Consideration on the Legal Regime of the Mergers and Acquisition

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Abstract
In the present context of the European Single Market and the globalization among economies, mergers and acquisitions represent the means by which companies increase their competitive capacity. Real economical facts outline that traders performing activities in a competitive economical environment enforce the improvement of business relationships under the aspects of production and retail. Under such conditions, companies resort to mergers and acquisitions from economical, financial and fiscal reasons aiming to concentrate the production agents involved in the accomplishment and diversification of economic activities. At a global scale, it is observed an amplification of the mergers and acquisitions which purpose is to increase the competitive capacity, to enter on a new retail market, to increase the economical performance by optimization of production and distribution conditions. As a result, regulations regarding the control of mergers and acquisitions propose the creation of a balanced legal framework to stimulate the free initiative of the traders, and in the same time to retribute the actions which could affect free competition on the common market.

Key words: merger, acquisition, merger control, concentration

JEL Classification: G34, K21

Introduction
A merger represents a way of company restructuring. It appears as a result of the shareholders' will and leads to the modification of the companies involved in such an operation (Angheni et al., 2008; Cârpenaru, 2009). Romanian law defines two kinds of mergers: merger by consolidation and merger by absorption. In Romania, merger is regulated by means of the Company Law 31/1990 republished, in articles 238-251. Additionally, merger is defined in the New Civil Code in articles 176-177 as a way of reorganizing the legal entity, among division and transformation.
A more detailed analysis of the concept of merger, its forms, its procedures and effects is presented in special works of both Romanian and foreign authors (Angheni et al., 2008; Cârpenaru, 2009; Piperea, 2008; Schiau și Prescure, 2007; Ripert și Roblot, 1991; Teichmann, 2004; Saintourens, 2004, and others).

1. Merger - concept and types

Schiau and Prescure (2007) analyze the provision of art. 238 para. (2), letters (a) and (b) identifying the resemblances between merger by absorption and companies’ division:

- they both are forms of company restructuring;
- they both are extinctively effective for the juridical personality;
- they both have translatively effective on the patrimony;
- they both generate amendment for the articles of association.

The same authors classify as essential the differences between the two forms of company restructuring the following effects:

- in the case of merge by absorption:
  - the patrimony is transmitted to a single beneficiary company;
  - the patrimony is universally transmitted

- in the case of total division:
  - the patrimony is transmitted to several companies;
  - the sharing of the patrimony is either equal or unequal, depending on the decisions of the General Meeting of the Shareholders involved in the division;

The special literature raises the question whether the regulation of the merger in law 31/1990 republished, is completed or not by the stipulations in the Decree 31/1954, its provisions representing the common law of legal entities. The solution given in doctrine is that the provisions in the Decree 31/1954 are not applicable for companies (Băcanu, 1999).

The grounds of this doctrinarian solution consists on the provision of article 48 of the Decree 32/1954 for the implementation of the Decree 31/1954, stipulating expressly that “companies submit to the company law and to the concerning dispositions”.

Merger is accomplished between independent law subjects. Thus, doctrine outlines the fact that it cannot be qualified as merger the operation through which subsidiaries are incorporated by a different company. Such operation is qualified as representing a cession of goodwill (Georgescu, 2002). In legal practice, it is admitted that the absorption of the parent-company by the company-daughter falls within the concept of merger and is a legal procedure (Angheni et al., 2008).

According to provisions of law 31/1990 republished merger can be achieved also between companies of different forms. As a result, a limited liability company can merge with a share company. Likewise, a share company can divide, and its patrimony can be shared to several limited liability companies. In the situation of companies in liquidation, they may merge or divide only under the circumstance in which they did not proceed to the distribution among shareholders of the due shares of the liquidation.

The agreement signed between the companies involved in the merger on the grounds of the express mandate given by the General Meeting of the Shareholders is considered the source of law of the merger operation (Schiau and Prescure, 2007). From a corporatist point of view, merger is compared to a contract of exchange by which it is provided a payment in order to determine the balance of services (Schiau and Prescure, 2007).
Merger has as consequence the universal transmission of the company's patrimony or of the absorbed company by the absorbent or the new created one. The transmitted active assets by merger comprise in principle all the rights belonging to the companies involved in the merger. There are consequently transmitted:

- the right to sue;
- the right to claim for damages in order to cover the prejudice caused by the managing board of the absorbed company;
- the right to continue the forced execution initiated by the absorbed company without obtaining any new enforceable title;

If among the goods transmitted to the absorbent company by merger there are also immovable goods, there must be complied the formalities established by law 7/1996, stipulating the disclosure in the land registry database of the transfer of goods by the absorbent company. In doctrine, mergers are analyzed as operations concerning exchanges of social rights and not of alienation of securities, which means that the provisions regarding the preemptive right, regulated by special laws, are not particularly observed (Angheni et al., 2008).

In what concerns the industrial property rights, these are transmitted to the absorbent company except for the situation in which a third entity proceeds in equity, having as object the declaration of the absolute nullity of the merger. As a consequence of transmitting the patrimony with universal title, the absorbent company also acquires the passive assets of the absorbed company, while the merging companies' passive assets are transferred to the newly created one. Are thus transmitted:

- the undue debts of the absorbed companies;
- the liability of warranty for the prejudices of the good belonging to the absorbed company;
- the liability for non-concurrence assumed by the absorbed company;
- the debts appeared from a fact of the absorbed company, even if with personal character.

Under the circumstances in which there is an agreement of limitation of the liability between the companies involved in the merger, there can also be limited in court the quantum of the debts to which the absorbent company can be kept, transferred by the operation of merger (Angheni et al., 2008). According to the doctrine, by interpreting the art. 241 of the law 31/1990 republished, any operation of merger must comply with two important rules. The first rule is that the process of merger occurs in two steps. The second rule imposes a certain structure and a minimum compulsory content for the draft term of merger (I. Schiau, T. Prescure, 2007).

In what concerns the adoption of the merger decision, this is achieved, according to art. 239 of law 31/1990 republished, by each of the participant companies to the operation of merger, under the conditions established for the modification of the articles of association. This implies the fact that in the case of General Partnership, Limited Partnership and Limited Liability Company the decision is taken in unanimity, and in the case of Joint Stock Company and Partnership Limited by shares the merger is decided by the majority regulated by art. 115 of law 31/1990 republished. The merger implies the adoption of two decisions of the General Meeting of Shareholders. The first represents the agreement of principle of the shareholders regarding the merger, while the second consists of the approval of the merger and its conditions. Consequently, in practice, during the first General Meeting of the Shareholders are presented only the intention of merger and the managers' proposal regarding the manner of accomplishment of the merging operation. In most cases, the merger project is drafted by the managers after the adoption of the GMS
decision of approval in principle of the merger. It can also occur that shareholders propose for analysis the project of merger at the first General Meeting.

2. Draft terms of merger – content and conditions

According to the legislation in force, the draft term of merger comprises (art. 241 of law 31/1990 republished):

a) the form, the name and the head office of all the companies involved in the merger or division;
b) the foundation and the conditions of the merger or the division;
c) the conditions of share assignment at the absorbent company or any of the beneficiary companies;
d) the date when the shares provided at letter c) offer the owners the right to participate to benefits and any other special conditions affecting this right;
e) the exchange rate of the shares and the quantum of the eventual payments in cash;
f) the quantum of the merger or division premium;
g) the rights conferred by the absorbent or beneficiary company for the holders of shares conferring special rights and those who hold securities beside the actions and the measures proposed for such perspective;
h) all benefits specially granted to experts referred to in art. 243-3 and the members of the managing or control authorities of the companies involved in the merger or division;
i) the date of the papers of the participant companies, used in order to establish the conditions of the merger or division;
j) the date when the absorbed or divided company’ transactions are considered in accountancy as pertaining to the absorbent company or to any of the beneficiary companies;

Special literature considers that it is of greater importance the foundation and the establishment of the conditions of the merger in the purpose of achieving the objectives followed by the shareholders approving the merger decision, than the respect of the formal conditions established by art. 241 of law 31/1990 republished (Schiau and Prescur, 2007).

The draft term of merge signed by the representatives of the participant companies is filed at the Trade Register where are also registered the companies mentioned. The draft is accompanied by a declaration in which the company ceases the existence after merger, regarding the way of covering the passive assets. The merger can affect the interests and rights of the creditors of the participant companies. As a result, the legislation provides the fact that they can protect their interests since they can appeal to opposition to merger as legal instrument. The creditors of the companies involved in the merger, with debts anterior to the disclosure of the draft term merger, have the right to oppose to merger. By the amendments brought to art. 243 of law 31/1990 republished, the creditors' submission of opposition to the merger does not have a suspensive effect. The new regulation allows the creditor with an uncontested, liquid debt, anterior to the disclosure of the draft term merger to obtain guaranties or the anticipated payment of the debt. In the European states’ laws there were adopted similar legal solutions. Thus, in France it was opted for the unopposability of the merger gradient to the creditor who decides in his favor. In Bulgaria it was decided that merger is not unopposable to the creditor for a 6-months term. In Belgium and Luxemburg it was chosen the legal solution of the maturity date of the creditor's debt.

According to the provisions of the art. 243, para. (2) of law 31/1990 republished, under the hypothesis when the debtor company does not offer warranties or the adequate
privileges for the satisfaction of the debt or even if he offers them does not constitute imputable reasons, the court can accept the opposition and enforce the debtor company to immediate payment of the debt or on a given term. The opposition request is considered of emergency and preeminent, while the decision of acceptance of the opposition is enforceable. Company Law provides two hypotheses of declaring the nullity of the merger without enlisting the concrete causes conducting to nullity. In order to determine the nullity causes of the GMS decision concerning the approval of the merger, there should be submitted to analysis if there are accomplished the fond and form conditions of the decision. The nullity is pronounced by the court in the jurisdiction the participant company is headquartered and in which case the GMS decision of approval of the merger is of 6 months the longest. In case the causes of nullity are eliminated or remedied, there cannot be initiated the procedures of certification or declaration of nullity (Schiau and Prescur, 2007, Angheni et al., 2008, Carpenu, 2010, Gheorghe, 2010).

Special literature makes a distinction between the nullity of juridical acts preliminary to the moment of occurrence of the merger effects and the nullity certified after the accomplishment of the effects provided by law (I. Schiau, T. Prescur, 2007).

3. Evolution of regulations regarding merger control

The evolution of the regulations in matter of merger, the compared analysis of their legal system raised the interest of certain authors and makes the object of several special researches (Parker et al., 2003; Harty, 2008). Thus, a part of these researches realize a compared analysis of the regulations in continental and American laws with reference to mergers and acquisitions in order to identify the elements of convergence between the two legal systems (Magnusson, 2008). The main differences identified concern especially the mechanisms of merger control.

It is outlined in consequence that the federal American regulation insists on the ex-post application of the merger control, while the European model of regulation is mainly focused on the preeminent control of the merger. Likewise, the American legislation in matter provides contraventional and criminal retributions for the persons involved in the anti-competitive agreements, while in the European legal system are retributed only the companies. A specific feature of the American model of merger regulation is the existence of two levels of constitution and application of the federal and state law acting distinctly, but complementarily (Magnusson, 2008).

The starting point of the regulations regarding mergers and acquisitions is placed in different moments in continental and American laws, fact determined by the structure and the different dynamic of the respective economies. The first regulation at a federal level regarding the merger control was represented by the Sherman Antitrust Act adopted in 1890, conceived to represent a supplementary regulation to the antitrust law of the states. Before, in 1889 the state of Kansas adopted the Act of March sanctioning the cartels at that moment for the practices of restriction of the competition. At the same time, at least 12 American states adopted regulations with respect of the competition. As a consequence of adopting the Clayton Act in 1914 the following period was the one when the antitrust federal law dominated the antitrust state law. The same year was adopted the law of the federal trade commission (FTC – Federal Trade Commission), and in 1936 was issued the Robinson-Partman Act. Until the ´80 it was observed a prevalent at the federal level, states keeping their competences in regulating the local causes such as the legality of auctions. Starting with 1981 the competence of the federal agencies was considerably reduced, so that these had the ability to sanction the cartels and horizontal mergers of a significant dimension. In the same time, the competence of the states was reactivated and extended to not only local causes but to federal and multi-state. The year 1989 marks the closure of the
period of limitation of power for the federal agencies, the state remaining active and a great number of which enforcing their means of retribution for the anti-competitive manifestations.

Regulations regarding the mergers control at a communitarian level appeared later than the American models, the first act making references to economical concentrations being the EEC Treaty in 1957, in articles 85(81), 86(82) and 90 (Lefter, 2003; Stoica, 2009; Manolache, 2006). After the accession of the Treaty, there was registered a fast increase of the number of mergers. Consequently, in 1962-1970 in the Community of the six states the number of mergers increased from 173 to 612. The decision of the Court of Justice of the European Community (CJEC) of 1973 in the cause CONTINENTAL CAN opens the path for the ex-post control of the mergers, offering the possibility of control of the concentration by means of the CJEC decisions (Lefter, 2003; Stefanescu, 1979).

In July 1973 the European Commission presented a first draft of regulation for the economical concentrations. In 1989 was adopted the Act 4064/89. This regulation establishes that there must be declared incompatible with the common market those operations of concentration of communitarian dimension creating of enforcing a dominant position and which have as consequence the non allowance of the effective concurrence on the communitarian market or in a significant region of it. By the Regulation 4064/1989 the Commission has the right to examine the concentrations before their accomplishments in order to determinate the compatibility with the internal market. Such act was amended ulteriorly by the Regulation 1310/1997. This one bring amendments concerning the levels took into consideration when qualifying a concentration as communitarian. In 2004 was adopted the Regulation 139/2004 which brings a new simplified procedure, by means of which the European Commission analyses certain economical concentrations. The new Merger Regulation 139/2004 together with the new guides regarding Horizontal Mergers created a new category of anti-concurrencial mergers: an oligopol non-collussive restricting the concurrence without satisfacting the level od singular or collective dominance. Thus, it is obvious that the European control over the mergers covers all kinds of anti-concurrencial situations, inter alia the non-coordinated effects.

Conclusions
Fluctuant economical circumstances force companies to go through restructuring processes representing instruments of permanent adjustment both for shareholders to the new professional demands and traders to the increasing economical concurrence occurring globally. Yet, mergers as forms of economic concentrations can have an adverse effect on the free concurrence on international and national markets. Regulating the control of mergers remains a constant preoccupation for the resort authorities. There are still considerable differences as what concerns the way of regulation of the mergers control in USA, UE respectively, such as the nature of examining mergers, yet the trend is that of uniformization of regulations in matter.

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