

*Cross-Border Merges Fever*  
**Utah's International Growth and Business Legislation**  
**An international comparative analysis of H.B. 29 - Business Entity Mergers**

*Gian P. Zini* © 2011 <sup>(1)</sup>

**Utah** makes no secret of the State's meritorious commitment to economic and business development, and of its focus in assisting Utah companies in expanding into international markets, connecting Utah businesses to international partners, hosting foreign trade missions and business representatives, increasing Utah's international trade and investments, and, likewise, developing business resources for the creation, growth, investments and recruitment of foreign companies to Utah. Brought to international attention also by the 2002 Winter Olympics

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**Gian P. Zini**, admitted in Italy in 1984 (admission and practice recognized in the territory of the European Union pursuant to the Directives No. 1998/5/CE and 2005/36/CE of the European Parliament and Council), to Italian Supreme Courts in 2003 and licensed as foreign legal consultant in New York State in 1997, has 25 years of international experience in the legal and consulting industry, with a diversified track-record, and focus on a variety of industries, in the fields of **International M&A** and **Cross-Border Structuring, Capital Markets, Corporate and Structured Finance, International Trade & Investments**, and **Antitrust, (Mergers and Concentrations)** along with a tangible commitment to the academic world, as former adjunct faculty at the **Department of Communication, Economics & Information** of the **University of Modena and Reggio Emilia**, Italy, at the **David Eccles School of Business** and **College of Social & Behavioral Sciences** of the **University of Utah**, and at the **Bill and Vieve Gore School of Business** of **Westminster College**, Salt Lake City.

Frequent speaker at national and international professional and academic conferences and seminars, author and co-author of various articles (most recently '**The United Nations system and other International Organizations and Agencies, what role in a time of economic and financial crisis**' published by **Global Utah**) and publications (including the Italian section of various 'special papers' of the **European Venture Capital Association (EVCA)**, of the Treaty "**International Capital Markets and Securities Regulations**" published by Clarke Boardmahn & Callaghan, New York, and of the '**Guide to Italy and Switzerland (Capital markets: Italian structured finance market)**' published by the **International Financial Law Review (IFLR)**, **Gian P. Zini** is often active on a pro bono basis in the stakeholders' policy making and legislative process, nationally and internationally, having commented inter alia on 1.) the Directive **2003/6/EC** of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) and the report submitted in September 2003 by the **Forum Group on Financial Analysts: "Financial Analysts: Best practices in an integrated European financial market"** and 2.) various regulations and recommendations by the **Western Climate Initiative**, including **Draft Principles and Market Oversight Questions**, designed "**to help guide its research, analysis, and deliberations**", and "**to gather information on market monitoring and oversight**", pursuant to the **Markets Committee's** invitation, focusing on prevention of market manipulation and abuse in North American Cap & Trade Markets and on suggested coordination with national and international securities laws and market authorities.

Games and by the State's dynamic trade, industry clusters and economic development policy, the State of Utah is unequivocally one of the most dynamic business and investment locations/destinations in the United States, with a track record of consistent growth, as testified by some of the domestic most prestigious business and economic rankings (*inter alia* #1 **Best State For Business and Careers**/Forbes Magazine; #1 **Most Dynamic Economy**/Kauffman State New Economy Index; #1 **Economic Outlook**/Alec-Laffer State Economic Competitiveness Index; #1 **Technology Concentration and Dynamism**/Milken Institute, etc.).

In announcing 2010 results, Forbes noted that while states across the nation have suffered as a result of the economic downturn, some states, like Utah, have weathered the global crisis better than others: "**Who's doing the best job when it comes to fostering growth? Utah**". Utah Governor Herbert stated "**Utah has all the elements that make us a successful place to start or expand a business**", and cited, among the factors that placed the State of Utah at the top • **Annual economic expansion of 3.5% over the past five years**; • **Annual total employment increase of 1.5%**; • **Decrease of corporate tax rate from 7% to 5%**; • **Energy costs that are 35% below the national average** and • **a dynamic and competent professional environment and work-force adequate to assist foreign companies and investors in establishing themselves in North America and/or growing their presence at a competitive cost.**

An additional factor which has a paramount value and is *tout-court* indispensable, within the due diligence review and decision making process of corporate executives and professional advisors, for attracting out-of-state or foreign investment or the establishment of out-of-state or foreign business entities is the standing of business and corporate legislation, as measured and ranked by a comparative analysis with similar legislation in other states of primary reputation and competitive economic appeal.

At a time when companies are struggling to come out from a recession mode and increasingly focusing on expanding their presence into the global market place, at a time when growth means literally and necessarily growing beyond the borders of the State of Utah and dealing with foreign business and different business and legal cultures, at a time when internationalization and globalization are not just buzz-words, a marketing pitch, or a race at offering the most intriguing forms of tax incentives or exemptions (however, often poorly perceived on the international arena and regarded with suspect), but a real process of adaptation, change-management and performance-review, international expansion has inevitably led to greater economic integration, expressed not only by a growing number of cross-border acquisitions/investments (and the recent business chronicles have shown that Utah companies may not only be active in foreign M&A transaction, but, inevitably, when we get on the map, when we fall under the radar of out-of-state or foreign investors, Utah companies will become the target of cross-border takeovers), but also by a growing number of cross-border mergers.

And while the world, and also Utah, is experiencing a new wave of M&A fever and the revamping of the cross-border transactional practice and corporate process (*'in the first three quarters of 2010, global announced M&A value reached \$2.03 trillion, an increase of 22 percent compared with the \$1.67 trillion in deals announced in the same period in 2009'*; *'up to Q3 2010, global cross-border deal value rose 67 percent, compared to the same period last year. There have been 7352 global cross-border deals this year, which generated \$764.5bn, whereas last year 6036 deals generated \$456.8bn. Of these deals, the US was the most targeted nation, accounting for \$147bn of cross-border deals, followed by the UK with \$80.3bn and Canada with \$70.9 bn. Meanwhile, outbound cross-border deals reached a record high for Asia Pacific at \$152.8bn, up from \$51.9bn for the same period in 2009.'*<sup>(2)</sup>), cross-border mergers have come not only on the

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<sup>2</sup> source: Dealogic's M&A review (<http://www.dealogic.co.uk/en/mergers.htm>). Further, 'A geographical look at deal activity shows that in the first nine months of 2010, the emerging markets contributed the most (32 percent) towards of global M&A volume. During this period, announced deals in the region surged to \$653.2bn, a 69 percent increase on the \$387.6bn in the same period last year, exceeding European M&A for the first time on record. In second place is the US, with targeted M&A value reaching \$615bn, an increase of 7 percent on the \$574.2bn worth of deals announced in the same period last year.

European M&A takes third place, accounting for 28 percent (\$572.9bn) of the value of global deals announced through Q3 2010, an increase of 16 percent over the \$495.5bn of deals announced in the same period last year. The UK accounted for 24 percent (\$140.1bn) of total European value, followed by Spain with \$66.4bn.

horizon of companies and business entities at any development stage (start-ups, second/third financing round, well-established private companies and public companies), but have reached out, as a necessary consequence of intrinsically integrated capital and financial markets, also to the most important international stock-exchanges.

Not more than a few weeks ago, on February 9<sup>th</sup>, 2011, the **London Stock Exchange (LSE)** and the **TMX Group**, the parent company of the **Toronto Stock Exchange**, announced an all-share merger at value, respectively, of \$3.25 billion and \$2.99 billion, and, if approved by shareholders, the combined exchange would form what would probably be the largest market for mining and natural resource stocks. **LSE Group** also owns the Milan-based **Borsa Italiana**, acquired in 2007. On the other hand, **TMX** also operates the **Montreal Exchange**, the **Natural Gas Exchange (NGX)** in Calgary, the **Boston Options Exchange** and the **TSX Venture Exchange** in Calgary and Vancouver. **Borse Dubai**, the state-owned company that operates **Dubai's stock exchanges** and holds a 20 percent stake in the **LSE**, and it obviously endorsed the **TMX** deal.

Less than a week later, on February 15<sup>th</sup>, 2011, **NYSE Euronext** and **Deutsche Börse** agreed to a **\$10 billion** all-stock merger, combining two of the world's biggest stock exchanges into one trans-Atlantic powerhouse. If completed, the union of the operators of the **New York Stock Exchange** and the **Frankfurt Stock Exchange** would create the biggest example of the consolidation among financial markets, allowing investors access to thousands of stock listings in the United States and Europe, as well as options, derivatives and other services. In 2007, had **NYSE** acquired **Euronext**, operator of the **Paris, Amsterdam, Lisbon** and **Brussels exchanges**. **NYSE Euronext** formed not only the first trans-Atlantic financial market, but the world's largest at the time.

In the same year, **Nasdaq** bought **Nordic exchange operator OMX AB**. And these two most recent cross-border mega-mergers revamped the merger-plans between **SGX**, the operator of the **Singapore stock exchange**, and the **Australian stock exchange**, representing a **\$8.4 billion deal**.

It is only obvious that consolidation at capital market level will trigger an exponential deal-flow of cross-border mergers, and the equation will not work easily, or efficiently, without adequate cross-border legislation. But creating a business-friendly legislation, again, is not just a buzz-word or a marketing proposition: focusing on life-style and accessibility of the destination, intriguing tax rates, and a competitive cost of doing business cannot be sufficient.

The business-friendly nature of legislation shall be tested, again, by experienced executives and professionals, which will competently, methodically and impassionately carry out a cross-border comparative analysis of the pros & cons, of the bells and whistles attached to the business laws of such *'target market'*, of such *'target jurisdiction'*, and will accordingly verify the actual degree of internationalization of the same, benchmarking with the first one-stop shops of foreign companies in the U.S. (mostly still New York and L.A.) and the real chances that any such out-of-state, or foreign, company will deal with business laws, with conflict of law provisions, with business conditions, with a professional environment that are effectively up to speed and efficiently comparable with other competing environments, with the mission to prove, *'beyond reasonable doubt'* that the business community and the legal/judicial environment will reserve any such foreign company a real chance and a fair game, rather than being out on a witch-hunt to punish the foreign company, the stranger, after having obtained its investment.

An attitude, still present in some less than mature, self-proclaimed 'international jurisdictions', which still carry into the actual business/legal context an obsolete, and protectionist theory of *versari in re illicita* (i.e. the legal doctrine that does not limit liability to the forms of *dolus* and *culpa*, i.e. willful misconduct or negligence, but that may be found liability for conducts and facts which are accidentally realized as a consequence of a prohibited, or un-favored circumstances, such as simply being a foreign company).

Accordingly, a state of the art legislation process, when it comes to business, cannot assume an ability to enact legislation of primary standing and quality without any benchmarking, and accordingly abstain from an in-depth

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*As for the rest of global deal value, Asia Pacific generated \$449.1bn, Latin America generated \$192.5bn, \$157bn was contributed by China and Hong Kong, \$54.2bn by Africa, and the Middle East accounted for \$25.9bn.'*

and competent comparative analysis of business legislation in the most globalized jurisdictions, of the most advanced economic systems.

The temptation of a self-centered '*Roma Caput Mundi*' legislative disposition, i.e. still at this time and age displaying the craving for or belief of being the best or the top of the world <sup>(3)</sup>, or the misplaced and disingenuous ambition **a.** to limit the validity of the choice of foreign law in international contracts entered into by the domestic corporation, **b.** to condition the validity of a cross-border merger/transactions to the domestic company being the surviving company (or to the foreign surviving company complying with the law of the non-surviving domestic company), **c.** to retain control, **d.** to impose the name of the domestic company on the merger or **e.** to allow the possibility of political scrutiny/interference hanging over the deal <sup>(4)</sup>, simply does not fly high in terms of attracting foreign capital, of gaining status as an international/cross-border destination, or a symbol of economic freedom.

As cross-border mergers, acquisitions and share exchanges will be more and more a business necessity, legal frameworks are not always equipped to deal with the complex nature of these transactions, and too often the legislative process is late in catching up with the needs of its corporate citizens.

While cross-border mergers and acquisitions are often not explicitly regulated, or even if are permitted under local law, which is not always the case, may be subject to cumbersome legal and administrative formalities, to challenging terms and conditions, or simply to a partial, if not provincial and protectionist, requirements, the European Union has enacted a legal framework which has become an international model for the regulation of mergers, having resolved in an efficient way controversial aspects, which have hindered previous drafts for three decades, and addressing all general problems of cross-border mergers <sup>(5)</sup>.

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<sup>3</sup> For those who did not share the pleasure, or misfortune, of an European classical and legal education, i.e. ten years of studying Latin and two years of Roman Law studies, '*Roma Caput Mundi*' is a Latin expression to mean "**capital of the world**" (literally: "**head of the world**"), originating from the classical European understanding of the known world during the Roman Republic and Roman Empire, and the dominance of Roman law, expressed over more than a thousand years of jurisprudence, as the legal system of ancient Rome, known for centuries in the known world or the time as *Caput Mundi*.

<sup>4</sup> In this regard, and in the context of one of the most significant cross-border mergers of all times taking place in the financial centers of the world, I can't omit to quote the expressed desire of a U.S. Senator from New York said that the combined company should place "New York" first in its name. Here's an excerpt of his statement: '***I intend to consider any potential deal from the same perspective that I always use: will it keep New York on top as the financial center of the world?***', '***But let me say in advance that a key factor to consider in judging this deal will be its implementation. For instance, a sticking point that could emerge, even after a deal is announced, is the name of the new entity***', '***Some may say what's in a name, but I say a lot. The New York Stock Exchange is a symbol of national prestige, and its brand must not suffer under this merger***', '***Keeping N.Y.S.E. first in the name is the right thing to do from a business perspective***', '***The name of the new company will be a critical factor in determining support for this merger, both in the regulatory review process as well as in the court of public opinion***'. I have not read *Der Spiegel* in these last few weeks, or the *Frankfurter Allgemeine Zeitung*, but I am sure that I could find statements by some German Senator from Frankfurt who might say exactly the same, I mean ... the opposite..... Needless to say that business-men have already found the solution, Mr. Francioni of **Deutsche Börse** will be chairman of the combined company, while Mr. Niederauer of **NYSE Euronext** will be chief executive, and have jointly announced "***This transaction is a catalyst for the development of a global capital markets community, delivering the best, most transparent and innovative services for clients and issuers, wherever they are.***" expressing roughly a 10% premium to the American company's stock price on February 8<sup>th</sup>, before the two announced their talks. Again, the deal values **NYSE Euronext** at about \$10 billion...

<sup>5</sup> Mathias M. Siems. "The European Directive on Cross-Border Mergers: An International Model?" **Columbia Journal of European Law** 17 (2005): 167-186.

Reference is made to the EU Directive **90/434/EEG** dated July 23<sup>rd</sup>, 1990 (the “**EU Merger Directive**”, providing a legal framework for the harmonization of Member States’ legislations on the ‘**common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States**’<sup>(6)</sup>), as amended by Council Directive 2005/19/CE of February 17, 2005 (the “**Tax Directive**”), , the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the **EC Merger Regulation**) Official Journal L 24, 29.01.2004, p. 1-22<sup>(7)</sup> and the EU Directive **2005/56/EC** of October 26<sup>th</sup>, 2005 (the **E.U. Cross-Border Mergers Directive**<sup>(8)</sup>)

Quite timely, the attention of the 2011 Utah State Legislature, by means of **H.B. 29 - Business Entity Mergers** (sponsored by Rep. Dunnigan, J., Drafting Attorney: Owen P., Fiscal Analyst: Pratt S.C.<sup>(9)</sup>), recommended by the **House Business and Labor Interim Committee**, and the **Senate Business & Labor Standing Committee**) is focusing, even though marginally, on this certainly current and extremely important topic.

It is therefore the duty of the international practitioner and businessman, to verify moves in fact in the right direction and that no legislation could possibly affect business and economic development of the State of Utah, discourage Utah’s business globalization and/or increase the cost of doing business.

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<sup>6</sup> the text of Directive 90/434/EEC of 23 July 1990 can be downloaded at  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0434:en:HTML>.

<sup>7</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>

<sup>8</sup> the directive can be downloaded also at:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:310:0001:000:en:PDF>

<sup>9</sup> Fiscal Note - State of Utah - 2011 General Session, 1/4/2011, **HB 29 - Business Entity Mergers**, which noted **State Government (UCA 36-12-13(2)(b))**: Enactment of this bill likely will not materially impact the state budget; **Local Governments (UCA 36-12-13(2)(c))**: Enactment of this bill likely will not result in direct, measurable costs and/or benefits for local governments; **Direct Expenditures by Utah Residents and Businesses (UCA 36-12-13(2)(d))**: Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.

**H.B. 29 - Business Entity Mergers**, and specifically the part amending **Utah Code -- Title 16 -- Chapter 10a -- Utah Revised Business Corporation Act**, as last amended by Laws of Utah 2008, Chapter 364, with regard to cross-border mergers by Utah companies (i.e. **16-10a-1107. Merger or share exchange with foreign corporations** <sup>(10)</sup>), is no doubt important.

A quick glance at the bill, and more generally at **Title 16 -- Chapter 10a**, show however that, apart from a few provisions quickly addressing the approval and contents of the plan of merger, or marginal amendments, the proposed legislation runs short from bringing regulation of cross-border mergers up to speed with the international legislative experience of multi-jurisdictional corporate transaction between domestic and foreign corporate entities. Also, I am afraid a few provisions could establish significant limitations to the implementation of cross-border mergers, and, when better known in the international legal arena, could –if not adequately address in this legislature or in forthcoming legislative sessions, create some challenges for out-of-state or foreign companies to doing business in Utah, and accordingly confirming some of those same issues which had in fact undermined the approval of **H.B. 296** in the 2010 legislature.

A comparative analysis of **Utah Code, Title 16, Chapter 10a, Utah Revised Business Corporation Act**, and specifically of Section **16-10a-1107 (Merger or share exchange with foreign corporations)**, as proposed for

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<sup>10</sup> the text of the bill, highlighting the changes vis-à-vis the current text of **Utah Code, Title 16, Chapter 10a, Utah Revised Business Corporation Act**, and the status of the related legislative process can be found at <http://le.utah.gov/~2011/htmdoc/hbillhtm/HB0029.htm>.

**Section 16-10a-1107. Merger or share exchange with foreign corporations:**

- (1) ~~One or more domestic corporations may merge~~ *A domestic corporation may merge with a foreign entity* or enter into a share exchange with ~~one or more foreign corporations~~ *a foreign corporation* if:
- (a) in a merger, the merger is permitted by the law of the state or country under whose law ~~each~~ *the* foreign ~~corporation~~ *entity* is incorporated *or organized* and ~~each~~ *the* foreign ~~corporation~~ *entity* complies with that law in effecting the merger;
  - (b) in a share exchange, the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated;
  - (c) the foreign corporation complies with Section 16-10a-1105 if it is the surviving corporation of the merger or the acquiring corporation of the share exchange, and provides, in addition to the information required by Section 16-10a-1105, the address of its principal office; and
  - (d) ~~each~~ *the* domestic corporation complies with:
    - (i)* the applicable provisions of Sections 16-10a-1101 through 16-10a-1104; and
    - (ii)* if it is the surviving corporation of the merger ~~with~~, Section 16-10a-1105.
- (2) Upon the merger or share exchange taking effect, the surviving foreign ~~corporation~~ *entity* of a merger and the acquiring foreign corporation of a share exchange shall either:
- (a) agree that service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights may be made in the manner provided in Section 16-17-301;
  - (b) promptly pay to the dissenting shareholders of each domestic corporation party to the merger or share exchange the amount, if any, to which they are entitled under Part 13, Dissenters' Rights; and
  - (c) comply with Part 15, Authority of Foreign Corporation to Transact Business, if it is to transact business in this state.
- (3) Service effected pursuant to Subsection (2) is perfected at the earliest of:
- (a) the date the foreign ~~corporation~~ *entity* receives the process, notice, or demand;
  - (b) the date shown on the return receipt, if signed on behalf of the foreign ~~corporation~~ *entity*; or
  - (c) five days after mailing.
- (4) Subsection (2) does not prescribe the only means, or necessarily the required means, of serving a surviving foreign ~~corporation~~ *entity* of a merger or an acquiring foreign corporation in a share exchange.
- (5) This section does not limit the power of a foreign corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange of shares or otherwise.

amendment by **H.B. 29 - Business Entity Mergers** and the **European Directive 2005/56/EC** on cross-border mergers should first of all attempt to respond to the rationale of the norm, and objectively consider if the legislation serves the purpose to suggest a valuable and practicable set of rules, and accordingly to adequately provide the business community with a legal framework supporting cooperation, synergies, and consolidation between various types of limited liability companies and corporations from different jurisdictions in the context of a global business environment and of global capital markets; in other words, we need to assess if the many issues, the many legislative and administrative difficulties surrounding such mergers have been satisfactorily addressed, removing any uncertainty which could cause an unnecessary, excessive cost of doing business.

In order to express a positive judgment with regard to any cross-border legislation, it is therefore necessary subject to assess that any such legal framework, possibly coordinated also with applicable tax laws (indeed a deficiency of **Title 16, Chapter 10a** and **H.B. 29 - Business Entity Mergers**), successfully pursues clarity, competence, suitability and corporate /market diligence, and integrity, conflict avoidance, prevention and management, disclosure: and transparency, and efficiency.

The mix of the aforesaid EU Directives and Merger Regulations is aimed at doing just that, exactly, resulting from an in-depth analysis of all transactional challenges for cross-border mergers, by benchmarking of each of the Member States' corporate/mergers legislations.

These measures were in fact purposely designed:

- to establish and harmonize the legal framework for cross-border mergers within the EU among certain types of company (types of company which have their statutory seat, central administration or principal place of business within the EU, and which are clearly defined (for those who do not wish to set up a European Company (**Societas Europaea** or SE <sup>(11)</sup>),
- to identify specifically corporate procedures and international share transaction which fall under the definition of merger and cross-border merger <sup>(12)</sup>,
- to specifically define the procedural aspects in terms of a common denominator of draft terms and minimum content to be drawn up in the same terms for each of the companies concerned in the various Member States;

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<sup>11</sup> A European Company (SE) is, by definition, a European, not a national company. The European Company (as clearly expressed in the **SE Directive ( Directive 2001/86/EC)** linked to the **SE statute ( Council Regulation (EC) No 2157/2001** of October 8<sup>th</sup>, 2001) will allow companies incorporated in different Member States to merge or form a holding company or joint subsidiary, while avoiding the legal and practical constraints arising from the existence of fifteen different legal systems. The SE is made as an option for companies to operate their businesses on a cross-border basis in Europe under the same corporate regime.

<sup>12</sup> Excerpt from the E.U. **Cross- Merger Directive: Art. 2 Definitions**

**'merger'** means an operation whereby:

- (a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

(...)

- to assign the monitoring of the completion and legality of the cross-border merger to the national authority having jurisdiction over the company resulting from/surviving the cross-border merger,
- to reduce the cost of mergers,
- to guarantee their legal certainty,
- to offer a merger option as suitable and practical as possible in such cross-border/international context,
- to limit the tax impact of such mergers and share exchanges; and
- to prevent any provisions and formalities of national or state law, which would de facto introduce restrictions on freedom of establishment or on the free movement of capital (save where these can be justified in accordance with the case-law of the European Court of Justice and/or in particular by requirements of the general interest) <sup>(13)</sup>.

As the rationale of the E.U. Cross-Border Merger Directive is clearly defined, by a detailed text originated from the legislative process that was put in place by the European Commission, Council and Parliament, and by its

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<sup>13</sup> Excerpt from the recitals of the **Cross- Merger Directive**; recitals provisions identifying the scope of the E.U. Directive:

- (1) There is a need for cooperation and consolidation between limited liability companies from different Member States. However, as regards cross-border mergers of limited liability companies, they encounter many legislative and administrative difficulties in the Community. It is therefore necessary, with a view to the completion and functioning of the single market, to lay down Community provisions to facilitate the carrying out of cross-border mergers between various types of limited liability company governed by the laws of different Member States.
- (2) This Directive facilitates the cross-border merger of limited liability companies as defined herein. The laws of the Member States are to allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of company.
- (3) In order to facilitate cross-border merger operations, it should be laid down that, unless this Directive provides otherwise, each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger. None of the provisions and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the free movement of capital save where these can be justified in accordance with the case-law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements.
- (4) The common draft terms of the cross-border merger are to be drawn up in the same terms for each of the companies concerned in the various Member States. The minimum content of such common draft terms should therefore be specified, while leaving the companies free to agree on other items.
- (5) In order to protect the interests of members and others, both the common draft terms of cross-border mergers and the completion of the cross-border merger are to be publicized for each merging company via an entry in the appropriate public register.
- (6) The laws of all the Member States should provide for the drawing-up at national level of a report on the common draft terms of the cross-border merger by one or more experts on behalf of each of the companies that are merging. In order to limit experts' costs connected with cross-border mergers, provision should be made for the possibility of drawing up a single report intended for all members of companies taking part in a cross-border merger operation. The common draft terms of the cross-border merger are to be approved by the general meeting of each of those companies.
- (7) In order to facilitate cross-border merger operations, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of the completion and legality of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger. The national authority in question may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the cross-border merger takes effect, this being the law to which the company resulting from the cross-border merger is subject, should also be specified.

implementation in and harmonization of the Member States' legislation, **H.B. 29** does not clearly steps up to the same functional purpose and leaves many areas open to uncertainty.

When we consider what types of companies, or entities, can participate in a merger under **Utah Code, Title 16, Chapter 10a**, as possibly amended by **H.B. 29**, on one side, and the E.U. Directive, on the other side, the issue of eligibility to cross-border mergers is not adequately clarified in the Utah legislation.

The amendments proposed by **H.B. 29** <sup>(14)</sup> seem to create a discrepancy and introduce a further degree of uncertainty between the domestic person participating to the merger or share exchange, identified as a *domestic corporation*, and the foreign person participating to the merger, defined as a *foreign entity*, or entering into a share exchange, and defined as a *foreign corporation*. Hard to say, based exclusively on the text of the amendment, if the Utah legislator intends to open the door of a merger with a *domestic corporation* also to those *foreign entities* which cannot be classified as corporations, while on the contrary limiting the option of a share exchange to only to corporate entities whose capital is represented by shares.

When we benchmark the use of the terms *Corporation* and *Business Entity* (reflected also in the title of **H.B. 29**) with the definition of 'Business Entities' suggested by the **Utah Department of Commerce, Division of Corporations & Commercial Code** <sup>(15)</sup>, we can identify as such, either from a Domestic (Utah) or Foreign (outside the state of Utah) standpoint, **Corporations** (Profit, Non-Profit, domestic and foreign), **Professional Corporations** (only Utah), **Doing Business As** (DBA) (either a sole proprietorship or general partnership), **Limited Liability Companies** (Domestic, Professional, Series Domestic, Foreign, Series Foreign, Low-Profit), **Limited Liability Partnerships** (Domestic and Foreign), **Business Trusts**, **Tribal business entities** (either a nonprofit or for profit corporation, a limited liability partnership, a limited partnership, or a limited liability company), and **Uniform Limited Cooperative Associations**.

Does the wording of **H.B. 29**, reflected into the aforesaid legal definition of the term 'Business Entities', mean that any *foreign entity* equivalent to the Utah definition of 'Business Entities' may enter into a cross-border merger with a *domestic corporation*, and that only a *foreign corporation* may enter into a share exchange transaction, as regulated under the new suggested Section **16-10a-1107. Merger or share exchange with foreign corporations**, with a *domestic corporation*? Or did Utah legislator use the term, as opposed to *foreign entity*, as opposed to *foreign corporation*, simply because it did not want to commit to or prevent mergers opportunities to *domestic corporation* based on a definition of a company type possibly not sufficient or adequate in a different legal system?

The level of uncertainty may obviously create a serious challenges, and unnecessary legal costs, to merger and consolidation projects, as it is not clear whether such differentiation between the term *corporation*, used to throughout Utah Code -- Title 16 -- Chapter 10a (Utah Revised Business Corporation Act), from Section **1101**. to Section **1106** to regulate Utah **Mergers**., and the terms 'Business Entities' as used in the title of **H.B. 29** or the aforesaid term *foreign entity* as used in (1) of Section **16-10a-1107. Merger or share exchange with foreign corporations**, is clearly intended, and if so what is its rational, or if it is just a drafting an involuntary lapse?

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<sup>14</sup> Excerpt of the proposed amended text of Section **16-10a-1107**:

*A domestic corporation may merge with a foreign entity* or enter into a share exchange with [~~one or more foreign corporations~~] *a foreign corporation* if:

(a) in a merger, the merger is permitted by the law of the state or country under whose law [~~each~~] *the* foreign [~~corporation~~] *entity* is incorporated *or organized* and [~~each~~] *the* foreign [~~corporation~~] *entity* complies with that law in effecting the merger;

the surviving foreign

[~~corporation~~] *entity* of a merger and the acquiring foreign corporation of a share exchange

<sup>15</sup> <http://corporations.utah.gov/business/index.html>.

On the other hand, the E.U Directive defines eligibility in a very specific and clear fashion <sup>(16)</sup>:

- identifying beyond reasonable doubt (Article 2(1)) the various types of limited liability company governed by the laws of different Member States, and defining ‘**limited liability company**’ (Art. 2 **Definitions**) as : ‘(a) **a company as referred to in Article 1 of Directive 68/151/EEC** <sup>(17)</sup>, or ‘(b) **a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others**’. Accordingly, no doubt remains as to which type of company may take advantage of the provisions of the E.U. Directive <sup>(18)</sup>.
- extending application of the E.U. **Cross- Merger Directive** to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment to exceed 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger;
- offering Member States the option not to apply this Directive to cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of ‘limited liability company’ as laid down in Article 2(1)
- excluding the application of the Directive to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders’ request, repurchased or redeemed, directly or indirectly, out of the assets of that company (action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption).

Another essential element of cross-border mergers legislation is to be found in the provisions of the conditions to which the validity of such transaction are subject. In addition to the procedural conditions and formalities provided

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<sup>16</sup> suggesting a criteria that could have been easily pursued by Utah legislator to avoid the aforesaid legislative ambiguity of the term *entity* vis-à-vis *corporation*.

<sup>17</sup> i.e. the First Council Directive 68/151/EEC of 9 March 1968 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968L0151:en:NOT>) on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies throughout the Community:

<sup>18</sup> limiting the list to the most significant European jurisdictions, as identified from a standpoint of economic and industrial importance (France, Germany, Italy, Spain and U.K.), or as simply based on particularly favorable financial/tax characters of the Member State (it would be the case of Ireland, Luxembourg and The Netherlands), the following are the eligible E.U. Merger Participants:

1. **France:** *Société anonyme* (SA); *Société par actions simplifiée* (SAS); *Société en commandite par actions* (SCA); *Société à responsabilité limitée* (SARL);
2. **Germany:** *Aktiengesellschaft* (AG); *Gesellschaft mit beschränkter Haftung* (GmbH); *Kommanditgesellschaft auf Aktien* (KGaA);
3. **Ireland:** Public company with limited liability; Private company with limited liability;
4. **Italy:** *Società per azioni*; *Società a responsabilità limitata*; *Società in accomandita per azioni*; *Società cooperativa*;
5. **Luxembourg:** *Société anonyme*; *Société à responsabilité limitée*; *Société en commandite par actions*; *Société en ommandite simple*; *Société en nom collectif*; *Société civile immobilière*; *Société coopérative*;
6. **The Netherlands:** *Naamloze vennootschap met beperkte aansprakelijkheid* (NV); *Besloten vennootschap met beperkte aansprakelijkheid* (BV);
7. **Spain** *Sociedad anónima* (SA) ; *Sociedad limitada or sociedad de responsabilidad limitada* (SL or SRL) ; *Sociedad comanditaria por acciones* (SComA) ;
8. **UK** Public companies (Plc) ; Private companies (Ltd, LLP); Unregistered companies; Companies in administration;

for by **Section 16-10a-1101** for mergers between domestic corporations as again amended under **H.B. 29** <sup>(19)</sup> or a share exchange in accordance with **Section 16-10a-1102** <sup>(20)</sup>, **Section 16-10a-1107, Merger or share exchange with foreign corporation**, as per the text and amendments again proposed by **H.B. 29**, provides that ‘**A domestic corporation may merge with a foreign entity** or enter into a share exchange with [~~one or more foreign corporations~~] **a foreign corporation** if:

- (a) in a merger, the merger is permitted by the law of the state or country under whose law [~~each~~] **the foreign [corporation] entity** is incorporated **or organized** and [~~each~~] **the foreign [corporation] entity** complies with that law in effecting the merger;
- (b) in a share exchange, the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated;
- (c) the foreign corporation complies with Section 16-10a-1105 if it is the surviving corporation of the merger or the acquiring corporation of the share exchange, and provides, in addition to the information required by Section 16-10a-1105 , the address of its principal office; and
- (d) [~~each~~] **the domestic corporation** complies with:
  - (i) the applicable provisions of Sections 16-10a-1101 through 16-10a-1104; and [;]
  - (ii) if it is the surviving corporation of the merger [~~with~~], Section 16-10a-1105’.

All in all, the legislative criterion expressed in **H.B. 29** seems to be aimed at securing the dominance and priority of Utah legislation over the jurisdiction of the *foreign corporation* or the *foreign entity* involved in the merger or share exchange, further introducing/maintaining two asymmetrical limitation whose legislative scope is not exactly clear; i.e.:

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<sup>19</sup> **16-10a-1101. Merger.**

(1) [~~One or more domestic corporations~~] **A domestic corporation** may merge into another [~~domestic corporation~~] **entity** if:

- (a) the board of directors of [~~each~~] **the domestic** corporation adopts and its shareholders, if required by Section 16-10a-1103 , approve the plan of merger [;] **and**  
(b) **any other entity that plans to merge approves the plan of merger as provided by the statutes governing the entity.**

(2) The plan of merger referred to in Subsection (1) shall set forth:

- (a) the name of each [~~corporation~~] **entity** planning to merge and the name of the surviving [~~corporation~~] **entity** into which each other [~~corporation~~] **entity** plans to merge;
  - (b) the terms and conditions of the merger;
  - (c) the manner and basis of converting the [~~shares of each corporation into shares;~~] **ownership interests in each entity, in whole or part, into:**
    - (i) **ownership interests**, obligations, or other securities of the surviving [~~or any other corporation or into~~] **entity or another entity; or**
    - (ii) cash or other property [~~in whole or part~~]; and
  - (d) any amendments to the articles of incorporation **or organization** of the surviving [~~corporation~~] **entity** to be effected by the merger.
- (3) The plan of merger may set forth other provisions relating to the merger.

<sup>20</sup> **16-10a-1102. Share exchange.**

(1) A domestic corporation may acquire all of the outstanding shares of one or more classes or series of one or more domestic corporations if the board of directors of each corporation adopts a plan of share exchange and the shareholders of the corporation, if required by Section **16-10a-1103**, approve the plan of share exchange.

(2) The plan of share exchange referred to in Subsection (1) shall set forth:

- (a) the name of each corporation whose shares will be acquired and the name of the acquiring corporation;
  - (b) the terms and conditions of the share exchange; and
  - (c) the manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for money or other property in whole or part.
- (3) The plan of share exchange may set forth other provisions relating to the share exchange.
- (4) This section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange of shares or otherwise.

- in a merger, ***‘the merger is permitted by the law of the state or country under whose law the foreign entity is incorporated’***; as we have commented above, the fact that a legal system does not explicitly or specifically permit or regulate a cross-border merger does not mean that such merger is prohibited: in fact, the E.U. directive regulates, providing a preferential course of action, cross-mergers among companies established in E.U. Member States, but this does not mean that cross-border mergers with non E.U. corporations are prohibited, or not permitted, by the legislation of E.U. members states;
- in a share exchange, ***‘the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated’***, in which case it is not clear why ***‘the corporation whose shares will be acquired’*** cannot be the *foreign corporation* or the *foreign entity*, and how can such transaction be implemented and effected if ***‘a share exchange’*** is ***not ‘permitted by the law of the state or country under whose law the acquiring corporation is incorporated’***, a case to which Utah legislator remains explicitly indifferent (***‘whether or not’***, as per ***‘de minimis non curat lex’***, but it is not really a trivial problem.....).

Neither is it clear, other than for a generic, administrative ‘publicity’ purposes which could be adequately satisfied otherwise, why Utah law requires that ***‘the foreign corporation complies with Section 16-10a-1105 if it is the surviving corporation of the merger or the acquiring corporation of the share exchange’***, by filing with the **Department of Commerce, Division of Corporations & Commercial Code**, at a Non-Refundable Processing Fee of \$37.00, the **Articles of Merger / Share Exchange** <sup>(21)</sup>, when, in the absence of any provision which coordinates such administrative obligations, the surviving foreign corporation would have to file in any event an **Application for Authority to Conduct Affairs** in Utah, at a Non-Refundable Processing Fee of \$70.00.

Is the foreign corporation dispensed from such obligation by filing the **Articles of Merger/Share Exchange**? How can a foreign corporation file **Articles of Merger/Share Exchange** if such share exchange is ***not ‘permitted by the law of the state or country under whose law the acquiring corporation is incorporated’***? Would such domestic corporation -which did not survive the merger or the share exchange- have to file the same **Articles of Merger / Share Exchange** , or an **Articles of Dissolution** ?.

The approach of the E.U. cross-border mergers directive does not reflect the desire of imposing on one another Member State the legislation and obligations of the jurisdiction of the surviving company, or of a specific state (quite obviously, if any legal system impose its own legislation and jurisdiction as the prevailing one, whether or not its own company survives the merger or not, such legislative approach would factually become an impediment and deterrent to the merger which is possibly dictated by business opportunities and/or the desire to reduce cost of doing business).

Article 4 (**Conditions relating to cross-border mergers**) provides simply as follows:

1. **Save as otherwise provided in this Directive,**
  - (a) **cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States, and**
  - (b) **a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable <sup>(22)</sup>.**

<sup>21</sup> <http://www.corporations.utah.gov/pdf/merger.pdf>

<sup>22</sup> Article 21 **Application of the Regulation and jurisdiction**

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations EC No 1/2003 (1), (EEC) No 1017/68 (2), (EEC) No 4056/86 (3) and (EEC) No 3975/87 (4) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent. (...)

2. **The provisions and formalities referred to in paragraph 1 (b) shall, in particular, include those concerning the decision making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 16. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.**

More specifically, the directive sets forth common terms of compliance by the companies participating to the cross-border merger <sup>(23)</sup>, including the need of independent expert report intended for members and made available not less than one month before the date of the general meeting (Article 8 **Independent expert report**) and it will be a national court, or other authority in the member state of either the absorbing company or where the new company resulting from the EU merger is to be domiciled must scrutinize the legality of the EU merger and, where appropriate, the formation of the new company resulting from the EU merger. The authority in charge of the registration of the company resulting from the merger must notify the registry in each of the jurisdictions where the merging companies are required to file documents that the merger has taken effect.

It seems an easier process, which tends, again, to reduce costs and administrative compliance.

Another essential principle stated in the European legislation, and coordinated for the specific effects of cross-border mergers, is tax neutrality, subject to certain conditions (and of course a systemic reciprocity), in terms of a **'common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States'** provided for by **EU Merger Directive 90/434/EEG** dated July 23<sup>rd</sup>, 1990 <sup>(24)</sup>, as amended by the Tax Directive 2005/19/CE of February 17<sup>th</sup>, 2005, and national legislations which have implemented the cross-border merger directive.

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#### Article 5 **Common draft terms of cross-border mergers**

The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger. The common draft terms of cross-border merger shall include at least the following particulars:

- (a) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;
- (b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;
- (c) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;
- (d) the likely repercussions of the cross-border merger on employment;
- (e) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;
- (f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the crossborder merger;
- (g) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;
- (h) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
- (i) the statutes of the company resulting from the crossborder merger;
- (j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16;
- (k) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;
- (l) dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

<sup>24</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0434:en:HTML>.

The rationale of Council Directive **90/434/EEC** of July 23<sup>rd</sup>, 1990 and the tax-neutrality principle is defined in the recitals of the directive <sup>(25)</sup> and in Articles **4**, **7** and **8**.

The **Directive 90/434/EEC** of July 23<sup>rd</sup>, 1990 provides in fact (Article **4**) that a '**merger or division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes**' ( ) and that where, '**under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred**', such exemption '**shall not apply to the assets and liabilities in respect of which that option is exercised**' <sup>(26)</sup>.

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<sup>25</sup> Excerpt from Directive **90/434/EEC of July 23<sup>rd</sup>, 1990**:

Whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

Whereas tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State; whereas it is necessary to remove such disadvantages;

Whereas it is not possible to attain this objective by an extension at the Community level of the systems presently in force in the Member States, since differences between these systems tend to produce distortions; whereas only a common tax system is able to provide a satisfactory solution in this respect;

Whereas the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company;

Whereas in respect of mergers, divisions or transfers of assets, such operations normally result either in the transformation of the transferring company into a permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company;

Whereas the system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the State of the transferring company at the date of their disposal;

Whereas it is also necessary to define the tax regime applicable to certain provisions, reserves or losses of the transferring company and to solve the tax problems occurring where one of the two companies has a holding in the capital of the other;

(...)

<sup>26</sup> Article **4** provides for the following definitions:

- **value for tax purposes**: the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger or division but independently of it,
- **transferred assets and liabilities**: those assets and liabilities of the transferring company which, in consequence of the merger or division, are effectively connected with a permanent

Pursuant to Article 7 *'Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation'*; further, Article 8 states that *'On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder'*, that *Member States shall make the application of paragraph 1 conditional upon the shareholder's not attributing to the securities received a value for tax purposes higher than the securities exchanged had immediately before the merger, division or exchange'* and that such *'application of paragraph 1 shall 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'*.

Again, H.B. 29 does not provide with any reference to applicable tax laws. On the other hand, the topicality and complexity of cross-border merger, and the recurrent practicality of related tax issues (also from a state-budget standpoint) in terms of conditions precedent to tax neutrality, is confirmed also by the decision of the [European Court of Justice](#) ("ECJ") issued on December 11<sup>th</sup>, 2008 in case [n. C-285/07](#) dealing with the tax treatment of a cross-border EU transfer of shares under German law, carried out in compliance with the E.U. cross-border mergers directive and its national legislative implementation under the law of the relevant jurisdictions (Germany and France).

The Court held that the requirement imposed under German law, according to which the shareholders of the transferred corporation are not taxed on the gain from the exchange of their old shares for the shares of the acquiring/surviving corporation, at the condition that the acquiring/surviving corporation takes a tax basis in the shares of the target equal to the transferring shareholder's tax basis in those shares prior to the transfer (carryover basis), violates the EU Mergers Directive n. 90/434/CEE of July 23<sup>rd</sup>, 1990 and E. U. law. The decision ruled upon the case of a German public company which transferred a majority shareholding in a German private company to a French public company solely in exchange for stock of the French company. The German transferor took a tax basis in the stock of the French acquiring company received in the transaction, equal to the tax basis it had in the shares of the German transferred company (substituted basis). The French acquiring company carried the shares of the German target company at their fair market value at the time of the transaction.

The EU mergers directive prescribes that, in order to qualify for tax free treatment and defer the tax on the gain from the exchange of stock in the target for stock of the acquiring company, the shareholders of the target company must take a substituted basis in the stock of the acquiring company received in the exchange. The directive is silent as to the tax basis at which the acquiring company should carry the stock of the acquired company received in the transaction. German law prescribed that the acquiring company took a carry over basis in the shares of the target (so called "double carry over basis requirement").

The position of the German government on the issue was that the EU directive is silent and the matter falls within the authority of the Member States. The Court rejected the argument and held that the double carry over basis requirement imposed by German law violates the EU mergers directive and EU law in that it results in an undue restriction of a cross-border exchange of shares between EU companies.

Following the aforesaid decision of the European Court of Justice, several member states enacted specific regulation (for example in Italy <sup>(27)</sup>, a jurisdiction which implemented the EU mergers directive, as amended by the Tax Directive 2005/19/CE of February 17<sup>th</sup>, 2005, and the EU cross-border mergers directive of 26 October 2005 by way of Legislative Decree No. 108 of May 30<sup>th</sup>, 2008 published in the Italian Official Gazette on June 17, 2008, Italy's tax administration, by resolution n. 190 of December 13, 2000 took the position that shareholders of

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establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.

<sup>27</sup> For further clarification, see **Italy's Tax Administration Rules on Cross-Border Tax Free Mergers**, 2008, Marco Rossi, [www.euitalianinternaitonaltax.com](http://www.euitalianinternaitonaltax.com).

the target could achieve tax free treatment on their transfer of shares of the target for shares of the acquiring company at the condition that they took a substituted basis in the shares of the acquiring company and the acquiring took a carryover basis in the shares of the target received in the transaction. Subsequently, with resolution n. 159 of July 25, 2007 the tax administration revoked its previous ruling and eliminated the double carryover basis requirement <sup>(28)</sup>

## CONCLUSIONS

In Europe, **Directive 2005/56/EC** on cross-border mergers (Directive) has cleared up many issues and challenges surrounding such mergers, setting forth the conditions to satisfy the practical needs of certainties of business and the corporate environment.

**H.B. 29**, or in other words the text of **Section 16-10a-1107** as possibly amended, still:

- contains a few provisions which could establish significant limitations, from a perspective of a foreign company, to doing business or establishing formally in Utah, or merging with a Utah corporation
- omits to address significant problems, and provide adequate solutions, or to regulate and/or coordinate necessary topics, such as eligibility to cross-border mergers, and conflicts of law with the foreign corporation/entity;
- does not provide any reference or coordination with the norms setting forth a form of taxation, if any, of the assets of the target company transferred to the acquiring company in the merger, and/or the exchange of stock of the target company's for stock of the acquiring company(or the company surviving the merger, leaving room to uncertainty.

I am not suggesting of course that Utah should simply, *sic et simpliciter*, adopt the EU model, but certainly we should treasure the knowledge deriving from this legislative and jurisdictional experience, or from other states, to develop a sophisticated legislation which can match Utah's ambitions and achievements of economic development and international recognition.

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<sup>28</sup> In line with the Tax Directive, Articles 172 and 179 of the Italian tax code (Presidential Decree No. 917 of December 22, 1986, as amended the "ITC") provide that a merger of a limited liability company, resident for tax purposes in Italy, with a company covered by the directive and resident for tax purposes in another Member State, shall not be deemed a taxable event in Italy, provided that any assets and liabilities located in Italy and transferred to the foreign surviving company remain under or connected with an Italian permanent establishment of the surviving company. Limitations on the carry-over of net operating losses apply. However, 2008 Budget Law enacted various amendments to the tax regime applicable to mergers and cross-border mergers, providing that the surviving company, subject to certain conditions, may elect to be subject to a substitute tax, at a rate ranging within 12% to 16%, and to obtain validation of any accounting step-up of the assets received by means of the merger, vis-à-vis the allocation of any merger loss.