whose rights might be infringed shall be compensated in accordance with recital 51 of Directive 2017/1132/EU[81].

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[74] Stanley Foster Reed, Alexandra Reed Lajoux, and H. Peter Nesvold, *The art of M & A: a merger, acquisition, buyout guide* (4th ed, McGraw Hill, 2007) 262.
[75] Howard L. Shecter, 'Selected Risk Issues in Merger and Acquisition Transactions' [1997] 51 U Miami L Rev 720.
[76] Commercial Code of the Federative Republic of Germany "Handelsgesetzbuch", Section 25(1).
[77] *Ibid*.
[78] Corporate Code of Republic of Austria "*Unternehmensgesetzbuch"* 1897, Section 38(1).
[79] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/1, Recital 3.
[80] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 18.
[81] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/1, Recital 51.

Knowing that after the cross-border merger is performed, it cannot be considered invalid[82]. In that respect, if someone has brought a suit to court regarding the possible non-completion of all merger steps and requirements, it will not be taken into account. However, if someone is seeking compensation because the previous owner harmed him, then the court can make a decision for loss compensation. Moreover, if the court finds that all formalities and documents were not prepared correctly, it will ask for the explanation of the competent authorities, who have approved the merger[83]. In contrast to the national merger, if the competent national authority has considered that merger to have been done unlawfully in accordance with the requirements of the domestic legislation[84].

Article 49 of the Treaty of the Functioning of the European Union provides that any obstacles regarding the freedom of establishing within contracting countries of the EU has to be avoided[85]. As a result, it gives the possibility to establish, merge, or divide companies within all countries of the EU. For instance, this also includes the possibility to have and work for the company in one country, then transfer this company to another member state that has more advantageous tax or legal provisions, and then create a branch in the first state from which the company has moved to the second country. This can help to be involved in both markets; however, pay taxes in the country that has a lower corporate tax[86].

Based on the aforementioned information, it shall be pointed out that this aspect of having two enterprises and paying taxes in a country with an advantageous tax system was reviewed by the European Court of Justice to determine whether it is considered legal practice. The first old case that will be analyzed is the case of Daily Mail PLC[87]. The daily mail case is one of the basic cases that is used in the scope of legal seat transfer. Precisely the Daily Mail PLC was established in the United Kingdom, but the company management decided to change its headquarters to the Netherlands because there is a beneficial tax system for corporations. Actually, the transfer of seats is not prohibited, but there was an issue that it wanted to perform actions from the branch that is located in the UK[88]. In the judgement of the court was stated that the transfer of the seat is not compatible with Article 49 of the TFEU regarding freedom of establishment, precisely when the company wants to move its management office to another

[82] *Ibid*., Article 108(1)(b).
[83] *Ibid*.
[84] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 23.
[85] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1 , Article 49.
[86] Andrea Vicari, *European company law* (De Gruyter, 2021) 22.
[87] The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC [1988], High Court of Justice, Queen's Bench Division - United Kingdom. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0081.
[88] *Ibid*.

country in order to use the tax benefits of this country while operating through the branch, which is considered a violation from the point of view of EU company law[89].

It is worth noting that the previously mentioned aspect was reviewed from a different scope in the case C-212/97, commonly known as “Centros”, with very similar case facts. In the case of “Centros” two residents of Denmark were the founders of Centros Ltd. That was located in England, which is governed by the company law of the United Kingdom. Additionally, residents of Denmark wanted to establish the branch in Denmark in order to work there but applied for the UK company as it was considered the main company because the provisions of capitalization were more favorable in the UK[90]. In this case, contrary to the outcomes of the case on Daily Mail, the European Court of Justice has ruled that there shall not be any restrictions regarding the law under which the company is incorporated or the law under which the company’s registered seat is located. Moreover, the contracting state of the European Union shall not prohibit the company from being established, even if it is related to better protection of the creditors[91].

Regarding the liability of the shareholders, it shall be stated that usually the shareholders are protected, and in many cases they are not liable for the damages that occur. However, if the company's illegal and wrongdoing actions have caused damages to third parties, at the discretion of the court, the shareholders of the company can be liable for the damages and shall compensate all losses if the serious damage is[92].

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89 Andrea Vicari, *European company law* (De Gruyter, 2021) 22.

90 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999], Case C-212/97. Available at: https://curia.europa.eu/juris/liste.jsf?language=en&num=c-212/97.

91 Andrea Vicari, *European company law* (De Gruyter, 2021) 23.

92 Ibid., 232-233.

CHAPTER 2 – FINANCIAL, TAX AND LEGAL ANALYSIS OF ASPECTS OF *SOCIETAS EUROPAEA*

2.1. WHAT IS THE *SOCIETAS EUROPAEA*?

The *Societas Europaea*, often abbreviated as SE, is considered the European company, and by its form, it is considered the joint stock company having the status of a legal person[93]. For the establishment of SE, there have to be observed the legal requirements for the *Societas Europaea* establishment that are provided by Council Regulation No. 2157/2001 of October 8, 2001 on the Statute for a European Company (SE)[94].

The prerequisites for the creation of a common legal company within the whole European Union, to whom unified legal rules will be applied, were found many years ago. As a result of which, the European Commission adopted on October 8, 2001, a regulation that has direct effect on all Member States and entered into force three years after its adoption on 8 October 2004[95].

The establishment of SE can be done in accordance with the provisions of Regulation 2147/2001[96]. However, it should be stated that principles of competition have to be taken into account in order for *Societas Europaea* not to distort the internal market of the European Union[97]. The *Societas Europaea* is typically formed by merging with another company. However, merger directive provisions do not apply to this type of merger[98]. For instance, the SE can be established by merger with a subsidiary if it is located in another member state of the European Union[99]. Moreover, in this case, the main company should not perform any dissolution actions that are considered advantageous because they can reduce costs and time for carrying out this process[100].

The Regulation 2157/2001, in article 2, provides requirements for the Societas Europaea formation[101]. SE can be established if two joint stock companies that are located in different member countries of the EU are merged[102]. Additionally, the formation of *Societas*

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[93] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 1(1-3).
[94] *Ibid*.
[95] *Ibid*., Article 70.
[96] *Ibid*., Article 2.
[97] *Ibid*., Recital 2.
[98] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 7.
[99] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Recital 11.
[100] *Ibid*.
[101] *Ibid*., Article 2.
[102] *Ibid*., Article 2(1).

Europaea can be successfully implemented if at least two companies, specifically a joint stock company and a limited liability company, are located in different EU countries or if at least two companies have had a subsidiary or branch in another state for at least 2 years[103]. To continue with the options of SE establishment, it shall be noted that the *Societas Europaea* can be formed if any type of legal person, whether private or public, creates an SE daughter company if their legal address and registered office are located within the European Union and they are located in different member countries, or if at least two legal persons have a daughter company or subsidiary in another EU country[104]. In addition, the last way to form a SE is to merge the joint stock company with its subsidiary that has been located in another EU country for at least 2 years[105]. Usually, the form of *Societas Europaea* is chosen by big companies with big capital, because SE itself requires a minimum share capital of 120 000.00 EUR[106]

It is important to note that a big intention is aimed at the protection of employees that are working in the company before it is formed into Societas Europaea. They have a right to be involved in the adoption of decisions and in other questions related to the establishment and requirements of the SE in accordance with Directive 2001/86/EK[107]. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees is aimed at the protection of employee, that their voices have to be taken into account, for instance they can act as the consultation bodies for the company management. Considering that in many reorganization processes employees are less protected, this can give more protection in accordance with the directive[108].

For successful business activity, it is important to have a high level of professionals in the company's management. The requirements for the number of representatives either in the management board or supervisory board are usually regulated by the national law where the legal enterprise is established, and in this case, the Societas Europaea is not an exclusion. In contrast, the legal form of the SE has its own regulations regarding the number of board representatives, and usually the number of management representatives is lower than in regular joint-stock companies. As a result, the company has the option to decrease expenses on salaries

[103] *Ibid*., Article 2(2).
[104] *Ibid*., Article 2(3).
[105] *Ibid*., Article 2(4).
[106] *Ibid*., Article 4(2).
[107] *Ibid*., Recital 19 and 21.
[108] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L 294/1.

for the management board[109]. However, the SE Regulations provide the possibility for the state where a *Societas Europaea* is located to establish the precise number of people working in the management[110]. As a result, establishing a concrete number of management board members is at the discretion of the national laws of the SE-hosted country.

Before the SE is established, there are slightly complicated procedures that require a lot of actions, permits, and positive decisions by employees and shareholders in order to form the *Societas Europaea*. Before the SE is formed, there has to be a notification published in the Official Journal of the European Union with the necessary information, for instance, the name, registration number, the legal address of the future SE, and other aspects[111].

As before mentioned regarding the necessity of the workers participation in the adoption of any decisions, such as legal address changes, it shall be stated that there are countries in the EU that are providing either lower or stronger employee participation[112]. Considering this aspect, it shall be stated that some companies believe that this obligation can be considered an obstacle from a business perspective. For instance, employed people might oppose the adoption of certain decisions in accordance with the domestic legislation where the company is located. As a result, in order to decrease the chance of any obstacles, companies can form the SE in the member state that provides the lowest level of employee protection.

There are various points of view on the effectiveness of employee participation in business activities. Some people believe that worker participation is useless. In contrast to this, other people believe that when in the company are adopted additional legal provisions in accordance with which the employee has a right to participate in the adoption decision, then they can improve the company's economic situation or other aspects[113]. This is because the ideas and proposals of the employee would be taken into account.

Knowing that in the two-tier system SE management board actions and decisions are reviewed by the supervisory board, there might arise issues of the conflicts of the interests[114]. In order to avoid these issues, an independent director can be employed in the *Societas*

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[109] 'Societas Europaea: The main advantages of establishing a European Company' (accase.com, 13 October 2022) < https://accace.com/european-company-main-advantages-establishment/> accessed 18 June 2023.
[110] *Ibid*.
[111] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, article 14(1).
[112] Lars Hornuf, Abdulkadir Mohamed, Armin Schwienbacher, 'The Economic Impact of Forming a European Company' [2019], JCMS: Journal of Common Market Studies Volume 57, Issue 4, 659.
[113] *Ibid*., 661.
[114] Nicola de Luca, *European company law* (2nd edition, Cambridge University Press, 2021) 298.

Europaea who will help to solve issues regarding the salaries and appointment of the representative bodies[115].

2.2. FINANCIAL AND TAX ASPECTS OF *SOCIETAS EUROPAEA*

The establishment of a common market without borders or discrimination is one of the main tasks of the European Union. So, from this perspective, it was also necessary to implement not only unified provisions for *Societas Europaea* legal actions, such as establishment and transferring companies within the European Union, but also tax aspects that are significantly important for supporting the actions mentioned before. It should be noted that without common tax provisions for the transfer of *Societas Europaea's* legal address, it would be difficult to perform it because when each country has its own taxation policy and requirements, there could be issues of double taxation, which has to be avoided[116]. As a result of which, in order to avoid any tax issues and barriers within the whole European Union, Council Directive 2009/133/EC of October 19, 2009, was adopted, which is also applicable for all member states of the European Union[117] if they need a SE legal address transfer.

It shall be stated that the tax provisions for *Societas Europaea* are very similar to the taxation principles of other companies. Precisely, the taxes can be paid from the *Societas Europaea's* incomes, dividends, interests, incomes from the SE's permanent establishment or subsidiaries, transfer pricing, and other issues[118].

Additionally, it shall be added to the double taxation that the taxes have to be paid in one country where the company has a residence; otherwise, there will be a risk of double taxation that is not in accordance with the OECD Model Tax Convention on Income and on Capital of the 2017 year. The OECD MC by itself is aimed at avoiding double taxation. So, in accordance with Article 4 of the OECD MC, the resident of the state can be the company that has the residence, place of management, domicile, etc[119]. Knowing that there can occur situations where a company has its legal address, or in other words, its place of management, but the place from which the company's decisions are adopted, it can occur that both countries

[115] *Ibid*.
[116] Council Directive 2009/133/EC of 19 October 2009 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 [2009] OJ L 310/1, Recital 14.
[117] *Ibid*., Article 19.
[118] Sanaa Kadi 'Tax Issues and Tax Treatment of the Societas Europaea' [2013] NJCL No. 2 (2013), p. 17 <https://journals.aau.dk/index.php/NJCL/article/view/2896> accessed 28 June 2023.
[119] OECD Model Tax Convention on Income and on Capital 2017 Article 4.

will be considered residence countries of the enterprise[120]. As a result, the question of which country shall pay the taxes on income and capital can arise. From this perspective, it should be pointed out that in order to eliminate double taxation, an exemption method or credit method can be used depending on the specific contracting country[121].

It shall be stated that Regulation 2157/2001 does not provide information regarding tax aspects of the *Societas Europaea*. It is regulated by another legal act, precisely Council Directive 2009/133/EC, that provides aspects of tax when SE is transferring its own legal address to another company.

The aim of this directive was to avoid any tax obstacles that would limit some companies' activities, helping to increase productivity and establish a better position for companies operating in the internal market[122]. Moreover, the directive tackles the different tax systems of EU countries and establishes a unified tax requirement for special business activities[123].

Societas Europaea has one of the main advantages of all corporate types: legal address transfer without company liquidation. With the address transfer, the company will be aware of all tax aspects that might arise. In accordance with Recital 11 of the Council Directive 2009/133/EC, it shall be pointed out that the country from which the company is transferring has the right to apply a tax. However, if the financial assets of the SE continue to be inextricably linked to a permanent place of business in the country from which the corporate headquarters relocated, the taxation activities of stockholders for the day of the relocation of company-enrolled business should be disregarded[124]. The *Societas Europaea* might use all the advantages and benefits of the directive; however, if it has the aim of not paying and avoiding taxes or if the activities of the company are not complying with the requirement of the representation of employees, then the directive will not be applicable because all actions have to be performed in good faith[125].

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[120] Harm van den Broek, 'Cross-Border Mergers within the EU: Proposals to Remove the Remaining Tax Obstacles' [2011] EUCOTAX Series on European Taxation, 33, p.28 <https://wkldigitalbooks-integra-co-in.uaccess.univie.ac.at/Customer/Home/BookDetails?TitleGUID=C4209735-FBAA-4791-813E-8043FBB9F4B2>..
[121] OECD Model Tax Convention on Income and on Capital 2017 Article 23A and 23B.
[122] Council Directive 2009/133/EC of 19 October 2009 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 [2009] OJ L 310/1, Recital 2.
[123] *Ibid*., Recital 4.
[124] *Ibid*., Recital 11.
[125] *Ibid*., Recital 13.

It is worth noting that with the transfer of legal address, there is no tax applicable for the increase in the capital of the transferred company from the previous member state that is counted from the difference of the moved assets, value of liabilities, and amount from which taxes are counted[126].

To continue with exceptions, it shall be mentioned that when a company transfers its legal address to another member state, usually taxes are not paid from the gains of shareholders or other incomes[127] but if there is a profit from the securities that are related to *Societas Europaea* capital before changing a legal address, then most probably it will be taxed by the state where it is located before transfer[128]. One of the reasons why *Societas Europaea* is moving its registered address to another legal system is mostly connected with more advantageous commercial/corporate legislation aspects and tax aspects[129]. Usually, those aspects are important for doing a successful business, so when a company has a form of SE, it can change its registered SE and apply its laws to different jurisdictions.

Another aspect that should be mentioned is the taxation of permanent establishments (PE) of the *Societas Europaea* within member states of the Regulation. In this regard, those assets that are assigned to the principal headquarters of a legal person moving its declared seat will be taxable during the process of relocation[130]. However, when SE wants to assign its assets to PE from its home country, where SE is established, assets for the permanent establishment will not be subject to taxes[131].

Another financial aspect of SE is related to the submission of an annual financial report. The application of national law provisions to financial statements is mentioned in Article 61 of the SE Regulation. The preparation and submission of the annual report and other financial statements are governed by where the company has its registered legal address[132]. As a result, it is important to pay attention to the format of any type of assurance or accounting statement, the submission deadline, and other factors that are subject to domestic law.

[126] Ibid., Article 12(1)(b).
[127] Ibid., Article 14(1).
[128] Ibid., Article 14(2).
[129] Lars Hornuf, Abdulkadir Mohamed, Armin Schwienbacher, 'The Economic Impact of Forming a European Company' [2019], JCMS: Journal of Common Market Studies Volume 57, Issue 4, 659.
[130] 'Societas Europaea: The main advantages of establishing a European Company' (accase.com, 13 October 2022) < https://accace.com/european-company-main-advantages-establishment/> accessed 18 June 2023.
[131] Ibid.
[132] Erik Werlauff, SE - the Law of European Company (DJOF Publishing, 2003) 21.

2.3. LEGAL ASPECTS OF *SOCIETAS EUROPAEA*

The transfer of legal address is the process by which *Societas Europaea* has the right to move its legal address, or in practice, registered office, from one country of the European Union to another with the benefit of not performing liquidation activities in the origin country[133]. With the transfer of SE legal address, the resident of one country becomes the resident of another member state of the European Union[134]. Nonetheless, it should be pointed out that the decision on the legal address of the SE cannot be adopted faster than 2 months[135] because it shall be insured for the protection of people who were against the transfer of SE's legal address, as well as any interests of the shareholders[136].

Additionally, when *Societas Europaea* is transferring its address, it has to ensure the protection of people who have a relationship with the business activity of the company and are against it. This means that people who have not supported the move of the registered office of the SE shall be granted the protection of shareholders' and creditors' interests[137].

It is worth noting that according to Article 7 of the SE Regulation, *Societas Europaea* has to have its legal address and registered office in one member state of the European Union[138]. However, at the discretion of the SE hosting country and in accordance with its domestic legislation, it has the right to oblige the enterprise to have only one address for its legal address and for its registered office[139].

Each country has its own legal system for joint-stock companies. For instance, it can be a one-tier system or a two-tier system, depending on the domestic legislation. In contrast to this, the provisions of the SE Regulation give the possibility of deciding which legal form to choose for the SE[140]. For instance, in the Republic of Latvia that is a member state of the European Union, there is a two-tier system for joint-stock companies. However, if the SE is established in the territory of Latvia, it can be formed as a one-tier system.

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[133] Council Directive 2009/133/EC of 19 October 2009 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 [2009] OJ L 310/1, Article 2(k).
[134] *Ibid*., Article 12(1)(b).
[135] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 8(6).
[136] *Ibid*., Article 8(5).
[137] *Ibid*., Recital 24.
[138] *Ibid*., Article 7.
[139] *Ibid*.
[140] *Ibid*., Article 39(5) and 43(4).

An interesting finding was made in the SE Regulation regarding the one-tier system. It is stated that the number of members is not specified by the regulation, and national law might provide the concrete number of members that have to be on the management board[141]. However, if the SE is followed by Directive 2001/86/EK on employee participation, then the number of members in the management board shall not be less than three[142].

It is important to mention that when *Societas Europaea* is established, it cannot be considered an invalid entity[143]. As a result, many actions must be completed prior to the establishment of SE, such as ensuring the protection of shareholders, creditors, and employees, resolving all claims and issues, and only then does the competent authority have the power to allow the establishment of SE after conducting an analysis of all documents. The only possible reason that can be taken into account is if there is an assumption that there were not properly examined all necessary documents that could result in the termination of business activity if there are founded violations[144].

When *Societas Europaea* is established by merger, each joint stock company must ensure a high level of protection for creditors, security holders, and shareholders in accordance with the domestic legislation where each company is domiciled[145]. In addition to that, the government might establish additional procedures for the protection of minor shareholders of the company before creating an SE[146].

As in many jurisdictions, it is stated that management or supervisory bodies, either in private or public companies, shall be responsible for the damages and any losses that occur, and the *Societas Europaea* is not the exception[147]. So, it is seen that the responsible bodies of the SE should act with prudence because they are responsible for the actions of the enterprise. Regarding the liquidation of the SE if the meeting of the shareholders decides to liquidate the *Societas Europaea*, then in accordance with Article 63 of Regulation 2157/2001, it shall be governed by the provisions of domestic legislation where the company is established, and the process of liquidation shall be carried out with provisions for joint stock companies[148].

[141] *Ibid*., Article 43(1).
[142] *Ibid*., Article 43(2).
[143] *Ibid*., Article 30.
[144] *Ibid*.
[145] *Ibid*., Article 24(1)
[146] *Ibid*., Article 24(2)
[147] Erik Werlauff, *SE - the Law of European Company* (DJOF Publishing, 2003) 20-21.
[148] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 63.

Knowing that *Societas Europaea* is a limited liability company, the stockholders of the SE have liability only for the amount for which they own shares[149]. So, in the event of any suit brought against the SE and its shareholders, stockholders do not have unlimited liability; they can compensate the damages only in accordance with the amount of their shares.

Additionally, it shall be stated that if there is a case brought against the *Societas Europaea* either by a natural person or a legal person, the court will review the case, and the adopted decision, whether positive for the SE or negative, will be applicable only to *Societas Eiropaea* as the legal entity. Neither shareholders nor management of the SE shall be sued if there are any hearings related to the SE[150]. Moreover, if SE has submitted the claim to the court against someone, it will be considered as being submitted by the legal person and not the natural person because the interests of the legal person, specifically *Societas Europaea*, are affected.

A similar order is applicable for any disputes that are resolved with the use of the arbitration procedure[151]. One of the big differences between many usual joint-stock companies and *Societas Europaea* is the time limit for which the supervisory or management board can be elected, which is no longer six years[152]. Generally, many countries in the EU do not provide the concrete time period and deadline for which the responsible bodies of joint stock companies are elected. However, the SE regulation has provided time limits for this. There is a possibility to prolog the time of being an SE representative up to 6 years[153]. However, it would be better to provide in the articles of association that the management board or supervisory board is elected for unlimited time in order to avoid actions of reappointments, as it is in many other legal entities, but for the SE, it is a different order.

[149] Erik Werlauff, *SE - the Law of European Company* (DJOF Publishing, 2003) 27.
[150] *Ibid*., 28.
[151] *Ibid*.
[152] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 46(1)
[153] Ibid., Article 46(2).

CHAPTER III – FINANCIAL AND LEGAL OBSTACLES. IN MERGER AND ACQUISTION AND SOCIETAS EUROPAEA

3.1. OBSTACLES IN MERGER AND ACQUISITION

3.1.1. Public and State Interests

A member state of the European Union may prohibit an M&A entrance proposal in line with the directives aimed at mergers if they determine that doing so would be against the interests of the general public[154] in accordance with the Merger Directive. However, a Member State may forbid a cross-border merger only if it imposes the same regulations on corporate mergers that apply to transactions taking place within its borders and at least one company complies with local legal requirements in the State that, in the opinion of the relevant authorities, views the transaction as endangering the public interest[155]. As a result, a corporation from its own country cannot be barred from engaging in a cross-border transaction if the same restrictions are not in place at the national level.

To continue with the obstacles that might appear in merger and acquisition cases, the prohibition of the deal by public authorities on the ground that they might confront the society's interests[156].

3.1.2. Risk of Market Distortion

Living in a modern and rapidly developing world with new inventions and technologies is always supplemented by economic growth. As a result, the economic factor can be considered one of the cornerstones of each business transaction, and mergers and acquisitions are no exception. One of the reasons why companies decide to merge is to limit competition on the market, especially when both companies have similar products. They can then merge their assets and good ideas to be more competitive and stronger on the market[157]. As well, there is a practice of collusive behavior that will always be advantageous for the parties, but there are also limitations in order to not be considered collusive conduct with the aim of distorting market competition[158].

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[154] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/1, Article 121 (1)(b).
[155] Jérôme Vermeylen, Ivo Vande Velde, European cross-border mergers and reorganizations (Oxford University Press, 2012) 11.
[156] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 11.
[157] Simon Loertscher & Leslie M. Marx, 'Coordinated Effects in Merger Review' (2021) 64 JL & Econ 705.
[158] *Ibid.*,706.

The possibility of monopolistic or inappropriate corporate consolidation is mitigated by the need for horizontal merger transactions to have the approval of the competition council[159]. Special regulations were also developed in order to avoid the issue of a possible monopoly after the merger or acquisition. This law provides that, before the M&A deal is submitted to the government body that is responsible for checking whether M&A does not distort the competition on the market, the company has to submit an application for access. If the competition council gives its approval, then the company can fulfill its intention of acquiring the company. This procedure can avoid the risk that the competition council will say that they have violated the rules and impose a large fine. So, in order to avoid the risk of distortion that is strictly prohibited, it is necessary to clarify and ask for approval from the government's responsible bodies.

It means that if the company wants to have higher incomes and merges, then it removes the competitor from the market and can decrease productivity costs. However, as previously mentioned, because the Competition Council must approve the procedures, the merger of monopolies can be a comprehensive and long deal. As a result, there is not always a guarantee that the deal will be approved, and it can be time-consuming.

An example of this in the international practice would be the case of AT&T and Time Warner. In 2016, global telecommunications company AT&T announced that it wanted to acquire Time Warner; however, the justice department of the USA decided not to allow the acquisition because there would be a big concentration in the market after the acquisition of Time Warner. Taking these factors into consideration, in 2018, a court hearing was held in which it was decided to allow the acquisition of Time Warner by AT&T[160]. As a result, it can be seen that there are cases in which, due to the prohibition of possible mergers, court hearings and other activities might also last for 2 years.

The process of merger between two similar companies is regulated by legal acts, which have special provisions stating that after the merger, companies shall not have the dominant position on the market because it will be considered a distortion of the market that will cause serious damages to a company by having a huge number of fines. So, in some cases, there should be a written application to the national body that specializes in competition on the market and wait for their approval on whether two companies can merge. Following the

[159] Kaspars Mucenieks 'Company Merger and Acquisitions Financial Result Evaluation' [2020] Humanities and Social Sciences: Latvia Volume 28, Issue 1, 48.

[160] Nathan Reiff, 'AT&T and Time Warner Merger Case: What You Need to Know' (Investopedia, 7 December 2018) < https://www.investopedia.com/investing/att-and-time-warner-merger-case-what-you-need-know/> accessed 20 June 2023.

legislation, such as Council Regulation (EC) No 139/2004 can help to avoid problems and obstacles in the merger and acquisition process relating to the noncompliance with the Competition Law[161].

3.1.3. Share deal v. Asset deal

As was previously mentioned, the merger can be done with the sale of assets or shares. However, the method of asset deal cannot be chosen due to the fact that often there can be a situation of double taxation, specifically when the previous owner, when selling the company, pays the tax of the enterprise and the shareholder tax when shares are dispensed[162].

However, the transfer of assets might also have obstacles. One of them is connected with the legal aspects, precisely, each asset of the company has to be transferred[163]. This means that if the agreement is concluded without the approval of the other party, assets cannot be shifted. As a result, the transfer of each asset may linger.

To continue with the issues related to the asset deal, it shall be pointed out that in cases of cross-border mergers outside of the European Union, the laws related to sales, corporate, tax, and other issues that might be connected with the transfer of the asset to the new company shall be taken into account[164]. It is necessary to analyze because the foreign country might have some other issues that have to be taken into account, for instance, whether there are any encumbrances on the assets, whether there is a need to obtain any consents, or whether there are any third-party-related rights to transfer.

There is another option for how the shares of the company can be transferred using the share deal. It has pros and cons. One example of a share deal disadvantage is that the enterprise has to conclude an agreement with each shareholder who has shares[165]. It can be assumed that if the company has a lot of shareholders who have a large or small amount of the company's shares, there has to be an agreement for everyone, and even if one has decided not to sell his shares, it can create obstacles that might not lead to a successful merger.

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[161] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1.
[162] Stanley Foster Reed, Alexandra Reed Lajoux, and H. Peter Nesvold, The art of M & A: a merger, acquisition, buyout guide (4th ed, McGraw Hill, 2007) 265.
[163] *Ibid*, 265.
[164] *Ibid*, 266.
[165] *Ibid*. 268

The second reason why the share deal is not chosen for the merger is that with the share deal, a larger amount of taxes have to be paid[166]. If we are looking at the scope of taxes, then it should be pointed out that the asset deal has a better tax position. However, it should be mentioned that not always the benefits from the tax aspects of an asset or share deal will be shared by both parties. In some deals, the advantage will go to the seller, and in other cases, the acquirer[167].

3.1.4. Financial and Tax Obstacles

It is worth noting that if the companies are not complying with the provisions of the directive that provide tax reliefs for the companies in the M&A deal, then organizations might face issues related to tax aspects. For instance, usually the part of the untaxed capital gains and the enterprise's tax reserves when the company has a liquidation process is not applicable to the corporate income tax (CIT), but if companies finally decide not to comply with the directive applicable to taxes, then enterprises should pay more taxes[168].

As well, the author of the journal article regarding tax obstacles states that the European Union's legislation is not fully harmonized within member states of the European Union because when there is a case of cross-border merger, the national law of the EU countries does not take into account the expenses incurred by foreign subsidiaries. As a result, companies can be subjected to double taxation[169].

To continue with the consequences of not complying with the provision of the directive that provides tax benefits, it should be added that companies will not have the possibility to ask for remuneration if a dissolving enterprise has losses on which it has a right to claim them[170]. Should be noted that some countries of the European Union have in their domestic legislation laws that provide that the claim of losses in order to receive compensation can be transferred to the receiving company, not the dissolving company[171]. However, if the

[166] *Ibid*, 268.
[167] *Ibid*, 301.
[168] Harm van den Broek, 'Cross-Border Mergers within the EU: Proposals to Remove the Remaining Tax Obstacles' [2011] EUCOTAX Series on European Taxation, 33 <https://wkldigitalbooks-integra-co-in.uaccess.univie.ac.at/Customer/Home/BookDetails?TitleGUID=C4209735-FBAA-4791-813E-8043FBB9F4B2> page 12.
[169] Sanaa Kadi 'Tax Issues and Tax Treatment of the Societas Europaea' [2013] NJCL No. 2 (2013), pp. 18-19. <https://journals.aau.dk/index.php/NJCL/article/view/2896> accessed 28 June 2023.
[170] Harm van den Broek, 'Cross-Border Mergers within the EU: Proposals to Remove the Remaining Tax Obstacles' [2011] EUCOTAX Series on European Taxation, 33 <https://wkldigitalbooks-integra-co-in.uaccess.univie.ac.at/Customer/Home/BookDetails?TitleGUID=C4209735-FBAA-4791-813E-8043FBB9F4B2> page 12.
[171] *Ibid*., 13.

company is not guided by the directive provisions, then it has no right to use all its advantages[172]. However, in light of potential tax obstacles, it shall be pointed out that the potential dividends of the transferring company can be suspected of being subject to withholding tax in the residence state if the transferring company is expected to be dissolved[173]. wever, depending on the jurisdiction of a concrete member state, the state has a right not to tax the dividends with withholding tax, which means that the country will not use its tax claim against the company[174]. Moreover, the member state where the transferring company was located will not have the right to permit the continuation of loss compensation rights[175].

3.1.5. National Legislation of the Member States

Another issue that can arise after the merger is the conflict of laws, precisely by which the state company will be governed. The two commonly used theories that are in practice are the incorporation theory and the head office theory[176]. This might create an obstacle for parties to decide which law will be applicable to business activities. For instance, the incorporation theory means the law of the country where the company is registered[177].

However, in the real seat theory, the law is applicable to the country where the company factually performs activities. For instance, where the management of the company is located. There could be a conflict of law issue[178]. This might become an issue depending on the national legislation where the company will be established, especially when one company applies the principle of conflict of law while the other is governed by substantive law. In this regard, it should be stated that in the conflict of law, the issue with the incorporation theory or real seat theory that will be applicable to the enterprise[179].

The law that is applicable to incorporation theory can be chosen from the place where the company has its registered office[180]. This means that if the enterprise has its registered address in Austria, then the company will be governed by Austrian law. However, in the law theory of real seat, it shall be pointed out that the registered address has no impact on the

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[172] *Ibid*., 12.
[173] *Ibid*., 121.
[174] *Ibid*., 122.
[175] *Ibid*., 122.
[176] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 10-11.
[177] *Ibid*.
[178] Stefan Grundmann, European company law : organization, finance and capital markets (2nd ed, Intersentia, 2012) 588.
[179] *Ibid*.
[180] *Ibid*.

applicable law because the organization will apply the law of the country where its general office is located, from where all decisions are adopted[181]. So, if the registered address is in Latvia but its management office is located in Germany, the legislative acts of Germany will be applicable.

3.1.6. Other Obstacles

Furthermore, some companies, in order to operate in the market, must obtain special licenses or permissions from the government[182]. As a result, taking those aspects into account, the transfer of company assets might have problems related to the obtaining of new licenses that might require a long list of necessary documents that, in many instances, can cost a lot of money.

It is worth noting that the directive that provides provisions for mergers is not applicable in cases where two companies have a will to merge if they are public companies with collective investments[183]. So, if this case appears in practice, there will be obstacles because the provisions of the Merger Directive are not applicable.

It is worth noting that in some states of the United States of America, it is a practice that when a person buys assets of another company and avoids action plans for merger, the new owner is not responsible for earlier defects or damages that occurred when the owner was another person. However, there are also limitations under which the new owner can be held liable for any problems and damages. For example, if buying assets was with the aim of a merger, however, it was not revealed. In the event of any problems with the old owner of the company, under the discretion of special bodies, the new owner can have a liability if he misleads his potential actions by buying assets with the aim of company consolidation[184].

It should be pointed out that the practice in which the new owner of the business does not have liability for defects that have earlier occurred can be seen in many sale-purchase agreements, where if damage occurs, the new owner has to prove that he is not at fault and the previous owner has liability. Usually, in these cases, to avoid such problems, parties establish, for example, guarantees and warranty clauses for protecting each other because some things

[181] *Ibid*.
[182] *Ibid*, 265.
[183] Dirk Van Gerven, *Cross-border mergers in Europe Volume I* (Cambridge University Press, 2010) 6.
[184] Howard L. Shecter, ‘ Selected Risk Issues in Merger and Acquisition Transactions’ (1997) 51 U Miami L Rev 755.

that were earlier and the person was not aware of them can cause serious problems and many other obstacles that can occur during changing ownership.

Employment relations at the target firm are a key component of the merger and acquisition process. In our situation, the United States of America, there is a high level of employee protection when compared to foreign practice in merger and acquisition cases[185]. Due to the fact that there have been instances where a firm has been sold and all workers have been dismissed by the new owner and employer, the US government has developed particular firing criteria so that employees can be protected in the event of an impending dismissal. The new owner is not allowed to simply fire employees; instead, they must pay incentives, offer medical insurance, reimburse wasted vacation time, and provide other perks.

Additionally, if a firm established in the USA has more than 100 workers, they must be told 60 days in advance of any planned merger, acquisition, or sale of the company. Employees are safeguarded against dishonest employers on the one hand, but on the other, the entire dismissal procedure might provide a significant barrier to a possible merger, particularly if substantial compensation for leaving is required[186].

Another obstacle that can occur in the merger or acquisition of a business is intellectual property owned by the company. Under intellectual property, any types of intellectual inventions can be understood, such as software, patents, trademarks, and designs. The evaluation of goods created by the intellect is a long and hard process because it is not similar to gold, where we can see the average market value; it is different. As a result of which, there could also be any other hidden elements, such as to whom a patent or trademark belongs or whether all procedures of intellectual property registration were carried out correctly and finished before selling them to another company. All aspects of intellectual property registration shall be done in the right way in order to avoid any third-party rights to the patent or trademark or someone who has stolen the idea and registered it[187]. To avoid any potential negative aspects that might turn into obstacles for acquisition, the due diligence process has to be done very carefully. From my practice in the merger and acquisition field, it is seen that not always all intellectual property objects are registered correctly and sold to others, and some of them can have hidden defects that can turn in the future into bigger losses. For example, if

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185 Howard L. Shecter, ‘ Selected Risk Issues in Merger and Acquisition Transactions’ (1997) 51 U Miami L Rev 761.

186 Gili Malinsky, ‘Mass layoffs at Twitter, Meta and other companies spotlight a little-known U.S. law that protects employees’ (CNBC 10 November 2022) < https://www.cnbc.com/2022/11/10/warn-act-what-every-us-worker-should-know.html> accessed 15 May 2023.

187 Howard L. Shecter, ‘Selected Risk Issues in Merger and Acquisition Transactions’ (1997) 51 U Miami L Rev 775.

software is provided to a third party in accordance with the concluded agreement, the provider is liable for almost all damages that occur. The aspect of intellectual property is a very essential element in mergers and acquisitions that has to be carefully evaluated to avoid becoming an obstacle to performing a M&A deal. As Howard L. Shecter stated, the purchaser ought to make certain the company's proprietary rights are correctly transmitted, as well as acquire guarantees and representations regarding the type and scope of such rights[188].

Knowing that almost all actions have a positive and negative side, it should be stated that the process of mergers and acquisitions might have negative consequences. One of the opinions is that a lack of completion of mergers and acquisitions will have a variety of effects, including decreased productivity, a drop in profits for shareholders and employees, and the depletion of productive employees[189].

It should be pointed out that the stockholders who are against the merger and do not get the appropriate level of protection have a right to oppose the merger[190]. As a result of which, the decision will not be adopted. However, shall be pointed out that its under the discretion of the national legislation. For instance, taken into account the legislation of the Sweden or Portugal, creditors might oppose the merger, but if the court finally decide that the merger shall be performed, then creditors might have only securities after the merger is done. Moreover, the creditors can bring a claim to court during 60 year when the changes were made in the enterprise register[191].

As well, it shall be mentioned that in some countries it is the practice that the brought claims of the creditors will not be reviewed by the court as the reason for not allowing mergers if the auditors prove that the merger between organizations will not destroy the internal market of the country, for example[192].

Additionally, from one of the old examples, it shall be pointed out that, in accordance with the article from 1929, mergers were also in some cases not allowed by the government bodies when mergers of two companies might lead to market distortion[193]. For example, the merger can be opposed if one person is the owner of companies that are competitors in the market because the merger can result in price control in the market.

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188 *Ibid*., 777.
189 M. Ikhwan Maulana Haeruddin 'Mergers and Acquisitions: Quo Vadis?' [2017] Management, Vol. 7 No. 2, 85.
190 Andrea Vicari, European company law (De Gruyter, 2021) 245.
191 Ibid, 246.
192 Ibid., 247.
193 Leonard W. Horton, 'Obstacles to Merger' [1929] 1 Corp Prac Rev 65-66.

3.2. OBSTACLES IN SOCIETAS EUROPAEA

Similar to M&A transactions, national authorities may forbid the establishment of a SE business if doing so would be detrimental to society and the public interest[194]. It is found in the Article of 19 of SE Regulation[195].

For the establishment of the *Societas Europaea*, as before mentioned, it is necessary to take the necessary steps for the SE's creation, as a result of which competent authorities have to issue a certificate as approval that the companies might take part in the formation of the SE. However, there could be some obstacles, and government bodies under its discretion might oppose or decline it[196]. If they believe that the formation of SE, which in some cases is very similar to the typical merger, can be considered risky for the national market, they may follow the competition law.

The applicability of the real seat theory can be a problem in *Societas Europaea* when two businesses from different member states of the European Union merge. According to the concept that only the Merger Directive has strong harmonization, the SE has weak harmonization, which can lead to a situation where both countries can choose which law will continue to apply after an M&A deal, making it challenging to determine which law will govern the entity. Even if a company relocates its operations in accordance with SE regulations, it may still be subject to the laws of that country rather than the laws of the new location. That is contrary to the provisions of the SE regulation. If the SE entity's legal address changes, it will be subject to the laws of a new member state[197]. Should be pointed out that before creating *Societas Europaea,* the national laws of the other company under which it is governed should be accessed in order to avoid issues with conflicts of law under which the new company will be governed.

It is worth noting that during the process of changing the legal address of the *Societas Europaea*, it might appear that, at the discretion of the competent authority, the change of the legal address can be considered contrary to the state interests of the new country where the potential new SE legal address can be registered[198]. In addition to that, if a government financial

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[194] Jérôme Vermeylen, Ivo Vande Velde, European cross-border mergers and reorganizations (Oxford University Press, 2012) 62.
[195] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, article 19.
[196] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 19.
[197] *Ibid*., Article 9(1)(c).
[198] *Ibid*., Article 8(14).

institution is controlling Societas Europaea, it might also impose a ban on changing the legal address, but if SE considers that government institutions made the wrong decision, they have a right to bring a claim and ask for a review of the case regarding the ban on legal address change[199].

Knowing that directives and regulations created by the legislative organizations of the European Union are aimed at law unification between whole EU countries, it shall be stated that member states still have their own national law provisions that are different in all member states. From that, it can be concluded that when it comes to the question of adoption of decisions, there might appear some difficulties. For instance, when a meeting of the shareholders wants to make any amendments to the articles of the association of the *Societas Europaea*, shareholders must vote, and if more than 2/3 of the participants come to the same conclusion, it will be considered that the decision is adopted[200]. However, there might be an issue if, under the national legislation where the company is located, it receives a larger number of votes in order to implement the decision[201]. This means that in some cases, it will be difficult to end up with a decision because more positive voices have to be heard. It is worth noting that if national law provides a smaller number of necessary votes that cannot be applied to the implementation of a decision, only a larger amount can be taken into account.

Regarding the change of the legal address, it shall be added that before the transfer of the registered seat, approval from the stockholders shall also be received. On the one hand, this can create some difficulties because a larger number of shareholders might not support the proposal of a legal address change[202]. As a result, the decision will not be adopted.

If the SE has begun the activities of insolvency, liquidation, or other likely activities, the transfer of the SE address will be prohibited[203]. So, before the *Societas Europaea* has published the notification of terminating its activities, it has a right to transfer the legal address in order to, in the future, apply national law provisions for the winding up of SE activities that in another member state can be more advantageous.

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199 *Ibid*.
200 *Ibid*., Article 59(1).
201 *Ibid*.
202 Lars Hornuf, Abdulkadir Mohamed, Armin Schwienbacher, 'The Economic Impact of Forming a European Company' [2019], JCMS: Journal of Common Market Studies Volume 57, Issue 4, 666.
203 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, Article 8(15).

It shall be highlighted that the big attention of the EU is aimed at the workers protection of the company before it is reorganized into the *Societas Europaea*. So, if the government bodies consider that the employee does not have sufficient protection[204], The formation of the SE will be opposed. So, the national legislation where the possible SE will be established shall be carefully examined in order to make all necessary regulations and guidelines for the workers protection and avoid issues with them that might be followed by the refusal. As a result, the provisions mentioned in Directive 2001/86 on employee protection shall be followed.

One of the reasons why the financial authorities do not allow the merger can be justified by the fact that one of the companies had a problem with tax non-payment, which can be classified as tax avoidance and is considered a serious violation[205]. For instance, in Republic of Latvia the people who are governing the company can be liable for the Criminal liability[206].

The issues of double taxation are also very common for the Societas Europaea. Especially when SE has subsidiaries or branches in other countries of the European Union. Knowing that the state treasure is mostly made from taxes, no country wants to lose its taxation rights. From this perspective, the corporation fails to be compensated for expenses incurred in a particular contracting state of the European Union compared to earnings received in another Member State[207].

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[204] Erik Werlauff, *SE - the Law of European Company* (DJOF Publishing, 2003) 139.
[205] Gerard B. Pompan , Katherine M. Bristor, Jeremy K. Cox & Gregory A. Falk, 'Session 9: Managing the Inherent Risks Created by Corporate Merger, Acquisition and Disposition Transaction Activity - Pitfalls and Best Practices' [2007] 85 Taxes 133-134.
[206] Criminal Law of the Republic of Latvia 1998, Section 218.
[207] Sanaa Kadi 'Tax Issues and Tax Treatment of the Societas Europaea' [2013] NJCL No. 2 (2013), p. 17 <https://journals.aau.dk/index.php/NJCL/article/view/2896> accessed 28 June 2023.

CONCLUSION

The aim of the master's thesis was to analyze various financial, tax, and legal aspects that often or less often appear during mergers and acquisitions and the transformation of a new form of European company - *Societas Europaea*.

It is important to note that the legislators of the European Union has created regulations and directives that help to solve many of the issues that arise during before mentioned transactions. However, it is important to note that despite the fact that the directive does not have direct effect on the countries that are members of the European Union, it is necessary to mention that in general the laws among the countries are similar, however, there are areas of law and taxes that are determined by a specific country, for example, where merged company or *Societas Europaea.* The protection of creditors, employees, shareholders and other third parties is different in each country, but the main principles are taken from the recommendations of the responsible bodies of the European Union.

Moreover, mergers and acquisitions, as well as transformation of the Company, are not easy actions, for this it is necessary to take into account many aspects that may affect the transaction. For example, if the merger of the company can interfere with the interests of the country or the public. Also, the competition body in each member state plays an important role. Considering that it is the prohibition of distortion of the domestic market not in the country in which the enterprise is located, but in the European Union as a whole, it is necessary to request the first permission from the Competition Council in accordance with the laws in all cases.

Given the various aspects that mergers and acquisitions may be delayed due to many obstacles and permissions, owners of the company have the right to choose the course of action that they like best. Each aspect has its positive and negative sides. Considering that *Societas Europaea* can change its legal address without liquidation in order to use more favorable tax or legal aspects, it is definitely considered a plus.

Speaking about tax aspects, it is important to note that in general, in the case of mergers and acquisitions, they are similar in action to the *Societas Europaea,* since they are regulated by one directive and different national laws. More detailed all tax and legal aspects are considered in this master's thesis, but summing up, it is important to note what is necessary for each potential case is - to evaluate the national legislation of the countries of the European Union, tax aspects and all other aspects that may be different in each state.

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