HARMONIZING NATIONAL LEGISLATION REGARDING CROSS-BORDER COMPANY MERGERS OPERATIONS

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Abstract

The process of harmonizing national legislation with European norms is a dynamic, continuous one and aims to ensure the harmonization and compatibility of domestic law norms with the legal system of the European Union, by adding, amending or supplementing national normative acts in accordance with the rigors of European law. In this way, the legal norms of European law become a component part of the national law system.

Keywords: *companies, cross-border merger, principles, transformation, corporate assets*

JEL Classification: *[K20, K22]*

1. Introduction

The expansion, development and globalization of modern society requires a growing need to adapt to this dynamic economic and social environment for companies that carry out economic activities. The influence of the economic factor and life on the way societies are organized and function is not at all surprising. Starting from practice, economists were the ones who identified a series of phenomena for which appropriate means and legal procedures were created. In such a context, the legal methods allowed what economists call " *the reconversion of industrial enterprises*" to be achieved (Guyon, 2003: pp. 609). In the national legislation, this process of *reconversion of industrial enterprises* is materialized in the conversions of legal entities procedure.

Over time, the activity carried out by a company meets a series of transformations, which have at least two constant valences: an economic and a legal one. From an economic point of view, reorganization is a form of making activities more efficient by legal persons, which can be voluntary or forced.

For legal entities carrying out commercial activities, voluntary reorganization may involve changes in the structure of assets, personnel or operations(Bodu, 2016: pp. 107) (sale of some assets, closure of some activities, renunciation of certain corporate dismemberments or vice versa, establishment of new dismemberments or expansion to new businesses, including by changing the legal form). In turn, voluntary reorganization can be either at the internal level of a legal entity, without effects towards third parties, or with effects towards third parties (Beleiu, 1982: pp. 108-109).

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Reorganization of a company is carried out through merger, division and conversion, these being complex procedures with implications in the legal entity's patrimony (Angheni, 2022: pp. 553).

From a legal point of view, the merger of companies is a way of reorganizing them, being a complex operation, which is carried out by absorption or merger and which can have all three effects of the reorganization,[1] namely:

• creative effect, that appears in case of fusion, when new companies are born;

• the modifying effect, present especially in mergers by absorption, when a series of corporate elements change in the absorbing company;

• extinguishing effect, present both in the case of a merger by absorption, when the absorbed company ceases, and in the case of a merger by merger, when all companies participating in the merger cease, in order to create a new company.

Corporate merger is defined as an operation by which two or more commercial companies come together to form a single one (Băcanu, 1996: pp. 187). Provisions of art. 234 of the Civil Code regulates the ways of achieving the merger, respectively by absorbing one legal person by another or by merging several legal persons to form a new legal person.

Article 238 para. (1) (a) of the Companies Law[2], defines merger by absorption as the operation by which *one or more companies are dissolved without going into liquidation and transfer all of their assets to another company in exchange for distribution to the shareholders of the company or companies absorbed by shares in the absorbing company and, possibly, a cash payment of a maximum of 10% of the nominal value of the shares thus distributed*.

Article 238 para. (1) (b) defines merger by formation of a new company as *the operation by which several companies are dissolved without going into liquidation and transfer all of their assets to a company they constitute, in exchange for the distribution of shares to their shareholders to the newly established company and, possibly, a cash payment of a maximum of 10% of the nominal value of the shares thus distributed*.

2. Cross-border merger in European Union

Corporate merger can take place not only in the traditional way, at national level, between the companies regulated by Law no. 31/1990, but also cross-border, between companies operating in the community space.

Harmonization of the rules regarding cross-border mergers in European Union has been the subject of a long and laborious process. The existence of the transnational element, which naturally implies difficulties in carrying out such mergers, due to the different legal regulations of the component states of the European Union, as well as the dynamics of intra-Union economic life, led to the

[1] Civil code, 2009 (Law no. 287/2009), art. 232

[2] Companies Law no. 31/1990

need to adopt specific legislation at the Union level, later transposed by member states (Gheorghe, 2013: pp. 526).

The rationale for a supranational approach to the institution of cross-border mergers lies in the need of protecting the interests of associates and third parties that would be required to introduce into the domestic law of the member states provisions on mergers, with particular reference to the right to information of the shareholders of the merging companies and creditors, including bondholders, of the need to extend the guarantees granted to associates and third parties regarding mergers, in order to ensure legal certainty in the legal and economic relations established between the companies involved in a merger (Onișor, 2019: pp. 148).

Cross-border merger operations of companies respond to the needs of cooperation and association between companies established in different Member States, constituting particular methods of exercising the freedom of establishment, important for the proper functioning of the common market, and are therefore among those economic activities regarding to which the member states must respect the freedom of establishment[3].

In EU, the regulation of cross-border operations was carried out over time, in several stages.

By Directive 2005/56/EC of the European Parliament and of the Council of October 26, 2005, only cross-border mergers of joint-stock companies were regulated, in order to achieve and operate the single market, motivated by the need for cooperation and association between joint-stock companies from the various member states. The main objective of the Directive was to facilitate cross-border mergers of joint-stock companies, in the sense that the laws of the Member States allow the cross-border merger of a joint-stock company under domestic law with a joint-stock company from another Member State, if the domestic law of the respective member states allows mergers between these forms of commercial companies.

he principle underlying Directive 2005/56/EC was one of minimal harmonisation, as the merger procedure was governed in each member state by the rules applicable to internal mergers in that member state, with the exception of certain specific aspects regulated in Directive 2005/56/CE. Following this principle, the European legislator wanted to ensure that companies apply already known regulations, ensuring, at the same time, that a series of problematic aspects are facilitated through a harmonized legislative framework in the member states[4].

Directive 2005/56/CE was repealed on 19.07.2007, with the entry into force of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14

[3] C.J.C.E., Grand Chamber, case no. C-411/03, SEVIC Systems AG, judgment of December 13, 2005, par.19, Available at https://eur-lex.europa.eu (Accessed: 28 November 2023).

[4] Statement of reasons for the draft law for the amendment and completion of the Companies Law no. 31/1990, as well as Law no. 265/2022 regarding the trade register and for the modification and completion of other normative acts affecting registration in the trade register, Available at https://www.cdep.ro/proiecte/2023/400/40/2/em509.pdf (Accessed: 27 November 2023)

June 2017 relating to certain aspects of company law. The provisions of the old Directive on cross-border mergers have been incorporated into the codification of the new directive. Directive (EU) 2017/1132 does not bring any new elements in the merger procedure, only taking over the provisions of the old directive, in a new codification.

Novelties regarding cross-border mergers arise as a result of the package of amendments adopted by the European Commission in 2019, which also included the proposal that became Directive (EU) 2019/2121 of the European Parliament and of the Council of November 27, 2019 amendment of Directive (EU) 2017/1132 regarding cross-border conversions, mergers and divisions, also known as the Mobility Directive. The directive was published in the Official Journal of the European Union on 12.12.2019 and entered into force on 01.01.2020.

In an innovative way, Directive 2019/2121 introduces the new concept of cross-border transformation and, at the same time, an organic and complete regulation of all extraordinary cross-border transactions, including transformations and divisions, putting an end to the application uncertainties found in practice by virtue of an inorganic regulation of these matters[5]. Cross-border conversions is an operation by which a company, without being dissolved, restructured or without going into liquidation, converts its legal form under which it is registered in the Member State of departure (namely, the original Member State) into a legal form of a companies from a Member State of destination (i.e. the final Member State) and transfers at least its registered office to the Member State of destination, while retaining its legal personality.

According to the statement of reasons, the objective of the Directive is twofold: to provide for specific and comprehensive procedures for cross-border conversions, mergers and divisions, to stimulate cross-border mobility in the EU, but also to provide the stakeholders of companies with adequate protection, to guarantee the fairness of the market unique.

All these procedures aimes to ensure effective legal mechanisms for commercial companies that wish to move to another Member State without losing their legal personality or without having to renegotiate their commercial contracts. A conversion is particularly attractive for small companies that do not have the financial resources to take advantage of expensive legal advice and carry out a cross-border merger[6].

The provisions of the Directive are extremely timely, in the context in which, until its adoption, commercial companies from the territory of the European Union that wanted to transfer their registered office to a cross-border level, had to rely on the legislation of the member states. These norms were often incompatible or difficult to combine. In addition, more than half of Member States' legislation

[5] Available at https://www.universuljuridic.ro/noua-directiva-a-ue-privind-transformarile-fuziunile-si-divizarile-transfrontaliere/(Accessed: 27 November 2023)

[6] Directive on the cross-border transfer of the registered office of a company (14th Directive on the law of commercial companies)

did not provide for specific rules to allow cross-border conversions. SMEs in particular were affected as they often lacked the resources to complete cross-border procedures through expensive and complicated alternative methods.

3. Cross-border merger in domestic law

National participation in the European decision-making process and the transposition/application of European legislation are intrinsically linked and represent interdependent stages of the same single and coherent process. Thus, EU directives are assumed from the point of view of institutional competence from the project phase, and all their legal, economic, social, etc. implications. they must be clearly represented and thoroughly evaluated, during the EU decision-making process, in the context of promoting national positions on them[7].

Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions had a deadline for transposition into domestic law on january, the 31, 2023. Following the non-compliance with this deadline, the Romanian state, together with other European states, was notified to communicate the national steps for the transposition of the Directive into domestic law.

The transposition of the Mobility Directive was carried out at the national level following the entry into force of Law no. 222/2023[8], through which a series of changes and additions were made to the Companies Law no. 31/1990, as well as Law no. 265/2022 regarding the trade register and for the modification and completion of other normative acts with the incident on the registration in the trade register.

In order to transpose the Directive, the new normative act amends and supplements Law no. 31/1990, as follows: within Title VI of Law no. 31/1990 three new chapters were introduced: chapter IV called "*Cross-border merger*", chapter V called "*Cross-border conversions*" and chapter VI called "*Cross-border division*".

Explanatory memorandum of the draft Law no. 222/2023 states that the mandatory provisions of the Mobility Directive have been taken over in full, "*but in a manner adapted to the existing legal framework in the matter of internal mergers and divisions and the general rules regarding the decision-making process at the level of joint-stock companies, limited liability companies and companies with limited liability*", regulated by the provisions of art. 238 – 251 of the Companies Law.

Thus, in Law no. 222/2023, the information to be included in the project of the cross-border merger operation is expressly provided; provisions regarding the obligation to draw up the report intended for associates and employees, regarding the content of the report drawn up by the independent expert - authorized evaluator; carrying out advertising formalities; the requirements related to the approval of the

[7] Available at https://www.mae.ro/node/27929 (Accessed: 28 November 2023)
[8] Published in Official Gazette (Part I), no. 667 of july 20, 2023

project by the general assembly of associates; the protection standards of associates and creditors; provisions relating to the information, consultation and participation of employees. At the same time, the normative act provides rules regarding the prior control, exercised as the member state of departure, for the situation in which the company that is transformed or that is the subject of the cross-border division or merger is a Romanian legal person, and the control exercised as the member state of destination, for the situation incorporation, as an effect of the conversion or division of one/more Romanian legal entities or for the case where the absorbing company is a Romanian legal entity.

According to provisions of Artycle 251 ind. 23 of Law 31/1990, the cross-border merger can take four ways.

Thus, a first way of merger is the one in which one or more companies, among those listed in Annex II of Directive (EU) 2017/1132[9], of which at least two are governed by the legislation of two different member states, are dissolved without enter into liquidation and transfer all their assets and liabilities to another company in exchange for the distribution to the associates of the company or companies absorbed of shares, shares or securities representing the share capital of the absorbing company and, possibly, of a cash payment of a maximum of 10 % of the nominal value of the shares, shares or other securities representing the social capital distributed in this way.

In the second hypothesis, the cross-border merger is the operation by which several companies, among those listed in the same II of Directive (EU) 2017/1.132, of which at least two are governed by the legislation of two different member states, are dissolved without going into liquidation and transfers all of their assets and liabilities to a company that they set up, in exchange for the distribution to their associations of shares, shares or other securities representing the social capital of the newly established company and, possibly, a payment in cash of a maximum of 10% of the nominal value of the shares, shares or other securities representing the social capital distributed in this way.

Another type of merger is the one in which a company, among those listed in Annex II of Directive (EU) 2017/1132, is dissolved without going into liquidation and transfers all its assets and liabilities to another company governed by the legislation of another member state , which owns all its shares, its shares or other securities representing the social capital.

Finally, the fourth variant of cross-border merger assumes that one or more companies, among those listed in Annex II of Directive (EU) 2017/1132, transfer, as a result of dissolution without liquidation, all the assets and liabilities of a other existing companies, the absorbing company, without issuing new shares, shares or other securities representing the capital by the absorbing company, provided that a person directly or indirectly owns all the shares, shares or other securities representing the capital of the merging companies or provided that the associates of

[9] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L1132 (Accessed: 27 November 2023)

the merging companies hold the shares, shares or other securities representing the share capital in the same proportion in all the merging companies.

In addition to the mandatory provisions, Directive (EU) 2019/2121 provides a series of optional provisions, of which the national legislator took over those adapted to the regulations already existing in the national legislation.

Thus, it was adopted the regulation regarding the exemption of limited liability companies with a single partner involved in a cross-border operation from the need to evaluate the project of the operation by an independent expert - a solution justified by the specifics of the shareholding structure, in consideration of which the expenses related to the measures can be reduced protection of minority associates.

Another optional provision of the Directive adopted by the national legislator imposes the necessity of notification of the intention by the associate who wishes to exercise his right of withdrawal, at the latest during the general meeting, in order to be able to inform the creditors, in order to take decisions accordingly regarding the possibility of requesting adequate guarantees, in case they consider that there will not be enough available in the company to satisfy their claims - the solution being of a nature to ensure the adequate information of the creditors, for them to evaluate and decide on the appropriateness of the guarantees granted by the company through the cross-border operation project.

Also, it was adopted the provision regarding the maximum term (2 months from the date on which the operation takes effect) in which the price of the shares of the associate who exercises the right of withdrawal can be paid, with the possibility that, in the project of the operation, that a shorter term be provided or that such a term be agreed by the parties – for the flexibility of options available to the company, so that, depending on the available money, it can decide to pay the price of the shares/shares in a longer term shorter than the maximum provided by the Directive.

Last but not least, the provision from the Directive regarding the possibility of displaying on the company's website the documents whose publicity is necessary (with respect to a certain term and specific conditions) was taken over - a solution already applied to internal mergers and divisions.

Directive (EU) 2019/2121 has been transposed, or is to be transposed, in a similar manner into the domestic law of the other EU member states.

In Spain, Royal Decree-Law 5/2023, of 28 June, approved a new regime on structural modifications [10].

The implementation of the Mobility Directive in Austrian domestic law will be delayed until the enactment of the Austrian EU Company Reorganisation Act

[10]Available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/07/Spain-key-issues-new-modifications-regime.pdf (Accessed: 27 November 2023)

(EU-UmgrG), the latter of which requires changes to Austria's Reorganisation Tax Act (RTA)[11].

In France, Ordinance no. 2023-393 of May 24, 2023 and Decree no. 2023-430 of June 2, 2023 transpose EU Directive 2019/2121. They reform the French regime for mergers, spin-offs, partial contributions of assets (apports partiels d'actifs), and cross-border operations. The objective is to facilitate these operations within the European Union by harmonizing the legal framework and strengthening the protection of stakeholders. Until now, such operations have been relatively rare, mainly due to the disparity between the applicable regimes in the Member States. Cross-border operations should, therefore, now be facilitated, even if certain inaccuracies remain to be corrected via the ratification law[12].

The Italian Government has approved the Legislative decree no. 19 of 2 March 2023 (the "Decree") implementing in Italy the Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019, amending the Directive (EU) 2017/1132 regarding, among other things, cross-border mergers, demergers and transformations. The new regulation regarding cross-border transactions will enter into force as of 3 July 2023 and it introduces a new regime for cross-border conversions and demergers. In fact, prior to this new regulation, only cross-border mergers were expressly regulated in Italy by Legislative Decree No. 108 of 30 May 2008. In addition, the Decree introduced significant changes to the Italian Civil Code regarding the withdrawal of shareholders, the transfer abroad of the registered office and introduces a new discipline on the demerger via spin-off (*scissione mediante scorporo*).[13]

Ireland introduced new regulations in May 2023 amending the existing law on cross-border mergers and providing for cross border conversions and divisions. The European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (the Regulations) allow Irish limited liability companies to convert into, divide into and merge with limited liability companies based in other European Economic Area (EEA) countries [14].

4. Conclusions

Changes made to Law no. 31/1990 were necessary and welcome, as a result of the development of the activity of companies in the community space, but also mandatory as a result of the Mobility Directive. The impact of the new regulations

[11] Available at https://www.bdo.global/en-gb/insights/tax/world-wide-tax/austria-tax-regulations-for-cross-border-divisions-published (Accessed: 27 November 2023)

[12] Available at https://www.dechert.com/knowledge/onpoint/2023/7/reforme-des-operations-transfrontalieres-en-france/Reform-of-Cross-Border-Operations-in-France-.html (Accessed: 27 November 2023)

[13] Available at https://www.engage.hoganlovells.com/knowledgeservices/news/new-rules-in-italy-regarding-cross-border-mergers-demergers-and-transformations/ (Accessed: 27 November 2023)

[14] Available at https://www.mhc.ie/latest/insights/new-regulations-on-cross-border-conversions-mergers-and-divisions (Accessed: 27 November 2023)

on the business environment is expected to be positive, bringing considerable benefits to companies in terms of simplifying operations on the single market, by facilitating their cross-border mobility.

Part of the procedural changes introduced in the text of Law no. 31/1990 aim to reduce costs and administrative burdens by creating a common and streamlined procedure, and the solutions proposed for the protection of associates and creditors and the rules regarding their information and employees should ensure the strengthening of legal security and predictability regarding cross-border conversions.

Bibliography

1. Angheni, S.,2022, *Drept comercial. Tratat. Editia 2*, CH Beck Publishing House, Bucharest
2. Băcanu, I., 1996, *Modificarea capitalului social al societatilor comerciale*, Lumina Lex Publishing House, Bucharest
3. Beleiu, Gh., 1982, *Drept civil. Persoanele*, University of Bucharest Publishing House, Bucharest
4. Bodu, S., 2016, *Tratat de drept societar. teorie & practică, vol. III*, Rosetti International Publishing House, Bucharest
5. Gheorghe, C., 2013, *Drept comercial român*, C.H. Beck Publishing House, Bucharest
6. Guyon, Y, 2003, *Droit des affaires. Tome 1, Droit commercial général et sociétés,* 12e édition, Economica Publishing House, Paris
7. Onișor, A.R., 2019, *Fuziunea societăților în dreptul român și european*, Hamangiu Publishing House, Bucharest

Legislation

1. Civil Code of July 17, 2009 - Law no. 287/2009 – Republishing, Official Gazette (Part I), no. 511 of July 24, 2009
2. Companies Law no. 31/1990, republished in Official Gazette no. 1066 of November 17, 2004
3. Law no. 222/2023 for the amendment and completion of the Companies Law no. 31/1990, as well as Law no. 265/2022 on the trade register and for the amendment and completion of other normative acts affecting registration in the trade register, Published in Official Gazette (Part I), no. 667 of july 20, 2023
4. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies
5. Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification)
6. Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

Online sources

1. https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/07/Spain-key-issues-new-modifications-regime.pdf [Accessed 27 November 2023]
2. https://www.bdo.global/en-gb/insights/tax/world-wide-tax/austria-tax-regulations-for-cross-border-divisions-published [Accessed 27 November 2023]
3. https://www.dechert.com/knowledge/onpoint/2023/7/reforme-des-operations-transfrontalieres-en-france/Reform-of-Cross-Border-Operations-in-France-.html [Accessed 27 November 2023]
4. https://www.engage.hoganlovells.com/knowledgeservices/news/new-rules-in-italy-regarding-cross-border-mergers-demergers-and-transformations/ [Accessed 27 November 2023]
5. https://www.mhc.ie/latest/insights/new-regulations-on-cross-border-conversions-mergers-and-divisions [Accessed 27 November 2023]
6. https://www.mae.ro/node/27929 [Accessed 28 November 2023]
7. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L1132 [Accessed 27 November 2023]
8. https://www.universuljuridic.ro/retragerea-actionarului-sau-asociatului-din-cadrul-societatilor-ca-urmare-a-fuziunii-transfrontalier [Accessed 27 November 2023]
9. C.J.C.E., Grand Chamber, case no. C-411/03, SEVIC Systems AG, judgment of December 13, 2005, par.19, Available at https://eur-lex.europa.eu [Accessed: 28 November 2023]