The future of cross border mergers in the light of the new European Union provisions. Their implementation in Romania

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Abstract

Seeing the new Directives that modified Directive no. 2017/1132 of the European Parliament and of the Council of 14th of June 2017 relating to certain aspects of company law (herein after the Directive), one can't help but wonder how much of the Romanian legislation will need specific modifications in order to comply with the future provisions, in the field of cross border mergers. As of the end of last year, the new provisions of the Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 (herein after the Amending Directive) have entered into force and therefore we may conclude that regarding cross border mergers, the Directive itself is amended and will thus bring modifications to the national legislations in place.

Keywords: *Directive no. 2017/1132, cross border merger, European Union, Romanian legislation, future amendments to Law no. 31/1990.*

JEL Classification: K22, K29, K33

1. Introduction

European company law has evolved enormously since the establishment of the EEC and so must the provisions of both European and national legislations. If talking about the implementation of the company law in practice, it must be said that the European Court of Justice (herein after ECJ) has come a very long way: from the Daily Mail case, where the Member States had almost full liberty of determining company law since the Court ruled that "[...] it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning"[2], until present day where almost every aspect of company law is framed by a provision or a recommendation of the European Union.

Further the ECJ reconsidered its position towards company law in the EU and "thus unwittingly nudged Member States toward a certain vision of corporate law that had never been intended by policymakers"[3]. Especially by cases such as Centros[4], Überseering[5] and Inspire Art[6], the ECJ stressed the freedom of

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[2] ECJ, 27 September 1988, *Daily* Mail, Case 81/87, paragraph 19

[3] Martin Gelter, "Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law", *ECGI Working Paper Series in Law*, (2015): 3.

[4] ECJ, 9 March 1999, *Centros*, case 212/97.

[5] ECJ, 5 November 2002, *Überseering*, case 208/00.

establishment of corporations, and allowed them to seek national legislations that were more favorable to their line of business. This drove Member States to adopt a more competitive view of the market and to try and eliminate from their national legislations any provisions that influenced national companies to establish their registered offices abroad.

Criticism might be brought by doctrine to the Court for not being part to the real seat theory but of the incorporation theory[7], as it recently applies the provisions of art. 49 and 54 of the Treaty of the Functioning of the European Union (herein after TFEU) in such a manner that it almost always allows cross border mobility within the Member States.

The Court continued its rulings and the maybe among the most disputed ones and the one that interests our study is the *Sevic* case. In this case two companies, one from Germany and the other from Luxemburg wanted to merge by absorption, but the German law in force at the time forbid any mergers between companies that were non-German. The Court held in this case that the German law was not in accordance with the provisions of the Treaty and thus established that mergers fall under the provisions of freedom of establishment: "In accordance with the second paragraph of Article 43 EC [art. 49 TFEU], read in conjunction with Article 48 EC [art. 54 TFEU], the freedom of establishment for companies referred to in that latter article includes in particular the formation and management of those companies under the conditions defined by the legislation of the State of establishment for its own companies. [...] Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC."[8]

Regarding European legislation, it should be noted that the first enacted was the Cross-Border Mergers Directive[9], which was later repealed by the Directive; as doctrine has supported "The major achievement of the CBMD and title II ch II CLD is the creation of a clear, predictable and structured EU legal framework, providing the legal security essential for such complex transactions and significantly reducing the transaction costs"[10]

Then, came three Directives that should have amended the Companies Law Directive in the same time, but "regarding the text of the proposal on the cross-border mobility for companies, an error was identified in the text and as a result the vote was postponed so that the correction procedure provided for in the Rules of

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6 ECJ, 30 September 2003, *Inspire Art*, case 167/01.

7 See Martin Gelter, "Centros", 17-27.

8 ECJ, 13 December 2005, *Sevic*, case 411/03, paragraphs 16 and 19.

9 Directive 2005/56/EC on cross-border mergers of limited liability companies.

10 Jessica Schmidt, "Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package", *European Company and Financial Law Review*, De Gruyter, vol. 16(1-2) (2019): 223.

Procedure of the European Parliament no. 231 would be followed"[11] Thus, the Amending Directive was only adopted at the end of 2019, and shall normally have to be transposed into national legislation within two years of adoption.

2. Main differences between European Union and Romanian legislation in force

Member states still have a long term in order to implement the Directives, since the Amending Directive was just published, but this still means that the Romanian state must modify the present legislation in order to be in accordance with the European provisions. For the present study, we searched for some specific amendments that must be made to the Romanian companies' law, in order to be in accordance with the provisions in force. For the purpose of this study, we chose not to include the employees' rights as they are regulated by alternative Directives that amend the provisions of the Directive. In realizing the present study, we chose two combined methods the linear and analytic study of the Directive and the Romanian company legislation, meaning Law no. 31/1990. Without claiming that we are treating all the necessary modifications exhaustively, we shall continue by stressing out the differences that we consider important between the two pieces of legislation.

As a general view, we may say that the Directive concentrates more on rights of employees, rights of associates and rights of creditors of the companies that are merging. It also stresses out the importance for the Member States to put in place cross border communications in order to render Trade Registries and other documents that must be communicated to interested parties more easily accessible, generally without having the party present. They add more attributions to the administrators of the companies that are merging and tend to render the procedure more public, or at least more easily accessible for interested parties.

In practice, this cross border merger still generates a lot of debate - "the legal issue would not be so controversial if, beyond the technical discussion, there were no important political interests at stake. In this regard, several elements deserve to be mentioned. Some of the arguments relate to the general controversy between the two mentioned theories, others more directly address the case of the cross border merger, or of the cross border transfer of the seat."[12]

2.1 To whom it applies

The provisions of the Directive in force apply to cross border merges of limited liability companies, whether they are limited liability companies, companies by shares (joint stock companies) or limited partnership by shares, in

[11] Antigoni Alexandropoulou, "European legislative proposals on cross-border mobility of companies and the use of digital tools and processes in company law", *Business and Company Law Review (Dikaio Epihireiseon kai Etairion, Δίκαιο Επιχειρήσεων και Εταιριών)* (2019): 2.

[12] Eddy Wymeersch, "The Transfer of the Company's Seat in European Company Law", *Law Working Paper*, no.8 (2003): 4.

accordance to the Romanian legislation in force[13]. They also apply when setting up a European company (SE) by merger "in the sense of the fusion of one company with another one and not the <<familiar Anglo-Saxon>> merger by takeover"; as we consider that these provisions need to be read in conjunction with Council Regulation no. 2157/2001, issued on the 8th of October 2001 on the Statute for a European company (S.E.), and the Council Directive 2001/86/CE of the 8th of October 2001 supplementing the Statute for a European company with regard to the involvement of employees, with the subsequent amendments and additions, they will not make the purpose of this study.

However, apart from the restrictions already in place (no company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading are allowed to join in a cross border merger), according to the new Directive, cross border merges shall not be possible between companies that are in liquidation and have begun to distribute assets to the members or companies that are credit institutions or investment firms that fall under resolutions tools provided by the amended Directive 2014/59/UE[14]. The new Directive allows member states the possibility to choose whether to apply these provisions to companies that are undergoing an insolvency procedure, a liquidation procedure other than the one mentioned above or to credit institutions or investment firms that are making use of mechanisms of financing the resolution[15].

The Directive adds a new type of merger by acquisition procedure to the existing legislation in force, without the issuing of shares in the existing company under the condition that the company is acquired by a person who directly or indirectly holds all of the shares, or that the shareholders hold the same proportion of shares in the merging companies[16]. In our opinion, this brings certain ease to the procedure, as it allows companies that are owned by the same shareholders to easily transfer their assets, usually, without having to pay much taxes on the transaction.

2.2 Drafting the merger agreement/procedure in place

The Directive brought significant changes to the cross border mobility and was generally well acclaimed by scholars: "With respect to the content of the draft terms, the Mobility Package envisages some minor, but nonetheless significant modifications with respect to the draft terms for cross-border mergers".[17]

In order for a cross border merger to take place, the management or administrative organ of each company must draft common terms of the merger. Regarding the particulars involved in this draft, the Directive includes several

[13] For a detailed analysis of the provisions for Romanian companies, see Ovidiu Ioan Dumitru, Andreea Stoican, *Business Law - Lecture Notes*, (Bucharest: Ed. ASE, 2019), 158-216.
[14] See art. 120, paragraph 4 of Directive no. 2017/1132.
[15] See art. 120 paragraph 5 Directive no. 2017/1132.
[16] See art. 119 paragraph 2, letter (d) Directive no. 2017/1132.
[17] Jessica Schmidt, "Cross-border Mergers", 242.

elements that are not yet contained in the Romanian provisions[18], such as[19]: the legal form, proposed name and proposed registered office for the company resulting from the cross border merger (letter a), the instrument of constitution of the resulting company and eventually its statutes (letter i), details of the offer of cash compensation for the associates that disagree with the merger and thus wish to sell their shares (letter m), any other safeguards, guarantees or pledges offered to creditors (letter n). For the moment, these provisions are not implemented in the Romanian commercial law, in either of its articles.

One might argue that regarding the condition stated by the letter a) of article 122, paragraph 1 these conditions are met through art. 251^5 of the companies' law, where it is stated that administrators or members of the directorate of the companies that are merging will draft a common merger project that must comprise "the legal form, name and registered office of the new formed company, if applicable". In our opinion, this provision only refers to the merger that creates a new company, therefore not applicable to the other three types of mergers defined by the Directive.

As a novelty, the Directive allows Member States to circumvent the publicity made in the National Trade Registers if the merging companies make available the necessary documents on their websites free of charge for a least a month before the general meeting of associates[20]. This is provided for by the Romanian legislation under the mergers and divisions of national[21] companies but is not reiterated within the cross border provisions. Thus, we consider that such an important provision is to be at least referred to in the cross border merger section.

Pertaining to the report that the administrative or management body must draft up and make available to the members and employees of the company[22], in our opinion there should be some precisions made: first of all, in accordance to the Directive the administrative body must stress out the implications of the cross border merger for the employees and must draft up two sections in the report, one for the members and one for the employees. The Romanian legislation only points out that the report will be made available to the members as well as the employees without specifying what this report will be comprised. Furthermore, the Directive established a minimum term of 6 weeks in which the report must be made available, whereas the Romanian legislation only establishes a term of 30 days. Furthermore, doctrine has received these provisions very well as it supported that: "An interesting innovative feature is the proposed complete revamping of the management report. In order to tackle the problems resulting from the current "hybrid character" of the management report as a protection instrument for both members and employees". [23]

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[18] For the drafting of a merger plan as regulated by the Romanian law in force see Dumitru and Stoican, *Business notes*, 215-126.

[19] See art. 122, paragraph 1 Directive no. 2017/1132.

[20] See art. 123, paragraph 2 Directive no. 2017/1132.

[21] See art. 242 of Law 31/1990.

[22] See art. 124 of Directive no. 2017/1132 and art. 251^7 of Law no. 31/1990.

[23] Jessica Schmidt, "Cross-border Mergers", 244.

As pertaining to the protection of members, it is especially important for minority shareholders in order to protect them from an unwanted cross border merger in which they would lose all rights granted to the control of the company; "the current EU legal framework for cross-border mergers is [...] based on the "information model" (protection by means of information): The (minority) members are protected primarily through the (formal) right to vote on the resolution of the general meeting which approves the merger; in order to make sure that they can make an informed decision, the CLD sets out extensive information requirements (in particular: draft terms of the merger, management report, experts' report)"[24]. The Directive adds an additional mean of protection for the members who vote against the merger plan and exert the right to dispose of their shares, or the members who did not have or did not exert the right to dispose of their shares: if the said members consider that the cash compensation offered by the merging company is not adequately set, they shall be entitled to ask for additional cash compensations before the competent national authority or mandated body[25].

Referring to the protection of creditors, the Directive allows the discretion to the Member States to establish rules by which the administrative or management body of each merging companies can issue a statement proclaiming that under the knowledge of the administration, there is no reason for which the company that would result from the merger would be unable to pay the liabilities at their maturity. This declaration can be issued in the same time as the draft of the cross border merger, as disclosed under the provisions of art. 123 of the Directive[26]. This however, remains a recommendation, and therefore each Member State will have discretionary power on whether to draft such provisions in their national legislations.

The protection of the rights of the creditors is also ensured by the fact that they may apply and obtain within 3 months of the disclosure of the common draft terms of the cross border merger adequate safeguards, provided that they can demonstrate that the cross border merger affects their claims and they have not obtained adequate safeguards from the merging companies[27]. This provision has yet to be introduced in the Romanian legislation.

2.3 Validating the merger by the all national competent authorities

In order for the merger to be valid, the companies must obtain a pre-merger certificate from the "court, notary or other authority or authorities competent to scrutinise the legality of cross-border mergers as regards those parts of the procedure which are governed by the law of the Member State", in accordance with art. 127 of the Directive. The Directive imposes a number of conditions and formulates several recommendations for the Member States in order to grant this pre-merger certificate that the Romanian legislation has yet to

[24] Bech-Bruun/Lexidale, *Study on the Application of the Cross-border Mergers Directive*, 2013, *apud* Jessica Schmidt, "Cross-border Mergers", 253.
[25] See art. 126 a, paragraph 4 and 6 of Directive no. 2017/1132.
[26] See art. 126b, paragraph 2 of Directive no. 2017/1132.
[27] See art. 126, paragraph 1, second thesis, of Directive no. 2017/1132.

mention. This however, in our opinion, is due to the fact that most of the conditions and recommendations are formulated through the Amending Directive, thus, have just come into force.

Then each Member State implicated in the cross border merger, must verify the legality of the cross border merger, paying special attention to the approval of the common draft terms and the employee participation where applicable. The competent authority will take into account the pre-merger certificate as conclusive evidence in the accomplishment of proper procedures and formalities in the other Member States[28].

2.4 Registration of the cross border merger

As for the registration of the merges, the Directive allows each Member State to choose the arrangements made for disclosing the completion of the cross-border merger in their registers. These arrangements must be made in accordance to the provisions pertaining to the digitalization of the Trade Registries[29] and thus, must also be made available in an online format. We underline the fact that, at the difference of the Romanian legislation in force, in particular Law 26/1990 referring to the Trade Registry do not mention when registering a company that that company is issued from a cross border merger, nor that the striking off or removing a merging company from the register is a result of a cross border merger. Thus, to this respect, we consider that both Law 31/1990 and Law 26/1990 are to be amended for them to be in accordance with the provisions of art. 130 of the Directive, especially paragraph 2.

The date on which the cross border merger takes effect is to be settled by each Member State through their national legislation, but this date is to be after the scrutiny referred of each Member State's delegated authority. The Romanian legislation in force states that the date from which the cross border merger will take effect is the date of the registration in the Trade Registry of the new company or the date of the registration of the modified constitutive act of the company in the event of a merger by absorption. The Romanian legislation allows that in the latter case, the date of registration be an alternative one, decided by the parties, under the condition that this date comes after the closing of the current financial exercise of the absorbing company or the benefiting companies and not before the closing of the last financial exercise of the company or companies that transfer their assets, and not before the scrutiny of the judge mandated with the compliance of the merger to national legislation. In this respect, we consider that the Romanian legislation is in accordance with the European provisions in force.

The effects of the Directive as well as our national legislation[30] seem clear, in the sense that all assets and liabilities of the companies participating in the merger shall be transferred to either the newly formed company or to the acquiring

[28] See art. 128, paragraph 5 of Directive no. 2017/1132.

[29] See Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, and art. 16 of Directive no. 2017/1132.

[30] For the effects of mergers in the Romanian legislation in force, see Dumitru and Stoican, *Business notes*, 213-214.

company; doctrine has pointed out that the phrasing of the Directive: "<<all the assets and liabilities>> include <<all contracts, credits, rights and obligations>> [is necessary] [...] given that the concept of universal succession (and the assets and liabilities covered by it) has apparently not been applied uniformly in the Member States and that there have been various controversies in this respect (as was vividly illustrated by the decision of the CJEU in the case *Modelo Continente Hipermercados*), the clarification will probably not hurt."[31]

2.5 Nullity and validity of the cross border merger

Regarding the validity of the cross border merger, the Directive, as well as the Romanian legislation in force clearly establish that if the merger was registered in the Trade Registry, than it can't be declared null and void[32]. However, the Romanian legislation provides that the cross border merger may be declared null and void only upon a court decision. The Romanian legislator provides that if the situation has been rectified, the procedures pertaining to the nullity of the company can't be initiated, and if they were initiated, if the irregularity can be rectified, the judge will give the participating companies a term in which to rectify the irregularity.

This unusual permission given by the legislator is granted, in our opinion in order to allow the companies to rectify all possible reasons that may lead to the nullity of a company, and thus protect the legal personality of the company, its members and its creditors. The same concept was adopted by the community legislator throughout numerous regulatory acts, as "the community legislator's aim was to limit as much as possible the cases of nullity of commercial companies, especially for the protection of third parties."[33]

As a note, we may stress out that there are different types of aspects pertaining to nullity that are not covered by the Directive, such as the case where one of the merging companies has in its constitutive act a limited duration of functioning and the said duration expires before or during the merger. Doctrine[34] has delivered several points of view relating to weather the company is able to merge or if it ceases to exist.

3. Conclusions

In a context of uncertainty created by different national legislations of Member States, as well as the ECJ that changed its jurisprudence held in the Daily Mail in which it *de facto* acknowledged that the application of the real seat theory

[31] Jessica Schmidt, "Cross-border Mergers", 268-269.

[32] See art. 134 paragraph 1 of Directive no. 2017/1132 and art. 251^{19}, paragraph 2 of Law 31/1990.

[33] Cornelia Lefter, Ovidiu Ioan Dumitru, "Theoretical and Practical Aspects Regarding the Nullity of Commercial Company", *Revista de Economie teoretică şi aplicată*, no. 11 (2009): p. 36.

[34] For a larger perspective upon the nullity of a company due to the passing of time, as well as a presentation of several doctrine opinions on the matter, see Cornelia Lefter, Ovidiu Ioan Dumitru, "Dissolution of the Commercial Companies due to the Passing of Time Established as a Duration of the Company – Theoretical and Practical Aspects", *Revista de Economie teoretică şi aplicată*, no. 11 (564) (2011): 49-55, especially 62-64.

is consistent with the freedom of establishment[35] as defined by the founding Treaties, to the cases of Centros and others, in which it underwent an important revirement, recognizing that the real seat theory was in contrast with the freedom of establishment[36], the Directive is most welcome as it regulates a lot of aspects pertaining to company law.

The Directive does not however set specific boundries as it does not establish with certainty which incorporation theory should be held with priority in the national legislation of Member States. Thus, as doctrine has stated, the ECJ has opened the door to regulatory competition in European corporate law, and in particular to English Private Limited Companies flooding the continent[37]. Up until now, there was little regulatory competition, as no Member State regulated in its national legislation provisions to draw a large part of the incorporation market, but this might change as to the Brexit situation.

Nevertheless, the Directive is generally well received among practitioners and scholars as means to harmonize the application of cross border mergers within the EU and more. But there is still room for improvement as some point out that "there is still no special EU legal framework for cross-border mergers of partnerships. Although partnerships which are legal entities within the meaning of art. 54 TFEU enjoy the <<freedom to merge>> as an inherent aspect of the freedom of establishment (art. 49, 54 TFEU) based on the CJUE's decision in the *Sevic* case, the lack of a clear and secure EU legal framework and the resulting legal uncertainty, high risk and costly legal advice render the <<freedom to merge>> largely illusory for partnerships"[38].

It is important to note that there are also other European acts that act on merger control, mainly the Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings which reforms the old Regulation in place; doctrine has pointed out that this reform came after case laws of the ECJ, and proved the necessity of this control in the context of the common market and competition rules[39].

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[35] Daniele Fabris, "European Companies' "Mutilated Freedom". From the Freedom of Establishment to the Right of Cross-Border Conversion", *European Company Law*, volume 16, issue 3 (2019): 6.

[36] *Idem*, p. 8.

[37] Martin Gelter "Centros", Abstract.

[38] Jessica Schmidt, "Cross-border Mergers", 223-224.

[39] For an analysis on the development of Council Regulation (EC) no. 139/2004, as well as the case laws that leaded the Commission to the drafting of the proposal in this form see Ovidiu Ioan Dumitru, "The impact of Aerospatiale - Alenia/de Havilland and Ryan Air/Aer Lingus cases on the reform of European merger control", *Perspectives of Law and Public Administration*, vol. 9, no. 1 (2020): 33-43.

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