

Exit Taxation in Relation to Cross-Border Mergers

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Abstract:

The article looks at exit taxation within the European Union, including how it affects cross-border mergers. It starts with an explanation of the concept of exit tax, followed by an analysis of the current legislation and an analysis of the case law of the European Court of Justice. The article presents the results of the research, the implementation of exit taxes in a particular country, including how it is calculated, the determination of the market and tax value and the tax rate. The second objective is to examine how the rule is applied to cross-border mergers. The data was obtained through a qualitative data collection method in the form of a questionnaire survey from December 2023 to January 2024. The Baker Tilly Group's advisory network was selected to obtain high quality information. The questionnaire was sent to the employees of this company at the highest management positions who are responsible for tax advisory. The results of the survey showed that all countries analysed have implemented exit tax according to the rules set by the EU and mostly apply this tax to cross-border mergers. However, the application to mergers is not uniform and an assessment is needed for each case implemented as to whether it will be exempt from the exit tax.

Keywords: ATAD; Cross-Border Mergers; Exit Taxation.

JEL classification: G34; H25; K34.

1 Introduction

The exit tax, *i.e.*, the transfer of assets or registered office from one Member State to another EU Member State, was introduced as a part of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (European Commission, 2016); the so-called Anti-Tax Avoidance Directive – ATAD. The aim of this Directive was to ensure that taxes are paid where profits and value are generated, thereby ensuring greater tax fairness. In practice, there were often transfers of assets within one

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taxable entity to countries with lower levels of taxation, which ultimately led to the payment of lower taxes (Kappel, 2023). States had until 31 December 2019 to implement exit taxation in their national rules. However, for some European countries, this tax was not new, and they already had it included in some form in their national tax legislation.

The new tax rules may have a very significant impact on the business environment in the countries concerned. According to some researchers (*e.g.*, Dai, 2018), it is not rational for the tax authority or the state to impose exit tax on entrepreneurs. The aim of our article is to map the environment in EU countries regarding the implementation of ATAD exit tax rules and then to find out how the affected countries apply these rules to cross-border mergers. As shown by research conducted in the past in some countries, the introduction of taxation on mergers significantly affects the frequency of transactions carried out (Horáková, 2022).

The aim of our research is thus to obtain information on exit tax increases in individual EU countries and based on the data, to infer the impact on the practical implementation of cross-border mergers and to predict whether this will reduce the number of cross-border mergers. The area of cross-border mergers has long been a focus of research, among the most extensive being research carried out at Maastricht University, where Biermeyer and Meyer-Erdmann (2021) examined the frequency of completed transactions in each EU country between years 2010–2020.

The introduction of the exit tax is the subject of a number of research studies, theses and practically oriented professional articles. General impacts on the free movement of people and capital are analysed, *e.g.*, by Dabija (2015) or Zakrzewska (2020). The perspective of German tax law is analysed by Haag and Niermann (2021), stating that the German tax environment already applies the taxation of the revaluation of assets in mergers. In the Czech environment, Bureš (2019) and Kappel (2021) are very critical of the topic.

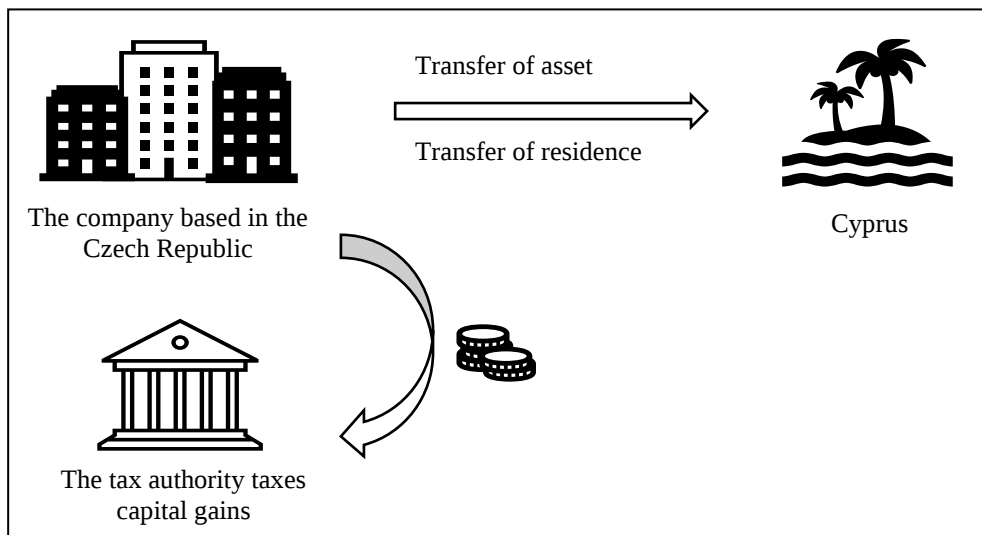
Most research analyses the case law of the European Court of Justice in relation to the EU Directive, *e.g.*, Hernández González-Barreda (2019) concludes that the draft Directive is too narrow. It is the only solution that could be incompatible with EU law. Greater flexibility should be provided in terms of different types of business.

The rest of the article is structured as follows: Section 2 provides an overview of the development of exit tax in case law and legislation at the level of the EU. Section 3 describes the research carried out by individual EU countries and its results concerning the established rules, tax rates and the impact of tax on cross-border mergers. Section 4 summarises the important findings and makes recommendations for practice based on the findings.

2 European Exit Tax Legislation

Until 2016, when the ATAD was adopted, exit taxation was not regulated at EU level. However, this tax is not new in the EU. The principle of exit taxation is that when a taxpayer moves its assets or tax residence to another Member State, the State of origin will tax the economic value of any capital gains made in its territory, whether or not those gains are realised. According to the European Commission’s explanatory memorandum (European Commission, 2006), this rule is intended to reduce the incentive for taxpayers to reduce their tax payments by shifting their tax residence or assets to Member States with lower taxation (Fig. 1).

Fig. 1 Relocation of assets after the introduction of the exit tax



Source: Authorial computation based on European Commission (2016).

Who is subject to exit taxation? To the income taxpayer if he or she is shifting:

- assets from its head office to its permanent establishment in another Member States or third country,
- assets from its permanent establishment to its head office or other permanent establishment in another Member State or third country,
- its tax residence in another Member State or third country, or
- the business carried on by the permanent establishment to another Member State or third country.

The calculation of this tax shall be based on the market value of the assets transferred less their value for tax purposes. The market value shall be determined at the time of departure of the assets on the basis of normal market conditions. While the market value is defined in the ATAD as *“the amount for which an asset can be*

exchanged or mutual obligations can be settled between willing unrelated buyers and sellers in a direct transaction.” (European Commission, 2016, Article 5(6)), there is no definition of the “value for tax purposes” in the ATAD. It can be assumed that Member States should follow their own national rules in determining this tax value.

A similar tax could be found in most western Member States. However, in the opinion of the Court of Justice of the European Union (CJEU), this taxation was in certain cases contrary to the freedom of establishment arising from Article 49 of the Treaty on the Functioning of the European Union (TFEU). As a general rule, this was due to the fact that the departing entity was disadvantaged by the immediate taxation of assets (profits) leaving the Member State. This disadvantage occurred in comparison with taxpayers who moved only within the territory of the Member State. In the latter case, the taxpayer who remained in the Member State concerned was taxed only at the time of their realisation, and not immediately upon transfer, as was the case with entities leaving the Member State. By imposing this exit tax, individual states effectively discouraged the free movement of people and capital within the EU, which was contrary to the fundamental principles of the TFEU.

The Court of Justice of the European Union itself has dealt with several cases of restrictions on freedom of establishment in the context of exit taxation. The decisions in Case C-9/02 Lasteyrie du Saillant in 2004 (CJEU, 2004) and Case C-470/04 N in 2006 (CJEU, 2006) have had the most significant impact on national exit taxation rules in EU. Admittedly, those judgments concerned the taxation of natural persons. However, the conclusions also had some impact on company’s national rules on exit taxation. The judgments have shown that the difference in treatment of departing residents constitutes an obstacle to free movement. Thus, if a State decides to apply an exit tax (transfer of assets to another Member State), then the entity must be allowed to defer that tax until the profits from the transferred assets are realised, provided that there are no restrictive conditions attached to the deferral of that tax.

The judgment in Case C-371/10 National Grid Indus of 2011 (van den Broek, 2011), the judgment in Case C-164/12 DMC of 2014 and the judgment in Verder LabTec GmbH & Co. KG vs Finanzamt Hilden (Case C-657/13) of 21 May 2015 have made a major contribution to legal entities in the area of exit taxation (CJEU, 2011; 2014; 2015). The latter concerned a German limited partnership which had transferred intellectual property rights to its Dutch permanent establishment. The transfer gave rise to an exit tax in Germany on unrealised profits arising from transferred intellectual property rights, which must be paid within ten years. The Court of Justice was asked to determine whether the German tax on unrealised profits from the transfer of assets to a Dutch establishment is compatible with EU rules.

The Court of Justice found that the rules were permissible under EU law. The Court reached that conclusion on the basis that rules: (i) are necessary to preserve the allocation of powers of taxation between the Member States concerned and are therefore objectively justified by overriding reasons in the public interest; and (ii) are proportionate, in particular, on the basis of the fact that the tax payable is payable over a period of ten years.

To sum up, according to the judgments of the CJEU, Member States have an unquestionable right to collect exit tax. Another groundbreaking conclusion was the fact that the CJEU clearly determined that the taxpayer should have the choice between immediate taxation and deferral of payment until the moment of realisation. The CJEU not only confirmed the right of Member States to collect the exit tax at a different point in time than its actual implementation, but also approved the possibility of dividing the payment of the exit tax into instalments.

In response to this case law and the repeated inconsistency of national tax rules of individual Member States with EU rules, substantial measures had to be taken. The Commission of the European Communities came up with the first initiative in the area of coordination of exit taxation as early as 2006. However, the EU Council did not issue the ATAD until ten years later.

Exit taxation is regulated by Article 5 of the ATAD. It seems at first glance to be a codification of the exit taxation case law developed by the CJEU (Peeters, 2017). The main reason for the adoption of the Directive is the shift from the question of whether and under what conditions Member States may impose an exit tax on unrealised capital gains to the rule that Member States must subject such unrealised capital gains to exit taxation.

An important aspect that needs to be addressed in the context of exit taxation is the relationship of this tax to cross-border mergers. From a tax point of view, cross-border mergers can be divided into mergers with the creation of a permanent establishment and mergers in which assets are transferred to another Member State without the creation of a permanent establishment.

How to approach the first type of mergers, *i.e.*, with the creation of a permanent establishment, is set out in European directives. The first directive on cross-border mergers was adopted in 1990. Specifically, it was Council Directive 90/434/EC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. The Directive has been amended many times, so Council Directive 2009/133/EC of 19 October 2009 (European Commission, 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 (hereinafter referred

to as the “Merger Directive”) was subsequently adopted, which is a codified version of the first mentioned Directive (Skálová, 2019).

The Merger Directive ensures fiscal neutrality in Article 4(1), according to which the differences between the actual and tax value of the transferred assets and liabilities should not be taxed in mergers. A condition for tax neutrality is that the acquiring company calculates the new depreciation, profits or losses relating to those transferred assets and liabilities in accordance with the rules to which the company being acquired would have been subject in the absence of the merger.

The Merger Directive also offers Member States the possibility of tax discontinuity. Tax discontinuity occurs when the acquiring company can rely on new tax values (*i.e.*, revalued values) for the purpose of calculating new depreciation, profits and losses on transferred assets under national rules. If this happens, the Merger Directive allows revaluation gains to be taxed. In essence, Member States thus have the option of having a two-pronged approach to the issue of revaluation in mergers.

The Merger Directive does not deal with the second type of mergers, in which a permanent establishment is not established in the territory of the state of the company being dissolved. This is a fundamentally different situation, which has not been addressed at EU level until recently. The transfer of assets to another Member State without the assets and liabilities of the transferring entity remaining linked to the permanent establishment had the effect of depriving the Member State of the company being dissolved of the right to tax capital gains arising from those operations. In certain cases, companies had considerable freedom to carry out this type of cross-border merger, which allowed them to carry out these operations towards lower-tax jurisdictions. On the other hand, many Member States responded by introducing an exit tax to apply these capital gains that had not yet been realised, which in turn could have had a deterrent effect. A possible solution for approaching cross-border mergers in the event that the assets of the company being dissolved are moved to the member state of the successor company were brought by the ATAD.

3 Results and Discussion

The aim of the research is to map the state of exit tax implementation in a particular country. The second objective is to examine how the exit tax rule is applied to cross-border mergers.

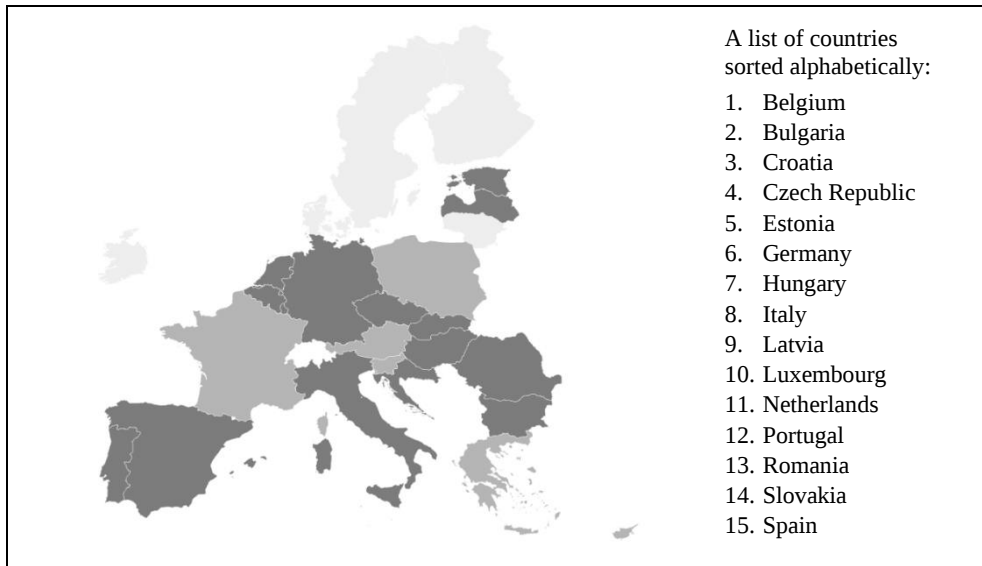
The data was obtained through a qualitative data collection method in the form of a questionnaire survey for the period December 2023 – January 2024. The questionnaire contained ten questions, which are listed in the Appendix A. The first question included the country of the respondent, followed by four questions on exit tax issues and five questions on the impact of exit tax on cross-border mergers.

To obtain good quality information, the Baker Tilly Group advisory network was selected, which also includes TPA Group Czech Republic, where the authors work. The questionnaire was sent to the partners responsible for tax advisory, restructuring or mergers in the respective country. The target group of respondents was selected from tax professionals working in the country in question in a consulting firm involved in the Baker Tilly chain.

While processing of the completed questionnaires, some answers were confirmed and clarified by telephone interview with the relevant professional. The results of the survey show that all the countries analysed have implemented exit tax according to the rules set by the EU and mostly apply the tax to cross-border mergers.

The research was carried out in 20 countries in Western, Central and Eastern Europe. The countries covered were Slovakia, Poland, Austria, Germany, Italy, Spain, Portugal, Greece, Cyprus, Bulgaria, Romania, Slovenia, Croatia, Hungary, the Netherlands, Luxembourg, Belgium, France, Latvia and Estonia. Responses were returned from 14 countries, giving a return rate of around 70%. Data from other countries were not included because the authors would have had to obtain them from other sources where it is not possible to ensure the quality or correct understanding of the text of the foreign legislation. Obtaining data from other countries should be the subject of further research. The Czech Republic's perspective was added by the authors. In Fig. 2, which shows the map of the Member States, the countries included in the research are shown in dark grey colour.

Fig. 2 Participating countries in the research



Source: Authorial computation based on the questionnaire return rate.

3.1 Status of the implementation of exit tax and its rates

Individual Member States were obliged to implement the ATAD by 31 December 2018, but in the case of exit taxation, this obligation was postponed until the end of 2019. The research showed that most of the countries implemented the implementation with effect within the set deadline. In the case of Spain, it is reported that the transposition into national legislation was only carried out in 2021, however, Spanish tax legislation already included provisions on output taxation before the introduction of the ATAD. With effect from 1 January 2021, only minor changes have been made to the Spanish tax legislation to bring the national legislation in line with ATAD rules. Latvia implemented the exit tax together with the hybrid mismatch rules into its national tax legislation with effect from 12 February 2020, but according to the provisions of the ATAD, these rules should have applied from 1 January 2020. The German national implementation process also took longer than expected. It was only in June 2021 that the last remaining parts of the ATAD were transposed into German tax law, and the new revised exit tax rules did not come into force until 1 January 2022.

However, exit tax is far from being new, as it might seem at first glance. Prior to the adoption of the Directive, most Member States already had some kind of exit fee or tax in cases where assets and liabilities were transferred to another Member State. In Fig. 3, which shows the map of the Member States, the countries that already had a certain form of exit taxation before the ATAD are shown in dark grey colour.

Fig. 3 Participating countries that already had an exit tax before the ATAD



Source: Authorial computation based on the tax rules of the Member States.

When examining the state of implementation of exit taxation, it was also investigated what tax rate individual states apply in the case of exit tax application – this is summarised in Tab. 1. The ATAD leaves the Member States free in this area, and the determination of the rate is thus fully within the competence of the given state.

Tab. 1 Exit tax rates in selected countries

Country	Exit tax rate
Belgium	25% corporate income tax (CIT) rate to be increased by 9% if insufficient advanced tax payments were made during the financial year
Bulgaria	10%
Croatia	18% standard CIT rate; 10% reduced CIT rate for taxpayers with annual revenue of up to EUR 1 mil.
Czech Republic	19% CIT rate until 2023; 21% CIT rate from 2024
Estonia	22%
Germany	15% CIT rate + about 15% trade tax rate
Hungary	9%
Italy	24%
Latvia	20% CIT rate upon determining the base taxable with the enterprise income tax in the taxation period the value of the object taxable with the enterprise income tax shall be divided by a coefficient of 0.8
Luxembourg	24.94%
Netherlands	25.8% standard CIT rate; 19% reduced CIT rate for profits not exceeding EUR 0.2 mil.
Portugal	21% CIT rate + municipal surcharge at maximum rate of 1.5%; state surcharge will also apply for taxable income higher than EUR 15 mil. at a minimum rate of 3%
Romania	16%
Slovakia	21%
Spain	25%

Source: Authorial computation based on the tax rules of the Member States.

3.2 Determination of market and tax value for exit tax calculation

Another area examined was how market and tax values are determined in the tax regulations of individual countries for the purpose of calculating the exit tax. For the calculation of the exit tax, the ATAD defines in para. 10 the need to determine the market value of the transferred assets at the time of their exit. The market value should be determined in accordance with the arm's length principle. To ensure that

this rule is consistent with the set-off method, it is appropriate to allow Member States to rely on the point at which the right to tax the transferred assets ceases to exist. This right to taxation should be defined at the level of each Member State. The ATAD also specifies in para. 10 the possibility of challenging the value of the assets transferred by the receiving State if it does not sufficiently reflect the market value. Tab. 2 shows how market and tax value is determined for the purpose of calculating exit tax in selected countries.

Tab. 2 Determination of market and tax value for exit tax calculation in selected countries

Country	Market value determination	Tax value determination
Belgium	The market value can be determined on free available information based on similar assets in similar circumstances.	The original acquisition or investment value reduced by fiscally accepted depreciations and amortizations.
Bulgaria	General transfer pricing (TP) appraisal rules.	The tax value of tax depreciable assets is their tax value as of the date of the transfer. The tax value of non-depreciable assets is their accounting value as of the date of the transfer adjusted in increase or decrease with the temporary tax differences (<i>e.g.</i> , from revaluations) and the revaluation reserve related to each asset
Croatia	The price that could be achieved in normal commercial transactions.	Market value.
Czech Republic	The normal price that would be negotiated in normal commercial relations between unrelated parties.	Acquisition price, the residual value of depreciable assets, the acquisition cost of non-depreciable assets <i>etc.</i>
Estonia	No special rules by law, the market price is the local average price.	Market value.
Germany	The market value is considered to be the price that could be achieved in normal business transactions. Unusual business discounts or personal discounts are not taken into account.	Book value.
Hungary	General TP appraisal rules.	Adjusted book value.

Country	Market value determination	Tax value determination
Italy	The market value must reflect the conditions and prices that would have been agreed between independent parties operating according at the arm's length principle.	The tax value of transferred assets is equal to the costs incurred by the transferor for the purchase and/or the construction of the assets transferred.
Latvia	General TP appraisal rules.	Book value market value less obligations.
Luxembourg	General TP appraisal rules.	Fair market value.
Netherlands	Fair market value. Free burden of proof for the taxpayer any creditable valuation method is acceptable.	Book value.
Portugal	The Portuguese exit tax regimes do not establish how to determine the market value.	Acquisition cost.
Romania	The amount for which an asset may be transferred or the mutual obligations that may be settled between interested independent buyers and sellers in a straightforward transaction.	Book value.
Slovakia	The fair value of the transferred assets at the time of the transfer abroad.	The acquisition price of securities and shares, the residual value of depreciable assets, the acquisition cost of non-depreciable assets <i>etc.</i>
Spain	The amount that would be agreed between two independent persons or entities on an arm's length basis.	The acquisition value of the transferred assets less depreciation or impairments that have been deducted from the CIT base.

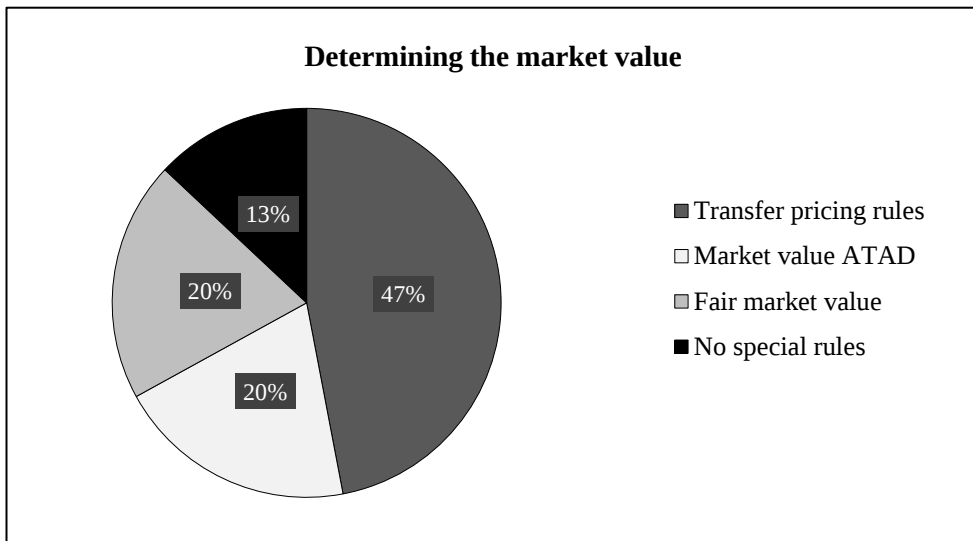
Source: Authorial computation.

Market value

From the results of the research, the determination of the market value for the purpose of exit tax differs from country to country. To make it clearer, these market values have been divided into four categories, which are shown in Fig. 4.

The definition of the market value as set out in Article 5(6) ATAD is most similar to the regulations of Croatia, the Czech Republic and Romania.

Fig. 4 Market value determination in selected countries



Source: Authorial computation.

The predominant share in the method of determining the market value is the so-called transfer pricing rules. The market price is set by Bulgaria, Hungary, Latvia, and Luxembourg based on these rules. In addition, Italy and Spain, which set the market price at arm's length, as well as Belgium, were also included in this category. In the case of Italy, the value of goodwill must also be considered in the situation of transfer of an enterprise or business unit (*i.e.*, the going concern). Goodwill must be calculated considering the functions and risks transferred. To determine that fair market value, it is necessary to consider the guidelines issued by the Italian Minister of Economy and Finance on 2 July 2014. For Belgium, in the case of a transfer of participation or immovable property, it is recommended that an expert opinion be drawn up to determine the market value.

Clarification of the concept of transfer pricing: These prices are governed by the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (OECD, 2017a) (hereinafter referred to as the "OECD Guidelines"). Transfer pricing is determined based on the arm's length principle. The interpretation of arm's length is contained in Article 9(1) of the OECD Model Tax Convention (OECD, 2017b). The arm's length principle requires that business relationships between related enterprises be set up as if they had been conducted between independent enterprises under similar conditions. This principle emphasises that the prices, fees and terms of transactions between related businesses should be set in such a way that they correspond as closely as possible to the prices

that would be chosen by independent parties in similar business relationships. In other words, if there is a business relationship between related parties which imposes different conditions from those that would apply between independent entities, then any profits that one of the undertakings would have made in the absence of those conditions but did not make those profits because of those different conditions, may be allocated to the profits of that undertaking and subsequently taxed.

Fair market values are used in Germany, the Netherlands, and Slovakia. According to the Slovak Accounting Act, fair value means: market price, the value determined by a valuation model that uses mainly information from transactions or quotes on an active market, if the market price is not known, or a value determined by a valuation model that uses mainly information from transactions or quotes on a market other than the active market, if information on the active market is not available; or an expert opinion if none of the above valuation models can be used.

It should be noted that all the above types of market value determination are very similar (if not identical) to the definition of market value resulting from the ATAD. However, each state may use different procedures and rules to determine this price, so it is always essential to thoroughly examine the tax treatment of a particular state.

Finally, the research showed that only two countries do not require special rules for determining the market value for the purposes of exit tax. According to Estonian tax regulations, the local average price is used to determine this value. The Portuguese exit tax regimes do not establish how to determine the market value. Therefore, the market value, and the procedures that were adopted to compute it, must be sustained by the taxpayer or tax authorities.

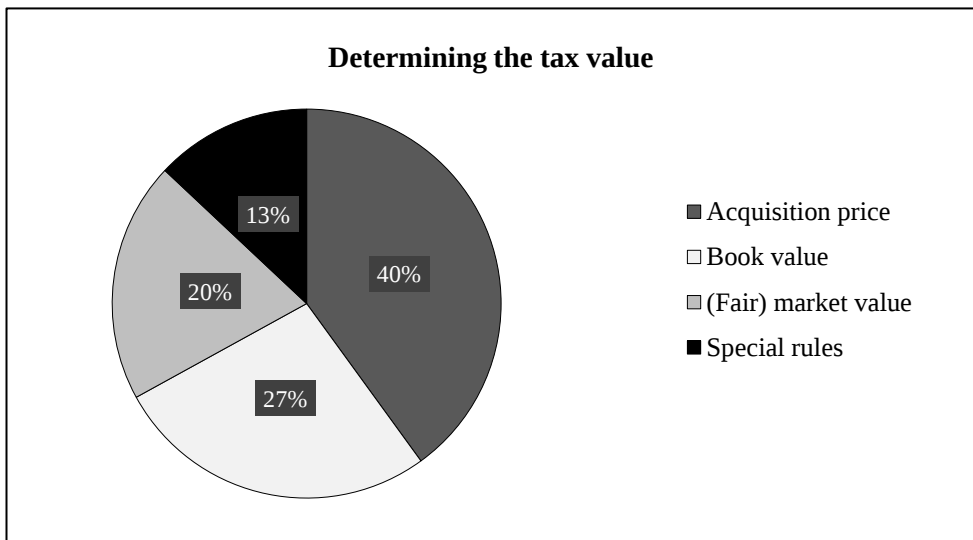
Tax value

Similarly to the determination of the market value, the data on the determination of the tax value were also divided into four categories for the sake of clarity – as shown in Fig. 5. However, unlike the market value, the tax value is not regulated by the provisions of the ATAD.

The most used tax value is the acquisition price. Italy and Portugal use the acquisition price as such, without further adjustments, as the tax value by which the market value is reduced for the purposes of calculating the exit tax. The acquisition price reduced by depreciation (residual tax price) or impairment that was deducted from the CIT base is used as a tax value for the purposes of exit tax by Belgium, the Czech Republic, Slovakia, and Spain. The acquisition price may vary depending on the type of asset and how it was acquired. If these are purchased assets, this is the price at which the asset was acquired. In the case of assets created by own activities, the acquisition price will be the own costs incurred in their creation, in the case of

assets acquired free of charge, it may be the replacement cost *etc.* The acquisition price as a tax value for exit tax also differs depending on whether the assets are depreciated or not. In these cases, the acquisition price of depreciated assets is their net cost (*i.e.*, the acquisition price reduced by depreciation), while in the case of non-depreciated assets, it is purely the acquisition price without further adjustments.

Fig. 5 Tax value determination in selected countries



Source: Authorial computation.

Another category for determining tax costs is the use of book value (whether adjusted or not). Germany, Hungary, Romania, and The Netherlands use the book value as a deductible tax expense. According to Hungarian law, the adjusted book value of the transferred assets is considered to be the tax value (however, no further specification of this value is provided).

The (fair) market value, as the eastern tax value for the exit tax, can be found in the tax regulations of Croatia, Estonia, and Luxembourg.

Bulgaria and Latvia have been included in the category of specific cases. Latvia defines the tax value differently depending on the type of transaction carried out. In the case of the transfer of assets from a permanent establishment in Latvia to the main company or another permanent establishment abroad, the tax value for the exit tax is the book value. In the case of a transfer of assets because of the transfer of the company's registered office or the transfer of economic activity to the main company abroad, the tax value is the market value reduced by the amount of obligations relating to these assets (excluding accumulated obligations attributable

to future expenses). The tax value of tax-depreciated assets in Bulgaria is their tax value as of the date of transfer. The tax value of non-depreciated assets is their book value at the date of the transfer, adjusted for increases or decreases in temporary tax differences (*e.g.*, from revaluations) and the revaluation provision that relates to individual assets.

In conclusion, it should be noted that the definition of accounting, acquisition or market prices may vary from country to country, so it is always necessary to thoroughly examine the tax treatment of a particular state before any reorganization is carried out. The same applies to the determination of the market value.

3.3 Exit taxation and cross-border mergers

Cross-border mergers without a permanent establishment

The second objective of the research is to map the application of exit tax to cross-border mergers.

First, it was verified whether the exit tax is applied to cross-border mergers in which a permanent establishment is not established in the territory of the company being dissolved. For types of cross-border mergers in which the assets remain linked to a permanent establishment in the state of the company being dissolved, there is a special European tax regulation.

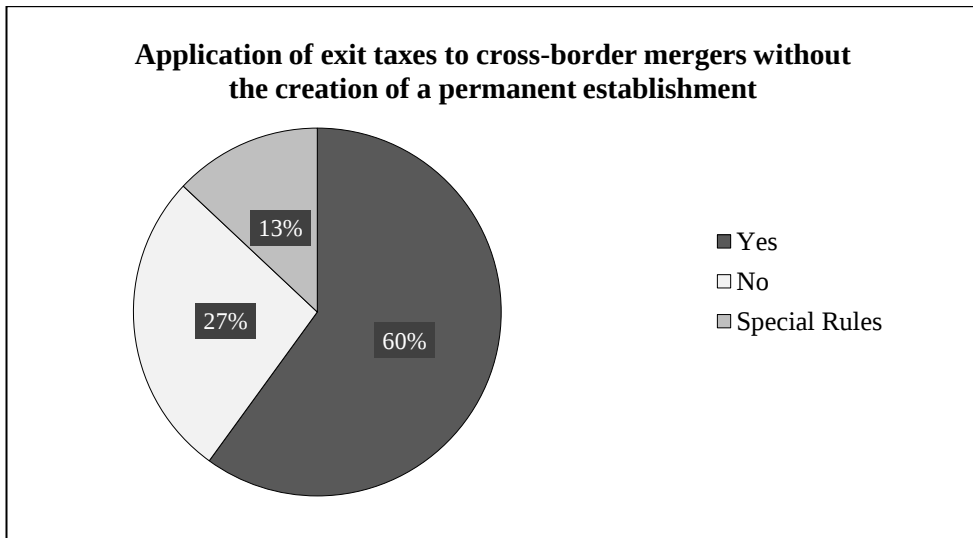
However, cases of cross-border mergers, where the assets do not remain linked to a permanent establishment, do not have any special tax regime at the level of European directives. Each state has the option to set its own rules for the taxation of these types of mergers, but the rules must be in line with the freedom of establishment and must not disadvantage the implementation of these mergers compared to domestic mergers.

With the possibility of taxing cross-border mergers without the creation of a permanent establishment, the ATAD came up with a possible application of exit tax. Some countries had already worked with this tax before its introduction, for some this institute is new. Similarly, the implementation of this provision of the Directive could be implemented differently by each Member State for different types of transactions. Not all countries necessarily have to apply this tax to cross-border mergers without the creation of a permanent establishment. Fig. 6 discusses whether the exit tax is applied to this type of merger in selected countries.

Most of the countries surveyed, *i.e.*, 60% of the sample, apply exit tax in some form to cross-border mergers without the creation of a permanent establishment. The nine countries are: Belgium, Bulgaria, Germany, Italy, Latvia, Luxembourg, Portugal, Romania, and Spain. Croatia, the Czech Republic, Hungary, and Slovakia do not

have any exit tax on cross-border mergers. Two countries were included in the category of special treatments, namely Bulgaria and Estonia.

Fig. 6 Merger without a permanent establishment and its impact on exit tax



Source: Authorial computation.

In Estonia, cross-border mergers without a permanent establishment are in principle taxed, but it is not an exit tax. Tax authorities in Estonia very often use the provisions of the Income Tax Act to reclassify transactions for tax purposes if the aim of these transactions is to obtain a tax advantage.

On the other hand, the Bulgarian exit tax regime stipulates that the exit tax may not apply to all cross-border mergers in which all assets are transferred to the successor company, but only to those that fall under one of the circumstances listed in a selected provision of the Bulgarian Income Tax Act, as a result of which Bulgaria no longer has the right to tax the transferred assets or activities.

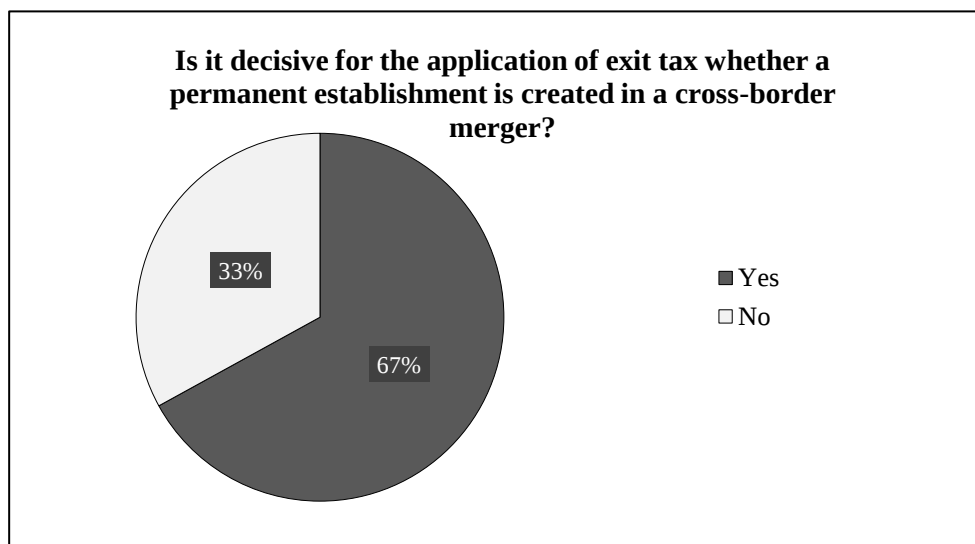
Cross-border mergers with creation of a permanent establishment

The analysis carried out shows that the creation of a permanent establishment has an impact on whether exit taxation will apply in most of the selected countries. The most common argument for this is the tax neutrality of cross-border mergers. Indeed, one of the main conditions for tax neutrality of cross-border mergers under the Merger Directive is precisely that the assets and liabilities transferred remain linked to the activities of the permanent establishment in the state of the disappearing company. Thus, the taxable entity essentially remains tax-present in

the territory of that State and that State does not lose the possibility of taxing capital gains on the transferred assets.

Fig. 7 shows that not in all cases the creation of a permanent establishment is related to the application of exit tax. This is the case of Slovakia, which does not apply exit tax to cross-border mergers where no permanent establishment is created. However, the creation of a permanent establishment in a cross-border merger from Slovakia has different considerations (Horáková, 2022). Whether the assets of the surviving company remain functionally connected to the permanent establishment in Slovakia is one of the factors that determines whether a cross-border merger can be carried out at historical or fair values for tax purposes. In addition, exit taxation applies only if the permanent establishment remains in the state of the dissolving company, but only in the event of a future transfer of those assets or business activities from the permanent establishment abroad.

Fig. 7 Effect of permanent establishment on exit tax



Source: Authorial computation.

Procedure for determining exit taxes in a cross-border merger

The fact whether the selected countries apply the exit tax to cross-border mergers without the establishment of a permanent establishment has already been verified above. The research showed a total of nine countries that confirmed this fact. Another area to be verified was the procedure for determining this tax. Tab. 3 provides an overview of the procedure for determining exit for cross-border mergers in each country.

Tab. 3 Procedure for determining exit tax in a cross-border merger

Country	Procedure for determining exit tax in a cross-border merger without a permanent establishment
Belgium	First it is necessary to analyse whether a cross-border reorganization can be exempt from Belgian CIT. In the case of an exempt reorganization Belgian exit tax is due on all assets (and exempt reserves) that do not remain in the Belgian permanent establishment after the cross-border reorganization. In the case of a taxable reorganization the Belgian company is deemed be discontinued for Belgian tax purposes and Belgian liquidation tax would be due.
Bulgaria	The exit tax in Bulgaria represents potential additional taxation originating from the adjustment of the tax base and resulting from the application of market values on the write-off of the transferred assets. The tax adjustments are applied in the last tax return if a company or permanent establishment is being dissolved or in the current yearly tax return in case a permanent establishment in the country remains.
Czech Republic	Taxation on the transfer of assets without a change of ownership (exit tax) does not apply to cross-border mergers without the creation of a permanent establishment as the merger involves a change of ownership.
Hungary	Cross-border mergers are not listed in the exit tax section of the Hungarian Income Tax Act. Under Hungarian legislation exit tax does not apply to capital withdrawals under company law.
Italy	The exit tax regime applies <i>inter alia</i> where a resident company transfers its tax residence or assets from Italy as a result of cross-border mergers, demergers and other corporate reorganizations and no permanent establishment remains in Italy. Capital gains arising from the transfer of the residence should be determined jointly by comparing the total fair market value of the “going concern” and its tax base.
Latvia	The taxpayer must increase the CIT base by the market value of the exported assets.
Luxembourg	This is a deemed disposal with taxation of hidden capital gains on assets measured at fair market value.
Portugal	The merger (dissolution and liquidation of a Portuguese company) is subject to taxation as if a sale of the assets occurred at market value. In general terms all assets and liabilities are considered transferred by the Portuguese company at market value – similar with the exit tax.
Romania	The registration of a permanent establishment in Romania following a cross-border merger represents a condition of tax neutrality from a corporate tax perspective. If no permanent establishment is registered in Romania as the state of the dissolving company the exit tax applies to the transfer of assets.
Slovakia	Exit tax effectively does not apply in this scenario because cross-border mergers are carried out at fair values for tax purposes.

Country	Procedure for determining exit tax in a cross-border merger without a permanent establishment
Spain	The exit tax applies to the difference between the market value and the acquisition value of the transferred assets. However, the Spanish CIT Act contains a special tax system applicable to restructuring transactions which is based on the tax neutrality of direct capital gains taxation.

Source: Authorial computation.

Note: Croatia, Estonia, Germany and the Netherlands are omitted as they have not answered the question.

The application of exit tax to cross-border mergers varies from country to country. Some countries do not apply it to cross-border mergers, while others do, and others have special rules that need to be examined in more detail to determine whether the tax will be applied to a given merger. In all cases, however, it is necessary to thoroughly examine whether it will be a so-called exempt (not subject to exit tax) cross-border merger or a merger that meets the criteria of the regulation for the application of the exit tax. In each country, the restrictions on the application of exit tax are set differently and, in some cases, no “exemption” can be applied. Thus, each cross-border merger must be examined on a case-by-case basis and the relevant tax regime in the country of the company being dissolved must be thoroughly analysed.

4 Conclusion

The analysis shows that the impact of the exit tax on cross-border mergers is considerable, especially if the focus is put on cross-border mergers without the establishment of a permanent establishment. Until recently, these cross-border mergers were not subject to any tax treatment at the European level. Individual Member States thus had a free hand in the tax treatment of mergers which did not entail the creation of a permanent establishment. The inconsistency of taxation and the virtually non-existent tax treatment of these mergers at EU level have created the possibility of aggressive tax planning. Thus, the merging companies could easily avoid taxation on the unrealised profits on the transferred assets by carrying out a cross-border merger without creating a permanent establishment in the State of the company being dissolved. However, this was not the case for all EU countries. Some states have treated these situations in their tax regulations with the equivalent of the now existing exit tax. The problem with these tax adjustments, however, was that they mostly went beyond what was necessary. A very common problem with these regulations was their inconsistency with European law on the free movement of persons and freedom of establishment. These types of mergers were disadvantaged compared to traditional domestic mergers or tax-neutral mergers under the Merger Directive due to their immediate exit taxation.

The introduction of a single exit tax rule has thus levelled the playing field in all Member States in exit taxation and introduced uniform rules for the collection and deferral of this tax. It should be noted that the transposition of this provision was carried out differently by each state, which may have led to deviations in individual legal regulations. Therefore, it cannot be 100% attributed that the exit tax is always applied to every cross-border merger without the creation of a permanent establishment. Although the exit tax has been transposed by all the countries surveyed, each applies it to different transactions. Therefore, even this uniform regulation will not always result in the taxation of transferred assets in the event of a cross-border merger, if the selected EU country does not include this transaction in its national exit tax legislation. From the research carried out, it can be concluded that, with a few exceptions, most of the countries surveyed apply this tax to cross-border mergers. This finding can be considered very beneficial and is likely to have a significant impact on the number of implementations of these types of mergers, especially in those countries that did not have a similar tax before its introduction. An important outcome of the analysis is also the procedure by which the tax is assessed, including the determination of market and tax values for its calculation.

Although the exit tax was originally perceived as an obstacle, the current state of the European legislation says the opposite and sets the basic rules and obligation to implement it. In conclusion, it should be noted that in the case of any cross-border transaction, it is always necessary to thoroughly study the tax treatment of exit taxation in the selected country. It is important not to rely on the fact that the implementation took place at the level of all European countries in the same way. This is because each country may apply this tax to different transactions, which may also result in variations in its application to cross-border mergers. This research compares selected European countries in two areas. The first presents the rules for tax collection on exit, which can be used as a starting point for further research. The section on the impact of exit taxes on cross-border mergers can then be used as a possible justification for reducing or increasing the number of cross-border mergers in each country. Barriers to harmonization of cross-border mergers were addressed by Žárová and Skálová (2010), Biermeyer (2013), and Biermeyer and Meyer-Erdmann (2021). The research builds on previously published work but brings a new perspective that has been gained by engaging tax professionals from several countries. The published summaries are thus truly reliable and have been obtained from qualified experts. However, the involvement of qualified professionals has also brought pitfalls as it has not been possible to obtain good quality responses from all EU countries, so the research is limited to 15 countries out of the 27. We expect to expand the sample of countries in future research to provide a comprehensive view.

References

Biermeyer, T., 2013. Study on the application of the Cross-Border Mergers Directive. European Commission. DOI: 10.2780/96404.

Biermeyer, T., Meyer-Erdmann, M., 2021. Cross-Border Corporate Mobility in the EU: Empirical Findings 2021. SSRN Electronic Journal. DOI: 10.2139/ssrn.3960618.

Bureš, M., 2019. Zdanění při odchodu („exit tax“) aneb Jak to může dopadnout, když Evropská unie poslouchá Francii. DAUČ. Daně a právo v praxi. Available from: <<http://www.dauc.cz/dokument/?modul=li&cislo=262041>>. [17 July 2023].

Court of Justice of the European Union (CJEU), 2004. Judgment of 11 March 2004, Hughes de Lasteyrie du Saillant, C-9/02, EU:C:2004:138. Available from: <<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=48987&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6129420>>. [11 March 2024].

Court of Justice of the European Union (CJEU), 2006. Judgment of 7 September 2006, N, C-470/04, EU:C:2006:525. Available from: <<https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:62004CJ0470>>. [12 March 2024].

Court of Justice of the European Union (CJEU), 2011. Judgment of 29 November 2011, National Grid Indus BV, C-371/10, EU:C:2011:785. Available from: <<https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:62010CJ0371>>. [15 March 2024].

Court of Justice of the European Union (CJEU), 2014. Judgment of 23 January 2014, DMC, C-164/12, EU:C:2014:20. Available from: <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=146689&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=22084892>>. [19 March 2024].

Court of Justice of the European Union (CJEU), 2015. Judgment of 21 May 2015, Verder LabTec GmbH & Co. KG, C-657/13, EU:C:2015:331. Available from: <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=164355&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=22085890>>. [15 March 2024].

Dabija, V., 2015. Exit Taxation in the European Union. Is there really a problem? Master's thesis, Lund University. Available from: <<https://www.lunduniversity.lu.se/lup/publication/5436075>>. [17 July 2023].

Dai, D., 2018. Is exit tax a good idea for the taxman? Journal of Economic Studies, 45(4), 810–828. DOI: 10.1108/jes-04-2017-0094.

European Commission, 2006. Explanatory Memorandum to COM(2006)825 - Exit taxation and the need for co-ordination of Member States' tax policies. Document 52006DC0825. Available from: <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0825:CS:html>>. [15 July 2023].

European Commission, 2009. 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 (Codified version). Available from: <<https://eur-lex.europa.eu/eli/dir/2009/133/oj>>. [30 March 2024].

European Commission, 2016. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Available from: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016L1164-20220101>>. [19 July 2023].

Haag, M., Niemann, M., 2021. Drastic Tightening Of Exit Tax As Of 1 January 2022. Mondaq. Available from: <<https://www.mondaq.com/germany/tax-authorities/1075286/drastic-tightening-of-exit-tax-as-of-1-january-2022>>. [10 February 2024].

Hernández González-Barreda, P. A., 2019. Exit Taxes: One Size Should Not Fit All. In: Almudí Cid, J. M., Ferreras Gutiérrez, J. A., Hernández González-Barreda, P. A., (Eds). *Combating Tax Avoidance in the EU: Harmonization and Cooperation in Direct Taxation*, 191–226. Alphen aan den Rijn: Kluwer Law International. ISBN: 978-94-035-0154-3.

Horáková, G., 2022. Accounting and taxation of mergers in Slovakia. Master's thesis, Prague University of Economics and Business. Available from: <<https://vskp.vse.cz/english/87830>>. [4 April 2024].

Kappel, J., 2021. Implementation of Exit Taxation in the Czech Republic. *Analysis and Studies CASP*, 12(2), 45–50. DOI: 10.33119/ascasp.2021.2.5.

Kappel, J., 2023. *Opatření proti vyhýbání se daňovým povinnostem [Anti-Tax Avoidance Measures]*. Praha: C. H. Beck. ISBN: 978-80-7400-912-9.

OECD, 2017a. *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*. Paris: OECD Publishing. DOI: 10.1787/tpg-2017-en.

OECD, 2017b. *Model Tax Convention on Income and on Capital: Condensed Version 2017*. Paris: OECD Publishing. DOI: 10.1787/mtc_cond-2017-en.

Peeters, S., 2017. Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool. *EC Tax Review*, 26(3), 122–132. DOI: 10.54648/ecta2017014.

Skálová, J., 2019. Účetní a daňové souvislosti přeměn obchodních společností [Accounting and Tax Aspects of Legal Form Transformation]. 3rd edition. Prague: Wolters Kluwer. ISBN 978-80-7598-570-5.

van den Broek, H., 2011. Exit Taxation of Cross-Border Mergers after National Grid Indus. *Studi Tributari Europei*, 3(1). DOI: 10.6092/issn.2036-3583/4819.

Zakrzewska, P., 2020. A legal study into the EU's approach towards exit taxation. Master's thesis, Lund University. Available from: <<https://www.lunduniversity.lu.se/lup/publication/9018330>>. [10 August 2023].

Žárová, M., Skálová, J., 2010. Accounting Regulation of Cross Border Mergers in Europe and Obstacles from the Implementation of the 10th EC Directive. In: 5th International Workshop on Accounting & Regulation, 23–25 September 2010, Siena, Italy.

Appendix A: Survey Questions

1. Please write the name of the country.
2. Has the exit tax been implemented in your country's tax system?
3. How is the market value of transferred assets determined for exit tax purposes?
4. How is the tax value of transferred assets determined for exit tax purposes?
5. Do you apply the exit tax to cross-border mergers in which all assets are transferred to a successor company in another EU Member State without establishing a permanent establishment in your state as the state of the company being dissolved? If so, what is the procedure for determining it?
6. When applying the exit tax to cross-border mergers, is it decisive whether a permanent establishment remains in the state of the company being dissolved?
7. If a cross-border merger from your country to the Czech Republic were to take place, when and under what circumstances would the exit tax be applied?
8. What is the valuation procedure for assets in cross-border mergers?
9. Do you use this valuation procedure for the cross-border mergers referred to in question 7 also as a starting point for exit taxation?
10. What is the exit tax rate?