ec TAX REVIEW 2023–2

Article

May a Country Tax a Subsequent Restructuring Under the Merger Directive?

Mikołaj Kondej[*] & Mateusz Wicher[**]

The article concerns the compatibility with the merger directive of Polish regulations introduced as of 1 January 2022, according to which a restructuring (merger, demerger or exchange of shares) is not tax neutral for a given shareholder if it involves allotment of shares in exchange of shares which were obtained as a result of a prior restructuring. For the purpose of this analysis, the authors take a deep look at the nature of deferral provided in Article 8 of the merger directive and summarize the case law and the doctrine views. While they acknowledge many areas of dispute around the concept of the deferral, they conclude that irrespective of the approach adopted, taxation of shareholders solely because they exchange shares granted to them as a result of a previous restructuring is not in line with the directive. Regardless of the above, the authors also discuss whether Article 8(6) of the directive provides for a right of a Member State to tax gain which arose until the moment of the restructuring if, as a result of the restructuring, the taxing right under a double taxation treaty (DTT) is transferred to another Member State.

Keywords: Merger directive, 2009/133/EC, 90/434/EEC, shareholder, allotment of shares, merger, demerger, exchange of shares

1 Introduction

In Poland 2022 was a year of tax changes. Significant amendments to the tax law, popularly known as the 'Polish Deal' – the name referring to the 'New Deal', an economic and social reform programme introduced in the United States by President Franklin Delano Roosevelt in the 1930s – came into force as of January 2022.[1] This article will analyse one of these amendments which relates to taxation of restructuring operations. Under the amended regulations the value of shares received by a shareholder as a result of a restructuring (merger, demerger or exchange of shares) is subject to taxation if the shares are allotted in exchange for shares which were allotted to the shareholder as a result of an earlier restructuring. Our aim is to discuss whether it is acceptable to impose such a tax under the merger directive. This seems an important issue, as such a tax may impede many business-driven cross-border restructurings and if it becomes widespread within the EU it could seriously hamper freedom of establishment.

To answer the above research question we begin with a succinct description of the Polish regulations and proceed to analyse in detail Article 8 of the merger directive,[2] and in particular its section 6, which seems to have inspired the Polish legislature to introduce taxation of subsequent restructurings. We analyse the wording of the regulation, as well as case law and doctrine views relating to it, in order to better understand the nature of the deferral of the taxation required under Article 8. This allows us not only to juxtapose the Polish legislation with provisions of the merger directive and answer the research question, but also to discuss what are the possible ways of taxing a shareholder by a Member State under the directive.

The research method applied by the authors is analysis and evaluation of legislation, case law of the Court of Justice of the European Union (CJEU or the Court) and literature.

2 Background: changes to the taxation of restructurings in Poland

When referring to restructuring operations in this article we will mean mergers, demergers and exchanges of shares. As the Polish law stood before 1 January 2022 (i.e., before the Polish Deal came into force), upon fulfilment of the relevant conditions each of the said restructuring activities could be tax neutral. The regulations as amended by the Polish Deal still provide that the fulfilment of certain conditions will result in the tax neutrality of restructuring activities, however, these conditions have been significantly

[*] (Dr) Tax & Legal Technical Senior Manager within PwC Poland. Email: kontakt@mikolajkondej.pl.

[**] MA in Law and BA in Management at the University of Warsaw, LLM Candidate at the University of London, Tax Consultant within PwC Poland. Email: mattwicher97@gmail.com.

[1] Act (PL) of 29 Oct. 2021 amending the Personal Income Tax Act, the Corporate Income Tax Act and certain other acts (Journal of Laws 2021, item 2105).

[2] Council Directive 2009/133/EC of 19 Oct. 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 ('merger directive').

© 2023 Kluwer Law International BV, The Netherlands

tightened. The Polish Deal introduced to the Polish law conditions for tax neutrality of restructurings provided explicitly in the merger directive, in particular, a requirement that the shareholder should not allocate to shares acquired as a result of the restructuring tax value higher than the tax value the shares had before the restructuring. On the other hand, however, a new condition, common to both mergers, demergers, and exchanges of shares, was introduced, with the result that it may deprive the second and subsequent restructuring of tax neutrality.

In particular, under a newly introduced provision, in the case of mergers and demergers no taxable revenue arises for a shareholder of the acquired or demerged company (in the amount corresponding to the issue value of the shares (stocks) allotted to the shareholder by the acquiring or newly established company) provided, among others, that shares (stocks) in the acquired or demerged company were not acquired as a result of an exchange of shares or allotted as a result of another merger or demerger.[3] This means that only the first restructuring is tax neutral for the shareholder of the acquired or demerged company. If the shareholder has acquired shares as a result of an exchange of shares, merger or demerger, they will not be able to benefit from the taxable revenue exclusion. The shares allotted to them, as a result of the subsequent restructuring, in the part in which they are allotted in exchange for shares acquired as a result of a previous restructuring, will qualify as their taxable revenue.

A similar provision has been introduced with respect to exchange of shares. Generally, if a transaction qualifies as an exchange of shares, the value of shares received under such a transaction does not qualify as taxable revenue either for the transferring or the acquiring company. However, for a transaction to qualify as an exchange of shares (and thus to benefit from the said exclusion), the transaction must meet several conditions listed in the Polish Corporate Income Tax Act. One of the conditions added by the Polish Deal is that the shares contributed by the shareholder have not been acquired as a result of any other exchange of shares, merger or demerger.[4]

The changes outlined above significantly alter the tax environment as to taxation of restructuring operations. In the following sections we will discuss the potential incompatibility of such measures with the EU law based on comprehensive analysis of the merger directive.

3 A comprehensive analysis of Article 8 of the merger directive

The right to conduct cross-border restructurings is seen as a particular method of exercising the freedom of establishment.[5] As such, this right should not be hampered by restrictions, disadvantages or distortions arising in particular from tax provisions of Member States.[6] To achieve this, both the currently binding merger directive (2009/133/EC), and its predecessor (directive 90/434/EEC[7]), imposed common grounds for taxation of restructurings.

At this point it should be underlined that the merger directive applies only to cross-border restructurings. Therefore, in the present article we will concentrate on compliance of Polish regulations with the directive in case of cross-border EU restructurings, leaving aside a discussion whether taxation of local restructurings could be challenged based on the directive.

The currently binding directive provides for rules of taxation for shareholders participating in a restructuring in its Article 8. The provision generally follows the wording of Article 8 of directive 90/434/EEC, therefore, in our further remarks we will also refer to doctrine views presented with regard to that act.

3.1 The General Aim of Article 8 of the Directive

Particular provisions of Article 8 remain closely related to one another. Therefore, the literature referring to this provision defines its purpose by analysing the article as a whole, rather than looking at the purpose of its particular sections separately. However, to facilitate a better understanding of the topic, we will begin our analysis by discussing the most important sections of Article 8, which relate to the position of a shareholder participating in a restructuring.

Articles 8(1) and (2) of the merger directive provide that allotment of shares granted as a result of a restructuring to shareholders of the transferring or acquiring company shall not, of itself, give rise to taxation on the part of shareholders. The aim of the regulation was well described in *the Kofoed* case. The Court stated that the aim of the Directive 90/434 was:

> *to eliminate fiscal barriers to cross-border restructuring of undertakings, by ensuring that any increases in the value of shares are not taxed before they are actually realised and by preventing operations involving high levels of capital gains realised on exchanges of shares from being exempt from income tax simply because they are part of a restructuring operation.*[8]

Consequently, it is argued that it would be unjustified to tax a capital gain solely because a restructuring takes place, as the restructuring does not effectively result in

[3] Article 12(4)(a) of the Corporate Income Tax Act (PL) of 15 Feb. 1992 (Journal of Laws 2022, item 2587).

[4] Article 12(11)(3) of the Corporate Income Tax Act (PL) of 15 Feb. 1992 (Journal of Laws 2022, item 2587).

[5] Case C-411/03, *SEVIC Systems AG*, 13 Dec. 2005, ECLI:EU:C:2005:762, para. 19.

[6] Case C-14/16, *Euro Park Service v. Ministre des finances et des comptes publics*, 8 Mar. 2017, ECLI:EU:C:2017:177, para. 29; *see also* recital 2 of the Directive 2009/133/EC.

[7] Council Directive (EEC) 90/434 of 23 Jul. 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225, 20 Aug. 1990.

[8] Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, 5 Jul. 2007, ECLI:EU:C:2007:408, para. 32.

the realization of such a gain.[9] Such taxation could lead to an unjustified cash flow disadvantage for entities participating in such operations, thus hampering freedom of establishment.[10]

However, the tax neutrality of the restructuring under the merger directive is subject to the condition, provided for in Articles 8(4) and 8(5), that the shareholder does not attribute to the securities received as a result of restructuring a tax value higher than the tax value the securities had before the restructuring (e.g., that no step-up in the tax value of shares held by the shareholder takes place as a result of the restructuring). Lack of tax step-up on the value of shares held by the shareholder at the moment of the restructuring, together with tax neutrality of the restructuring, seems to be aimed at effectively deferring taxation of the increase in value which took place between the acquisition of shares and the restructuring, rather than at fully exempting such an increase from taxation.[11] Under such a mechanism the gain realized at subsequent transfer will be calculated as the difference between the remuneration received and the historical cost of acquisition of shares held before the restructuring, which means that any increase in value which took place before the restructuring will also be taxed.

The fact that the directive is not aimed at exempting gains which arose until the date of the restructuring from taxation does not seem disputable, and is supported by case law and the doctrine. In particular, in the *Kofoed* case, the Court clearly stated that the aim of previously binding directive 90/434 was '*preventing operations involving high levels of capital gains realised on exchanges of shares from being exempt from income tax simply because they are part of a restructuring operations*'. A similar view was presented in *A.T.* in which the Court ruled that '*the purpose of the directive, / … /is to eliminate fiscal barriers to cross-border restructuring of undertakings, by ensuring that any increases in the value of shares are not taxed until their actual disposal*'.[12] The same statement was repeated in *Modehuis A. Zwijnenburg BV*.[13] CJEU presented also a similar position with regard to regulations of Articles 4 and 9 of Directive 90/43 in *3D I Srl*.[14] Although the said views were presented on the grounds of the previously binding merger directive, in our view they remain relevant. Such an approach was confirmed by the CJEU itself in the AQ & DN case, in which the Court stated in the context of the interplay between directive 90/43 and directive 2009/133 that '*those two directives have the same objective*' and '*the case-law of the Court relating to one of those two directives also applies to the other*'.[15]

The above understanding of the aim of the regulations seems to be supported also by the recitals to the directive. In particular, under recital 5 '*the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, partial divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the Member State of the transferring or acquired company'*. The reference to safeguarding the financial interests of the Member State could be understood as underlining that while the restructuring by itself shall be tax neutral, a Member State's right to tax the increase of the value of shares held by the shareholders should be preserved.[16]

Also, the doctrine emphasizes that Articles 8(1), (4) and (5) establish a tax deferral and not a tax exemption regime, even though the regime is referred to in different ways. In particular, Harm van den Broek states that by attributing to the securities received a tax value not higher than the tax value of securities held by the shareholder before restructuring Article 8 '*does not grant shareholders an exemption as a result of a merger, but rather a deferral of taxation*'.[17] Frederik Boulogne describes Article 8 of the directive similarly, stating that '*the taxation at the level of the shareholder should be deferred until it actually disposes of its securities*'[18] and Agnė Petkevičiūtė refers to the regime as '*postponement of taxation*'.[19] This position seems to be uncontested and non-controversial.

This, at least at the first glance, seems to be further supported by Article 8(6) of the directive. In accordance with this provision the general tax neutrality of the restructuring does not '*prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition*'. The beginning of the section clearly states that while the restructuring by itself shall be tax neutral, a Member State may nonetheless tax the subsequent transfer of securities received by shareholders as a result of the restructuring. It seems that it was the wording of this provision which led the Polish Government to conclude

9 Case C-285/07, *A.T. v. Finanzamt Stuttgart-Körperschaften*, 11 Dec. 2008, ECLI:EU:C:2008:705, para. 36.

10 Opinion of AG Wathelet in joined Cases C-327/16 and C-421/16, *Marc Jacob v. Ministre des Finances et des Comptes publics (C-327/16) and Ministre des Finances et des Comptes publics v. Marc Lassus (C-421/16)*, 15 Nov. 2017, ECLI:EU:C:2017:865, para. 53, and the case law cited.

11 *See* among others: Harm van den Broek, *Cross-Border Mergers Within the EU: Proposals to Remove the Remaining Tax Obstacles* 260 (Kluwer Law International 2012); Case C-207/11, *3D I Srl v. Agenzia delle Entrate – Ufficio di Cremona*, judgment of 19 Dec. 2012 (ECLI:EU:C:2012:818, para. 28); Case C-321/05, *supra* n. 8, para. 32; Case C-285/07, *supra* n. 9, para. 28; and Case C-352/08, *Modehuis A. Zwijnenburg BV*, judgment of 20 May 2010 (ECLI:EU:C:2010:282, para. 39).

12 Case C-285/07, *supra* n. 9, para. 28.

13 Case C-352/08, *supra* n. 11, para. 39.

14 Case C-207/11, *supra* n. 11, para. 28.

15 Joined Cases C-662/18 and C-672/18, AQ (C-662/18) and DN (C-672/18), 18 Sep. 2019, ECLI:EU:C:2019:750, para. 34.

16 Władysław Varga, *Komentarz do dyrektywy 2009/133/WE dotyczącej opodatkowania fuzji, podziałów i przekształceń spółek*, section Preambuła dyrektywy (LEX 2015).

17 van den Broek, *supra* n. 11, at 260.

18 Frederik Boulogne, *Shortcomings in the EU Merger Directive* 175 (Kluwer Law International 2016).

19 Agnė Petkevičiūtė, *Mechanism of Taxation of Reorganizations and Transfers Established in the Council Directive 2009/133/EC*, 16(4) Torun Bus. Rev. 54 (2017).

that it is allowed to tax any subsequent restructuring if it involves the transfer of shares received as a result of a previous restructuring.[20] In the following sections we will analyse Article 8(6) in detail to determine whether such a view is justified.

3.2 Article 8(6) of the Directive: Literal Wording

Article 8(6) of the directive provides that the Member State may tax securities allotted as a result of a restructuring '*in the same way as the gain arising out of the transfer of securities existing before the acquisition*'. In directive 90/434/EEC the same was stated in Article 8(2).

While some scholars interpret this regulation to be a clarification,[21] when considering its literal wording it does not seem that its aim was only to substantiate the Member State's right to tax an increase in the value of shares held by shareholders before the restructuring. Firstly, based on rules of literal interpretation, the scope of this section seems to refer to total gain arising out of a subsequent transfer rather than only to gain which results from the allotment of shares under the restructuring. In other words, this provision seems to relate not only to gain accrued until the moment of the restructuring, but also to any subsequent gain. Secondly, the wording of the section provides that gains from a subsequent transfer may be taxed '*in the same way*' as gains which would have been realized if the shares held before the restructuring had been transferred. Rather than simply stating that gains realized as a result of allotment of shares under the restructuring may be taxed at subsequent transfer, the section wording indicates that the subsequent transfer may be subject to taxation based on the same rules as those which applied to shares originally held by shareholders. Therefore, considering its literal interpretation, it seems to us that the analysed section aims to substantiate the Member State's right to tax the transfer of shares acquired as a result of a restructuring under the same rules which applied to shares held before this operation.

Considering recitals to the directive, which provide that the directive aims at '*safeguarding the financial interests of the Member State of the transferring or acquired company'*, Article 8(6) of the directive could also be interpreted as a provision which preserves a Member State's right to tax a subsequent transfer. This, however, remains disputable, especially considering that, based on its literal interpretation, the section refers not only to gains which arose until the moment of the restructuring, but also to any subsequent gains. We analyse this issue in more detail in section 3.5.

[20] Reply of the Ministry of Finance to the Member of Parliament enquiry of 28 Jul. 2022 (DD5.054.4.2022).

[21] Otmar Thommes, *Merger Directive*, 1 EC Corp. Tax L. 106 (2004) *cit. per* van den Broek, *supra* n. 11, at 262.

3.3 Article 8 of the Directive: Case Law

Case law relating directly to Article 8 of the directive is limited and was developed with regard to the previously binding directive. Still, we find it fully adequate due to the far-reaching similarity between the currently binding and the former merger directive, confirmed also by CJEU judgments.[22]

In the case *Jacob & Lassus*, CJEU considered French regulations relating to exchange of shares, which provided for a mechanism for deferred taxation. The mechanism assumed that the basis for assessing the capital gain on securities crystallized at the moment of the exchange, however, the capital gain was taxed and collected only when the securities received on the exchange were subsequently transferred.[23] In other words, French regulations provided that while the restructuring does not trigger the tax, the taxable amount is determined at the moment of the restructuring and effectively taxed upon the subsequent transfer. The said case considered the position of shareholders who, after the exchange of shares, changed their residence and subsequently sold shares received as a result of the exchange. The French courts referred to CJEU questions aimed at verifying whether France may impose the tax.

The first issue considered was whether Article 8 of the merger directive precludes legislation of a Member State under which the capital gain resulting from an exchange of securities is established when the transaction occurs, but is taxed in the year in which the event putting an end to the deferred taxation occurs (in the considered case the French government found that the event which ends the deferral was the transfer of the securities received in exchange). In this regard, CJEU began its considerations by stating that:

> *although Article 8(1) of the Merger Directive, by providing that an exchange of securities cannot by itself give rise to the taxation of the capital gain resulting from that transaction, ensures the tax neutrality of such a transaction, the purpose of that fiscal neutrality is not however to avoid such a capital gain from being taxed by the Member States with fiscal competence in respect of that gain, but only to prohibit them from considering that exchange as the chargeable event for the purposes of taxation.*[24]

The Court ruled that since the directive does not provide how this aim should be achieved, Member States have a certain degree of latitude in implementing the directive in this respect.[25] Consequently, the Court found out that as long as it is a subsequent transfer of shares rather than

[22] Joined Cases C-662/18 and C-672/18, *supra* n. 15, para. 34.

[23] Article 92 B(II)(1) of the code général des impôts (General Tax Code), in the version applicable to capital gains, the taxation of which was deferred as of 1 Jan. 2000.

[24] Joined Cases C-327/16 and C-421/16, *Marc Jacob v. Ministre des Finances et des Comptes publics (C-327/16) and Ministre des Finances et des Comptes publics v. Marc Lassus (C-421/16)*, 22 Mar. 2018, ECLI:EU:C:2018:210, para. 50.

[25] *Ibid.*, paras 51–52.

the exchange of shares that triggers the tax, Member States are free to establish a tax base at the moment of the exchange of shares[26] and defer taxation to the moment of a subsequent transfer. As the Court pointed out:

> *that conclusion cannot be called into question by the mere fact that the capital gain resulting from the exchange of securities is established when that transaction occurs. In that regard, it must be pointed out that such establishment is merely a technique allowing the Member State with fiscal competence in respect of the securities existing before the exchange, but which, under Article 8(1) of the Merger Directive, has been prevented from exercising that competence at that time, to preserve its fiscal competence and exercise it at a later date, namely on the date of the transfer of the securities received in exchange in accordance with the second subparagraph of Article 8(2) of that directive.*

In the Jacob *& Lassus* case, CJEU also dealt with the issue of the relationship between provisions of the directive and the regulations concerning the fiscal competence of Member States. At this point, we will leave this problem aside. We analyse it in detail in section 3.5.

The regime of Article 8 was further examined in *AQ & DN* case.[27] While the AQ case related to the exchange of shares, the DN involved a merger. In both cases after the restructuring shares were sold, which caused taxation of the previously deferred gain. According to French law the tax was calculated differently in case of gains subject to deferral (which arose until the restructuring) and gains resulting from an increase in value after the restructuring. In particular, for tax purposes, the time over which securities were held since the date of the exchange of securities was not taken into account while establishing tax relating to gain accrued until the restructuring. This impacted local allowance applicability. In the beginning of its judgment the Court confirmed its position taken previously in *Jacob & Lassus*,[28] as to whether French deferral regulations were acceptable. At the same time the Court stated that since French rules provide for a deferral of taxation, the same conditions of taxation and allowance must apply as the ones which would have applied if the exchange had not taken place.[29] Moreover, the Court stated that:

> *any other measure would go beyond a mere finding of the capital gain relating to the securities exchanged in the exchange of securities at the time it took place and could lead to real disadvantageous tax consequences on taxation of that gain at the date of the chargeable event for that taxation, in the present case on the date of the subsequent transfer of the securities received in exchange, which would be contrary to the principle of fiscal neutrality referred to in Article 8(1) of Directive 2009/133.*

This could be seen as the Court's observation that France was not allowed to apply any other taxation rules than the ones applicable before the restructuring took place. However, it should be noted that the above views were presented in specific cases concerning French rules which provided for deferral of collecting the tax (rather than deferral of establishing the tax amount). In the case of such a mechanism the application of taxation rules binding before the restructuring seems the only logical possibility. Therefore, one may not conclude that *AQ & DN* judgment establishes a one and only rule of taxing subsequent share transfers under the directive. This is because, as stated in *Jacob & Lassus,* the directive does not provide clear rules of taxation of gains resulting from the subsequent transfer. Accordingly, the deferral mechanism applied by France could be one of the possible ways of implementing the directive. In our view, one may not rule out the application of other mechanisms, such as, for instance, imposing a more preferable tax regime on gains arising from the subsequent transfer. This follows from the fact that Article 8(6) could be interpreted as securing a right of Member State, rather than imposing an obligation to tax income arising from a subsequent transfer based on rules which were applicable prior to the restructuring. Still, CJEU quite clearly stated that imposing a tax higher than one which would have been due at the moment of the restructuring could go against the principles of the directive.[30]

To sum up the case law referring to Article 8 of the merger directive, it clearly indicates that a Member States may provide for a mechanism under which the amount of gain is determined at the moment of the restructuring, and taxed at the moment of a subsequent transfer, as was the case of the French law. It does not preclude the possibility of the Member States introducing a different tax deferral mechanism (e.g., a mechanism under which the amount of tax due is established only at the moment of a subsequent transfer).

3.4 Article 8(6) of the Directive: Doctrine's View

In this respect, in the literature prior to the case law it was considered disputable whether Article 8 provides for the possibility of a Member State to implement a tax deferral under which taxable amounts are fixed already at the moment of the restructuring. The nature of Article 8 had been described instead as a 'roll-over mechanism' under which a deferral of a taxable event takes place, and not a deferral of tax collection. According to those views, taxation, and tax calculation in particular, should not take place at the moment of the restructuring, but only upon a subsequent transfer of shares obtained as a result of the restructuring. Thus it is the subsequent transfer that

[26] *Ibid.*, para. 54.
[27] Joined Cases C-662/18 and C-672/18, *supra* n. 15.
[28] *Ibid.*, paras 40–42.
[29] *Ibid.*, para. 44.
[30] *Ibid.*, paras 44–46.

should have been treated as a taxable event.[31] Under the roll-over mechanism, the shareholder was only expected to be taxed on the difference between the market value of the transferred shares and the historical acquisition cost of shares held before the restructuring.

The consequence of such a reasoning is, as pointed out for instance by Ivo Vande Velde, that in order for a gain to be taxed, the gain must still exist at the moment of the ultimate disposal of the securities. If the market value of the securities between the date of the reorganization and the moment of their ultimate disposal decreases, no taxable gain arises.[32] In other words, the moment of calculating the gain is the moment of the subsequent transfer of securities. Harm van den Broek underlines the importance of such an approach very clearly. He claims that *'if during the years following the merger, the market value of the shares in the receiving company decreases, this results in the corresponding decrease of the latent capital gains and future tax assessments'*.[33] He also accepts a situation in which such a gain would not arise at all due to a relevant decrease in the value of the securities. At the same time, in his 2012 book Harm van den Broek unequivocally rejected the possibility for Member States to apply a mechanism under which capital gains are fixed and tax is assessed at the moment of the restructuring, and only the collection of tax is deferred. This is one of the reasons why he also criticized the Dutch approach, which provided for a system of preserving the right to tax restructuring even if the Netherlands lose the right to tax the shareholders as a result of applying a tax treaty. He regarded the Dutch approach as infringing Article 8 of the directive.[34]

Most authors understand Article 8(6) of the directive as a further safeguard for Member States for a case in which the tax regime applicable to the shareholding changes.[35] It is argued that a Member State may disregard the fact that following a restructuring operation the shareholder fell under a different fiscal regime. In one of his works Frederik Boulogne gives an example of a situation in which the roll-over mechanism following from Articles 8(5) and (6) does not protect the fiscal interest of a Member State and discusses why, in his view, Article 8(6) of the directive is needed.[36] In the said example the shareholder exchanged a 3% stake in the transferring company for a 10% stake in the acquiring company as a result of an exchange of shares. Let us assume that regulations of a Member State provide for a tax exemption for share transfers under the condition that the shareholding is at least 5%. What follows is that in the discussed example, if the exchange of shares had not taken place, the share transfer would have been taxed. However, given that the exchange of shares did take place, a subsequent transfer would benefit from the tax exemption and, despite applying a 'roll-over' mechanism which ensures the continuation of the share valuation, the Member State would lose the possibility to tax the resulting gain. The author claims that it was due to such cases that Article 8(6) was introduced to the directive. It allows a Member State to tax the subsequent transfer from the above example as if the exchange of shares had never taken place, according to the rules which applied to the shareholder when he still had a 3% share in the transferring company.

However, Article 8(6) of the directive and the nature of the entire tax deferral contained in Article 8 of the directive lend themselves also to a different interpretation. In particular, the question arises whether Article 8 (6), in conjunction with Articles 8(1), (4) and (5), constitutes a right for the Member State of the transferring company to tax the gain which was deferred at the moment of the restructuring operation. In order to understand this question one should see when the answer could have practical significance. If a restructuring operation is carried out, the question whether a Member State acquires a fixed right to tax gains at the subsequent transfer of securities becomes relevant if, under the relevant double taxation treaty (DTT), the jurisdiction entitled to tax the gain realized upon a subsequent transfer changes. At the time of the subsequent transfer of the shareholding, a dispute may arise between the state which, allegedly, has a fixed right to tax the gain on such a transfer based on Article 8 of the directive, granted at the moment of the restructuring, and the state which has such a right based on the relevant DTT.

Literature prior to the case law rejects the notion that Article 8 of the directive confers such a fixed right on a Member State, providing several arguments against such an interpretation. In his 2012 book Harm van den Broek stated that provisions of DTTs should limit taxation by a state in which shares were held before the restructuring. In such cases DTTs should be applied. In his view, Article 8(6) of the directive should be interpreted as an entitlement for a Member State to construct its legal regime in a way which allows it to retain the taxing right after the cross-border merger. However, such a domestic change would require not only a change in the domestic law of the given state, but logically also in the DTTs

[31] Jonathan Schwarz, *Schwarz on Tax Treaties* (Kluwer Law International 2021), s. 14.09 [C].

[32] Jerome Vermeylen & Ivo Vande Velde, *European Cross-Border Mergers and Reorganizations* 104 (Oxford University Press 2012).

[33] van den Broek, *supra* n. 11, at 260.

[34] *Ibid.*, at 262.

[35] *Ibid.*

[36] Frederik Boulogne, *Safeguarding the Financial Interests of the Member States Under Article 8 of the EU Merger Directive and the Pending Marc Lassus (C-421/16) and Finnish Exit Tax Case (C-292/16)*, Kluwer International Tax Blog (2017), http://kluwertaxblog.com/2017/08/15/safeguarding-financial-interests-member-states-article-8-eu-merger-directive-pending-marc-lassus-c-42116-finnish-exit-tax-case-c-29216/ (accessed 29 Dec. 2022, 13:45 CET).

to be effective if needed.[37] This will be the case if provisions of the DTT granting a right to taxation to a different state at the time of the subsequent transfer of shares remain unchanged. Frederik Boulogne states that Article 8(6) '*refers to the taxation of a gain in a certain way ("in the same way"), but it does not fix the amount of the taxable gain. That is, it does not give the Member State of the shareholder the right to tax the amount of the gain that it would have been able to tax at the time of the restructuring operation*'.

Post case law literature had to confront the views of the CJEU in cases which have at least partially disrupted the perception of Article 8(6) described above (e.g., perception that under Article 8 fixing a capital gain as at the moment of the restructuring is not possible). Perhaps the best example of reflection on this topic is the article by Harm van den Broek from 2020.[38] As already mentioned, in his 2012 book he unequivocally rejected the possibility for Member States to apply a mechanism of imposing a tax assessment and fixing capital gains at the moment of restructuring and, as a result, deemed the Dutch approach which incorporates such mechanisms as infringing the directive. In 2020, however, he was forced to incorporate the views of the CJEU into his reasoning. Firstly, he notes that in Jacob and Lassus judgment, the CJEU acknowledged that Member States have a certain freedom to implement the merger directive, and in this respect the CJEU places a clear emphasis on the material objectives of the directive.[39] He concludes that the French system which was considered by the CJEU in the Jacob and Lassus case was permitted as a specific technique to achieve the directive's objectives. The system assumed that the capital gain of non-resident shareholders was determined upon a merger or demerger, and yet it was taxed only upon the subsequent disposal of the shares obtained in exchange. Since the French system was allowed by the CJEU, Harm van den Broek acknowledges that the Dutch approach should probably also be permitted at its core.

Comments on the Jacob and Lassus case can be found in work edited by Sjoerd Douma, Otto Marres, Hein Vermeulen and Dennis Weber.[40] In the work it was noted that the mechanism of, as it was called, 'defer and pay' accepted by the CJEU is a departure from the system envisaged under the merger directive, which involves '*the carrying over of tax* values *and eventual taxation of the difference between the real values at the time of subsequent alienation and the carried-over balance-sheet values of the shareholding (if positive)*'.

In their recent works other authors, such as Marjaana Helminen, adopt the views of the CJEU explicitly and without reservations, stating that:

> *Article 8 of the Merger Directive, however, does not preclude legislation of a Member State pursuant to which the capital gain resulting from an exchange of securities falling within the scope of that directive is established when the transaction occurs, but is taxed in the year in which the event putting an end to the deferred taxation occurs*[41]

3.5 Article 8 *v.* Right to Tax?

The analysis outlined above reveals a problem which we find worth discussing, even though it is not directly associated with newly introduced Polish regulations. The problem relates to the interplay between different interpretations of Article 8 and the Member State's right to tax gains on shares which arose before the restructuring under DTTs.

As an introduction to this problem, it should be noted that under the Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital rules, capital gains, including gains from the sale of shares in companies other than real estate companies, are taxed in the country of the shareholder. Restructurings usually lead to allotting shareholders new shares in exchange for the disappearing shares (in case of a merger), the demerged shares (in case of demerger) or the contributed entity (in case of an exchange of shares). This means that the jurisdiction of shareholders usually remains the same following the restructuring. As could be seen in *Jacob & Lassus*, subsequent events may lead to a situation in which the country entitled to tax gains on the transfer of shares allotted as a result of a restructuring under DTT changes, e.g., due to a change of residence of shareholder, another trans-border restructuring etc. This leads to the question whether Article 8 secures the right of a Member State in which the shares were held before the restructuring to tax gains from the transfer of shares allotted as a result of the restructuring.

In *Jacob & Lassus*, which was based on Directive 90/434, CJEU held that Article 8(2), which is currently incorporated as Articles 8(4) and (5) of the currently binding merger directive:

> *recognises the right of Member States which have fiscal competence for the capital gain relating to an exchange of securities but which, pursuant to art. 8(1), have been prevented from exercising that competence when that exchange occurred, to exercise that competence on the date of the subsequent transfer of the securities received in exchange.*

At the same time, the court, following the advocate general Wathelet, recognized that '*the Merger Directive does not harmonise the criteria for allocating fiscal competence between Member States. Thus, it does not regulate the*

[37] van den Broek, *supra* n. 11, at 263.

[38] Harm van den Broek, *Fiscale neutraliteit bij buitenlandse aandeelhouders onder de Fusierichtlijn*, NTFR Beschouwingen 2020/41 (2020).

[39] *Ibid.*, s. 5.

[40] Sjoerd Douma, Otto Marres, Hein Vermeulen & Dennis Weber, *European Tax Law Seventh Edition, Volume I*, Gist and System of the Directive (Kluwer Law International 2022), s. 17.5.

[41] Marjaana Helminen, *EU Tax Law. Direct Taxation* 259 (IBFD 2022).

allocation of the power of taxation of such a capital gain'.[42] Therefore, according to the Court, the '*Member States retain the power to define, by treaty or unilaterally, in compliance with EU law, the criteria for allocating their powers of taxation, with a view to eliminating double taxation*'.[43]

Under such an approach, the right of a former Member State of a shareholder to tax gains which arose after the restructuring would generally be limited due to DTT they concluded. This would apply even if Article 8(6) was aimed at securing the taxing right of a Member State, which in our view is not the case. The DTT would in many jurisdictions prevail over the local legislation implementing the directive. Similar conclusions will also be reached under the approach that Article 8 provides for a deferral not only of tax collection, but also of tax calculation. If tax is established at a moment when the former Member State has already lost its taxing right, there seems to be no grounds in DTT for that Member State to tax the gain, even if part of the gain relates to the period before restructuring.

More doubts could arise under the approach according to which the amount of taxable gain is fixed at the moment of the restructuring, but the tax point is postponed until a subsequent transfer. In such a case it could be argued that at the moment of subsequent transfer of shares the former Member State of the shareholder executes taxation of gain which arose at a time when that Member State still held the taxing right. This was put in other words in the opinion of advocate general Wathelet, in which he argued that:

> *the fiscal competence of the Member States at the time of the transfer of the securities that were the subject of an exchange does not affect the right of another Member State to tax a capital gain which arose within the ambit of its fiscal competence at the time of the exchange, even if the securities are transferred only at a later stage. That possibility in no way affects the fiscal neutrality of the exchange of securities while respecting the interests of the Member State in which the capital gain on the exchange was derived.*

The advocate general noted in this respect also that:

> *in addition, since that possibility also respects the interests of the Member State in which the subsequent transfer of the securities exchanged took place because it does not affect that Member State's right to tax any capital gains arising out of that transfer, it maintains, in my view, a balanced allocation of powers of taxation between the Member States, which is a legitimate objective recognised by the Court.*

While such an argumentation is reasonable for us, it is based on the assumption that the directive allows a Member State to fix the taxable gain at the moment of the restructuring, forcing only the postponement of tax collection. However, as already mentioned, even after the *Jacob & Lassus* and *AQ & DN cases*, we are not convinced that such an interpretation of the directive is justified.

[42] Joined Cases C-327/16 and C-421/16, *supra* n. 24, para. 60.
[43] *Ibid.*, para. 61.

3.6 Taxation of Shareholder Gains Under Article 8: Summary

To sum up our analysis, under the directive the restructuring by itself may not result in the taxation of shares allotment on the side of shareholders, as long as the shareholder does not perform a step-up on the value of the shares. It is also apparent that the directive provides for taxing any gain from shares which could have arisen at the moment of the restructuring upon the subsequent transfer of the shares. What seems disputable is whether the directive requires the amount of gain to be calculated at the moment of the subsequent transfer, or whether it allows the gain to be established at the moment of the restructuring and requires postponing only the tax collection. In our view, more arguments support the first approach. However, CJEU judgments went another way. While the judgments do not unequivocally preclude the application of mechanisms under which the calculation of tax amount is postponed, they provide grounds for establishing the amount of gain at the moment of the restructuring and postponing tax collection only. This opens the discussion whether such a mechanism preserves a Member State taxing right which we analysed in section 3.5.

Article 8(6) adds even more complexity to the problem. According to the predominant interpretation, rules of taxation applicable before the merger could or, according to different interpretations, should be applied to taxing gains from any subsequent transfer. Such rules, at least based on literal interpretation, would apply to gains realized both until the moment of the restructuring and afterwards. Moreover, under the approach that the directive provides for deferring both the calculation of the taxable gain and the tax point, rather than only the tax collection, there would be no way of applying section 6 only to gains which arose until the moment of restructuring, as they would be impossible to separate.

In our view, strict application of rules of taxation which applied before the merger also to gains from shares accrued after the restructuring would likely cause serious doubts. Following the example of F. Boulogne, let us imagine a country in which the transfer of shares is exempt if the investor holds a certain percentage of shares in a given company. Does Article 8(6) mean that if the threshold for applying the exemption was met as a result of the restructuring, the investor would never be allowed to benefit from such an exemption either for gains accrued before the restructuring or those accrued afterwards? To our mind, such an approach would be highly disproportionate and could even be seen as hampering a fundamental freedom. Therefore, we do not share the view of F. Bologune that Article 8(6) should be read in such a way. Such an interpretation would make sense for us if Article 8(6) would refer only to gains accrued until the moment of restructuring, but this does not seem to be the case.

On the other hand, it is difficult to see Article 8(6) as poorly worded clarification aimed only at confirming that gains accrued until the restructuring may be taxed at a subsequent transfer. While this would be in line with the reasoning of CJEU in *Jacob & Lassus,* in which the Court stated that this section:

> *recognises the right of the Member States which have fiscal competence for the capital gain relating to an exchange of securities but which, under Article 8(1), have been prevented from exercising that competence when that exchange occurred, to exercise that competence on the date of the subsequent transfer of the securities received in exchange*,

such an approach seems to disregard the fact that Article 8(6) literally refers to both gains accrued before and after the restructuring.

Therefore, we would rather see Article 8(6) as a provision applicable only in specific cases, allowing a Member State to tax the subsequent transfer of shares, which would otherwise remain out of the scope of the tax due to a change of tax regime. The wording which indicates that the Member State may tax gain from a subsequent transfer 'in the same way' does not necessarily have to be read as indicating that the exact same amount of tax should be applicable, as the amount which would be applicable if shares had been transferred before the merger. It could also be understood as indicating that the same rules of taxation should be applied, but not necessarily that those rules should be applied exactly in the same way. Consequently Article 8(6) does not necessarily need to be read as indicating that one should calculate the tax on subsequent transfer as if restructuring never happened. Rather than that, we would be inclined to argue that while applying the rules which were applicable before the merger, the Member State should take the fact of the merger into account and apply the rules appropriately. Referring back to the example of a country in which the exemption is dependent on the level of shareholding, this would mean that the exemption should be available as long as the shareholder holds the required threshold after the restructuring. Article 8(6) would apply for instance in situations in which due to the legal form of the company in which the shareholder received shares, completely different rules of taxation would be applicable. Only then could the Member State ignore those rules and apply previously binding regulations (applying them accordingly).

4 Non-compliance of Polish regulations with Article 8

The comprehensive analysis of Article 8 of the directive outlined above was aimed at examining whether this article (and in particular its section 6) provides any basis for accepting the approach introduced by the Polish legislature, under which the shareholder is taxed if the transaction involves allotment of shares in exchange of shares which were allotted to him as a result of a previous restructuring. To put it more simply, the question is whether under the directive it is possible to establish a rule that only the first restructuring is tax neutral for a given shareholder. Neither the case law nor the doctrine in any of the interpretative approaches presented above justifies such a standpoint.

The purpose of the directive is twofold: on the one hand, to provide for a deferral of taxation of an increase in the value of shares received as part of a restructuring until their actual disposal and, on the other, to safeguard the fiscal interests of the state by applying the deferral rather than exempting the gain from taxation. It must, therefore, be accepted that the implementation of the directive by the Member States will involve an interplay between these two objectives. This is clearly illustrated by the CJEU judgments discussed in the article, which accepted the French system of deferral of tax collection with a view to safeguard the fiscal interest of Member States, while allowing a certain degree of discretion as to how the objectives of the directive were to be achieved. Polish regulations, however, do not fit in the level of discretion the directive allows. While they perfectly fulfil the objective of fiscal protection of the state (e.g., result in tax collection at the moment of a subsequent transfer), they stand, to a large extent, in the way of the objective of effective tax deferral of gains realized upon restructuring operations. In this case it is not so much an interplay between the two objectives of the directive, as placing one of these objectives in favour of the other. As regards the directive's objectives, the Polish regulations appear to be incompatible with them. The tax neutrality of restructurings was introduced with a view to ensure that freedom of establishment is not hampered. Regulations which provide for taxing shareholders, only because they hold shares received as a result of a previously executed restructuring, seem to stand against this aim. It leads to significant cash flow disadvantages for a shareholder who performs a subsequent restructuring, as they are obliged to pay the tax on the value of the allotted shares.

As already mentioned, it seems most likely that the Polish legislature attempted to place the provisions it was introducing within the framework of Article 8(6) of the directive. As we have seen, the understanding of Article 8 (6) is not entirely clear. However, the dispute over its interpretation comes down to several key issues. The judiciary and the doctrine question whether the system introduced by Article 8(6) of the directive allows for fixing the tax assessment at the moment of the restructuring, while deferring only the moment of tax collection until a subsequent transfer, or defers the tax assessment to the moment of the subsequent transfer without fixing the gain at the moment of the restructuring. The question also remains whether Article 8(6) is to be understood as a mere clarification, confirming that gains accrued until

the moment of the restructuring may be taxed upon a subsequent transfer, or whether it goes further and establishes that rules of taxation which were applicable before the merger apply also to gains from shares accrued after restructuring. Regardless of which interpretation of Article 8 (and its section 6 in particular) one adopts, none one of them could affect the conclusion as to whether the Polish regulations are acceptable. It does not matter if we assume that the directive provides for a deferral of tax assessment rather than just a deferral of tax collection, or conversely. In each case, the Member State's power to tax the gain can only be exercised when the relevant taxation point occurs. Under Article 8(6) the relevant taxation point is the moment when the securities are transferred. It seems to us that the Polish legislature assumed differently, i.e., that the relevant taxation point occurs upon a subsequent restructuring. One should, however, bear in mind that under Articles 8(1) and 8(2) allotment of shares as a result of a qualified restructuring may not trigger taxation on the part of shareholders, and as such, a restructuring does not qualify as a tax point. Considering the relation between the said rule and Article 8(6), it is clear to us that the rule under which a restructuring should be tax neutral for a shareholder prevails over the rule imposed in Article 8(6).

Firstly, Article 8(6) states that the subsequent transfer should be taxed in the same way, as it would be taxed if the restructuring did not happen. The first restructuring does not in any way improve the position of the shareholder. Even if one ignores the first restructuring, conditions for tax neutrality of the subsequent restructuring would still be met and shareholders could benefit from the exemption. In other words, taxing the shareholder 'in the same way', comes down to exempting allotment of shares granted to the shareholder from taxation, even under the most restrictive interpretation of Article 8(6).

Secondly, Article 8(6) refers to taxation upon the subsequent transfer of shares. Based on CJEU judgments this should be understood as deferral of tax point. As a result, taxation should take place when such a tax point arises after the first restructuring. A subsequent restructuring, in a situation where the shareholder does not perform a step-up on the value of shares, does not trigger the tax point and consequently, in our view, it should not be considered as triggering taxation under Article 8(6).

Thirdly, the main aim of the directive is to eliminate fiscal barriers to restructuring. Taxing a subsequent restructuring would create such a barrier, as in many cases it could strongly discourage interested parties from participating in such operations. At the same time, taxation at the moment of a subsequent restructuring is not required to safeguard the financial interest of Poland. In our view, if a subsequent transfer meets the conditions for tax neutrality, the shareholders may again benefit from the deferral.[44] However, Poland could still tax the gain which arose from the first restructuring upon a subsequent transfer of shares.

Although our primary consideration is Article 8 of the directive, attention should also be given to its Article 15(1)(a), as a possible alternative basis for introducing the discussed amendment to the Polish legislation. The provision introduces anti-avoidance rules into the directive. It states that a Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1 has as its principal objective or as one of its principal objectives tax evasion or tax avoidance. Article 15(1)(a) of the directive is important from the perspective of our considerations, as a reference to the said provision appears in the explanatory memorandum to the draft of the Polish Deal.[45] Therefore, it should be considered whether the Polish legislature might regard the anti-abuse clause as a basis for the taxation of second and subsequent restructuring operations.

Given both the case law and the doctrine, introducing the mechanism of taxing the second and subsequent restructuring operations to the Polish law seems heavily against such a standpoint. Marjaana Helminen points out that basing on Article 15 of the directive a Member State may indeed refuse to apply or withdraw the directive benefits, but only in exceptional cases.[46] CJEU confirms the exceptional use of the anti-abuse clause in *A.T.*[47] and *Modehuis*[48] (both based on Directive 90/434). In *Foggia*, based on Directive 90/434, CJEU rejects mechanisms in which in order to establish whether the planned operation has the objective of obtaining a tax advantage, the competent national authorities confine themselves to applying predetermined general criteria.[49] CJEU takes the view that authorities must perform a case-by-case verification in this respect. Similarly, in *Leur-Bloem,* also based on Directive 90/434, CJEU points out that:

> *the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, on the basis of criteria […], whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such tax evasion or tax avoidance and would undermine the aim pursued by the Directive.*[50]

Based on the above considerations, the only acceptable conclusion is that Article 15 of the directive does not

[44] van den Broek, *supra* n. 11, at 262.

[45] The Polish legislator mentions that '*non-taxation of restructuring operations does not imply an indefinite exemption, but precisely a deferral of taxation. In fact, the directive contains a number of restrictions in this aspect, which are aimed at preventing harmful tax optimisation, including,* inter alia*, the principle of continued valuation or an anti-abuse clause'.*

[46] Helminen, *supra* n. 41, at 267.

[47] Case C-285/07, *supra* n. 9, para. 31.

[48] Case C-352/08, *supra* n. 11, para. 45.

[49] C-126/10 *Foggia – Sociedade Gestora de Participações Sociais SA v. Secretário de Estado dos Assuntos Fiscais*, 10 Nov. 2011, ECLI:EU:C:2011:718, para. 37.

[50] C-28/95 *A. Leur-Bloem and Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, 17 Jul. 1997, ECLI:EU:C:1997:369, para. 44.

provide grounds for introducing taxation of subsequent restructurings. Such provisions would be a vivid example of a 'rule automatically excluding certain categories of operations' which was not allowed by the CJEU under *Leur-Bloem*. Polish provisions exclude not only operations which are indeed oriented at tax avoidance, but also operations which are fully driven by business needs,[51] making no differentiation on a case-by-case basis.

5 Summary

To sum up, in our view, introducing taxation of allotment of shares to shareholders in cases where such allotments take place as part of a qualified restructuring, in exchange for shares which were granted to the shareholder as a result of a previous restructuring, infringes the merger directive. As discussed above, Article 8 of the directive, and in particular its section 6, raises problems of interpretation and is not entirely clear. However, irrespective of which approach to this provision is taken, none of them affects the conclusion as to whether the Polish regulations are acceptable. The arguments presented in this article may serve as a basis for taxpayers to challenge the Polish regulations which provide for taxing second and subsequent restructuring operations. At the same time, from the perspective of the compatibility of domestic law with the EU law, we postulate the amendment of the provisions introduced by the Polish Deal.

[51] For example, under Polish provisions, if two owners would like to merge the companies they own, and one of the companies has already undergone a merger, the subsequent merger will not be neutral for the shareholder. It is difficult to *see* any justification for taxing such a 'subsequent' merger when it is carried out for legitimate business reasons. That is why in our view Art. 15(1)(a) of the directive cannot serve as a basis for introducing taxation of second and subsequent restructuring operations.