Succinct Considerations Regarding the Merger of Companies in the New Romanian Civil Code [1]

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ABSTRACT

The presence of merger in the New Civil Code[2] proves the legal importance of such institution. The provisions of the NCC corroborated with those of Law no. 31/1990 on the companies[3] succeed to create today a framework, which is more comprehensive every day, of the merger between companies. A good regulation of the merger is the key to the settlement of the issues occurred and which may occur in practice. To this effect, here is a critical analysis of some of the provisions of the NCC regarding the merger (the merger as reorganization, the definition of the merger, the effects of the merger on the contracts) meant to clarify the advantages and disadvantages of the new regulations.

Keywords: merger, companies, new civil code, law no. 31/1990 on the companies

1. Introduction

The general legal framework regulating the merger of companies in Romania is Law no. 31/1990. But since 2011 the NCC includes provisions regarding the merger of legal entities, which are applicable to companies too.

By corroborating art. 1887 para.2 of the NCC - providing that the law may regulate various categories of companies according to the form, nature or scope of work - with art. 138 of the Law enforcing the NCC[4] according to which the companies regulated by special laws are still governed by these ones – from the perspective of the intertemporal law, it results that Law no. 31/1990 has remained the common law as regards the companies, and as a complement, the provisions of the NCC will be added. We agree to the opinion that, as the companies are legal entities, but also professionals, their legal framework of common law for aspects related to the legal entity, as well as to the obligations, will be that of the NCC.

2. Merger as Method for the Companies' Reorganization

The merger as a method for the reorganization of the companies has been inserted in Romanian legislation through the NCC. Until its entry into force, the case law and the doctrine defined such notion in the sense that is now provided by the NCC, and the legislator used the term 'reorganization' with several meanings, among which the term of 'code'. [i5]

The NCC contains a chapter dedicated to the reorganization of the legal entity (art. 232 – 243). At art 232, it defines the reorganization of the legal entity as the legal operation in which one or several legal entities may be involved, and which has for effect their setting-up, modification or termination. The following article enumerates the three methods used to reorganize the legal entity, namely: merger, division and conversion.[6] It may be noticed that these are also mentioned at art. 244 as methods for the termination of the legal entity.

3. Presence and Voting Quorum Necessary to Approve the Merger

The following paragraph of art 233 of the NCC regarding the reorganization mentions that this one is performed with the observance of the conditions required for acquiring legal personality, should the law, the incorporation deed or the articles of association provide differently.

On the other hand, art. 239 of Law nr. 31/1991 mentions that the merger is decided by each company separately, under the conditions established for the amendment of the incorporation deed, and when a new company is set-up, this takes place under the conditions provided by law for the agreed form of company. In the light of the provisions of the NCC which provide that for the reorganization of the legal entity is to be decided according to the legal provisions unless the incorporation deed stipulates differently, we believe that the provisions of Law no. 31/1990 regarding the method to decide the merger are not imperative but discretionary. Thus, the incorporation deed may provide special provisions regarding the merger and only when these ones do not exist, such decisions should be taken by the shareholders general meeting under the quorum conditions for the amendment of the incorporation deed.

Such construal found its application in a practical situation similar to the one that we have experienced recently. Thus, it was noticed upon the reorganization of two companies that one of them required for the company merger (the absorbing company) a certain presence and voting quorum in the shareholders general meeting, and for the amendment of the incorporation deed, a different presence and voting quorum was necessary, higher than the quorum for the merger. Therefore, by corroborating the provisions of the NCC with those of Law no. 31/1990, we concluded that in the case at hand these will be applied as follows: for the first shareholders general meeting which will decide in principle the merger of the company with another one, it will be with the presence and voting quorum for the merger, as in fact it concerns the initiation of the operations related to the merger between the two companies. At the second shareholders general meeting which will have to decide on the merger, if this implies also amendments of the incorporation deed of the absorbing company, then the necessary presence and voting quorum will be that related to the amendment of the incorporation deed, which will be anyhow higher than the quorum necessary to approve the merger, we believe that as long as such quorum is met both the merger and the amendment of the incorporation deed of the absorbing company as a result of the merger are duly and statutorily approved. However, in case a merger between affiliated companies takes place, which would not involve the amendment of the incorporation deed of the merger, we believe that this one may be decided with the statutory presence and voting quorum for the merger, in a legal manner.

From the perspective of all the above mentioned, it was proved that the provisions of the second paragraph of art. 233 of the NCC was of good omen and useful for the practice.

4. Definition of Merger

Please note that although the NCC dedicates several articles to the merger, it does not define the merger, but only presents the two methods to perform a merger, by absorption and by amalgamation.

A definition of merger is found in Law no. 31/1990 which at art. 238 provides that merger is an operation whereby one or several companies are dissolved without starting the winding-up procedure and transfer their entire patrimony to another company in exchange of distributing shares to the shareholders of the absorbed company or of the newly created company, and, possibly, in exchange of the cash payment of maximum 10% of the face value of the shares thus distributed.

We believe that the legislator was not clear when defining the merger as an operation and we think it is atypical to classify a legal institution using a term as impersonal as operation. Such term is difficult to integrate from a legal point of view, being rather borrowed from the economic literature. In law, the main sources of a legal relation are the legal act and the legal fact, thus a way for understanding the concept of merger is to relate to the two legal categories mentioned above.

After analyzing what a merger implies, we noticed that there are several legal acts concluded during such merger (for ex. the merger project, the decision of the shareholders general meeting approving the merger of each of the involved companies etc). On the other hand, a merger implies also a series of organizational actions, operations, from those who are in charge with performing the merger, so it seems that there would be legal facts during the merger. Besides, the term operation gets rather the idea of action, a legal fact, than a legal act. And this is probably the reason why, in practice, event the judges were confused when appreciating the nature of the merger, being mainly prone to see it as a legal fact, than a legal act.

Thus, we believe it is more than necessary to clarify from a legal point of view the legal nature of merger. To this effect, by reference to the legal provisions, we reached the conclusion that merger is a legal act – which is confirmed by the fact that, in compliance with Law no. 31/1990, it is possible to obtain its nullity.

Therefore, *de lege ferenda*, we think it would be opportune to complement the NCC with a definition of merger, which should mention clearly its nature, namely that of a legal act.

5. Effects of Merger over the Contracts

Law no. 31/1990 provides in case of a merger, the transfer of all assets and liabilities from the absorbed company to the absorbing company, a transfer that was identified as being a universal transfer. This one takes place *ope legis* and in the same time, both in the relations between the companies involved in the merger and in the relations of these companies with third parties; in other words at the merger date a lawful subrogation occurs, namely the companies which benefit from the merger replace the position of creditor or debtor of the third parties which was held by the companies ceasing to exist.[7]

As regards the manner used to perform the universal transfer, the legislator mentions that this one will take place according to what is mentioned in the merger project. But as regards the provisions of Law no. 31/1990 regarding the mandatory content of the merger project, we notice that there are no express references to the contracts of the absorbed company / the companies that will cease to exist as a result of the merger, as a new company is to be set-up. Indeed this does not prevent the companies involved in the merger to include in the merger project some provisions regarding the contracts of the merging companies.

In the absence of any express provisions in Law no. 31/1990, the provisions of common law will be applied as regards the universal transfer of the contracts. From this point of view, the rule is that all contracts are transferred by law from the absorbed company to the absorbing company / from the company ceasing to exist to the newly-created company, without any formalities being accomplished.

However, art. 240 of the NCC imposes an exception as regards the contracts that may be transferred, respectively when there are contracts that were concluded taking into account the capacity of the legal entity subject to merger, their effects do not cease except when the parties have expressly provided the contrary or when keeping or distributing the contract is conditional upon the parties' agreement. In this latter case, the concerned party will be notified by registered letter with acknowledgment of receipt, so it may give or not its consent within 10 business days after the notice is communicated. The absence of a reply within this term is equivalent to the rejection to keep or take-over the contract by the succeeding legal entity.

We ascertain that the exception mentioned at article 240 of the NCC regards a certain category of contracts, namely those concluded taking into account the capacity of the legal entity, known also under the name of contracts *intuitu personae.* Pursuant to this article, these contracts are also transferred by law in case of a merger, less those which include an interdiction clause as regards the transfer in case of such reorganization or those which include a clause imposing the obligation to obtain a consent in case of a transfer from the contracting party, which remains the same in the contract.

As a result of the universal transfer by merger, the absorbing / newly-created company will subrogate to the contractual rights and obligations of the absorbed company / the company ceasing to exist. Therefore, such transfer is easily assimilated to an assignment of a contract having the same effects, namely the replacement of a contracting party with another one, under certain conditions.

From this point of view, we believe that the provisions of art. 240 of the NCC represent also special rules as regards the assignment of the contract, rules that derogate from the general provisions regulated by art. 1315-1320 of the NCC. Although these latter provisions mention the obligation to obtain the consent of the assigned contracting party and refer to notifying this one about the contract assignment, they do not provide a term within which the notice should be sent, as art. 240 which

provides a 10 days term. We believe that the notice about the contract assignment will be sent within the term provided by the contract for sending notices or, should no such term be mentioned, within a reasonable term that the legislator used frequently in the NCC, without defining it. Therefore, the doctrine helped to define such term, estimating that the reasonable term will be decided on a case by case basis, depending on the nature, the purpose, the performance of the contract, the importance of the investments, the time required to complete a substitution situation etc.[8]

The provisions regulating art. 240 are private law provisions, because the purpose is the protection of the contracting party's individual interest, which is influenced by the contract transfer in case of a merger. In such context, we ask ourselves what is the nature of such 10 days term. Is it a mandatory or discretionary term? Given that the possibility for the parties to derogate from this term is not provided, it results that such term is mandatory, meaning that the parties cannot waive, under an express clause, to such term and cannot agree another term than that provided at art. 240.

Pursuant to art. 5 of the LPA the provisions of the NCC are applied to all deeds concluded and to all legal situations emerged after its entry into force. Therefore, it is obvious that these provisions are applied to all contracts concluded based on the NCC. However the question is whether the contracts concluded before 1 October 2011 should observe this notifying term. In order to find the answer to such question we will refer to the provisions of art. 3 of the LPA which provide that the legal acts concluded before the NCC entered into force cannot generate other legal effects than those provided by the law in force at their execution date. Therefore, the contracts concluded before the NCC entered into force are governed by the law applicable at that time.

As regards the penalty for the failure to observe the provisions of art. 240, we think that this one will be the termination of the contract *intuitu personae* and therefore it will not be transferred as a result of the merger to the absorbing company / the newly-created company. In the event that the termination of the contract will cause prejudices to the contracting party which disagreed with the contract transfer, we agree with the doctrine opinion according to which that party will be able to formulate an opposition against the deed whereby the reorganization[9] has been ordered - and ask for damages in order to cover the prejudice.

Thus, the validity of the merger itself is threatened if it takes place without observing the provisions regarding the contracts' transfer. In fact, as to this aspect, we are familiar with situations in practice when the deficiencies of the transfer of a contract led to ruling the merger nullity. Please find hereinafter a brief presentation of that case. A company which was involved in a merger as absorbed company has concluded a contract with a State authority. The employee in charge with that contract forgot to send a notice to the State authority about the merger. The shareholders of the absorbing company were not informed about that contract when the merger took place and so they did not know that the formalities regarding the notice had not been accomplished. They discovered this aspect after the merger took place, and that was the reason for invoking the merger nullity, based on the nullity of the decision made by the absorbing company meeting in which the vote of the majority shareholder was vitiated, because this one was in default and did not know that in fact the absorbed company had not accomplished its obligations to send the notice as provided by the contract concluded with the State authority and in fact it would not have been allowed to merge. The Court ruled the nullity of the decision made by the general meeting of the shareholders of the absorbing company and the merger nullity. So, it is necessary to be very careful as regards the compliance with the obligations of the contracting parties to send notices about a potential merger, so that no great risk is taken when such operation takes place.

Returning to the provisions of article 240 of the NCC, we notice that the contracting party which received the notice about the merger should reply within 10 days as of the date when the notice has been sent. Otherwise, the absence of a reply within that term will be the equivalent to the rejection of giving its consent to the contract transfer. Therefore, the legislator needs to underline that the silence does not worth acceptance, but rejection, in order to avoid any construal whatsoever of the absence of a reply.

Nevertheless, we may ask what happens in case the party which received the notice sends its reply in writing, but with delay - due to reasons imputable to it or not - so after the expiry of the 10 days term? In such situation we think that the party which sent the notice and which is subject to the merger will be able to benefit from the positive answer of the other contracting party, even if with delay.

Also, we asked the question whether it is possible that the other party agrees with the merger although the contract provided initially that, in case of a merger, the contract would be terminated. We think that in such situation the parties may sign an addendum in order to amend the initial provisions of the contract and to remove such interdiction. As a result of signing such addendum, it will be possible to transfer the contract by law in case of a merger.

As it may be noticed the provisions of art. 240 of the NCC are very useful in practice and are created in line with the meaning of the merger institution; however we believe that a clearer wording given the nature and implications of the 10 days term would be necessary.

6. Conclusions

The regulation of the merger in the NCC is salutary, even if certain texts regarding the merger are perfectible, we think that the legislator succeeded to approach some important aspects related to the merger which proved to be useful in practice. A clarification of some of these provisions is necessary and we hope to be taken into consideration in case the NCC would be subject to certain amendments.

REFERENCES

[1] Presented at Conference "New Civil Code at two years after its entrance into force. Theoretical and Practical issues organized by the Institute of Legal Research Acad. Andrei Rădulescu of Romanian Academy on October 9, 2013.
[2] Hereinafter referred to as the NCC.
[3] Hereinafter referred to as Law no. 31/1990.
[4] Hereinafter referred to as the LPA.
[5] See Beleiu, Gh. (2001), *Drept civil român – Introducere în dreptul civil român. Subiectele dreptului civil*, Ediția a XI-a, revizuită și adăugită de Marian Nicolae și Petrică Trușcă, Ed. Universul Juridic, București, 2007, p. 525 și urm. Gabriel Boroi, *Drept civil. Partea generală. Persoanele*, Ed. All Beck, București, p. 400, according to which the reorganization is the legal operation that includes at least two legal entities and which has effects on their setting-up, modification or termination. Professor Gh. Beleiu describes three orientations of the reorganization promoted by the Romanian legislator, retaining and developing the one regarding at least two legal entities existing or being set-up, namely the reorganization, underlining the fact that this is a complex judicial institution.
[6] See also Piperea, Gh. (2012) în *Noul Cod civil Comentariu pe articole art. 1 – 2664*, coordonatori Baias, F-A, Chelaru, E, Constantinovici, R, Macovei, I, Ed. C.H. Beck, București, p. 232, according to which "using special laws, the incorporation deed or the articles of association it is also possible to regulate other methods for the legal entity's reorganization. A control agreement, whereby the legal entity becomes an affiliate of the group, may be deemed as a reorganization of the legal entity. Also, an amicable taking-over, whereby the shareholding and managerial control over the company that is taken-over is transferred, may be deemed a contractual method for the reorganization of the legal entity."
[7] Schiau, I, Prescure, T, *Legea societăților comerciale nr. 31/1990 Analize și comentarii pe articole*, Ediția a 2-a, revăzută, adăugită și actualizată, Ed Hamangiu, București, 2009, p. 666.
[8] Zamșa, C în *Noul Cod civil Comentariu pe articole art. 1 – 2664*, coordonatori Flaviu – Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, Ed. C.H. Beck, București, 2012, p. 1337.
[9] Florescu E, Târșia, A C (2012), în *Noul Cod civil Comentarii, doctrină și jurisprudență, vol I Art 1-952,* Ed. Hamagiu, București, p. 288.