THE PROTECTION OF CREDITORS IN CASE OF THE FUSION OF COMPANIES-ASPECTS OF COMPARATIVE LAW

PhD student **Viorel BĂNULESCU**[1]

Abstract

Fusion, a complex operation, determines the reorganisation of the companies involved, so as, in addition to the associates, administrators or the employees, the third parties, as social creditors of the companies concerned, can be prejudiced .Through this article, we intend to analyse the means of protection provided by the national and European legislation, to identify the vulnerable aspects, and to submit solutions for the insurance of a real and adequate protection for the creditors of the companies involved in the fusion operation.

Keywords**:** *fusion, action in opposition, creditor, debt right, constitutive act, employee, nullity suit.*

JEL Classification: K20, K22

1. Preliminary considerations

The consequences of the fusion between two or more companies reverberate not only on associates, administrators, directors and employees of the companies involved in the process of reorganisation. In many cases, the fusion also has prejudicial effects on the third parties that the concerned companies are involved with in different legal reports.

Therefore, as a result of realising a fusion operation of the companies, the creditors' rights could be affected. In the specialty literature it is opined that through the realisation of this operation the creditors of the company which ceases to exist can be prejudiced, as, simultaneously with the disappearance of the company, the general pledge [2]of the unsecured creditors will disappear as well.

In this case, the risk for the creditors of the company dissolved as a result of the fusion is represented by the circumstance where they will compete with the creditors of the company beneficiary from the operation in order to harness the debt right of the general pledge of this company. Romanian legislation, similarly to the French or Italian legislation provides the prejudiced persons the legal means which ensure the protection of their rights and interest affected in the process of merging.

Specifically, according to the dispositions of the article 243 in the Companies' Law 31/1990, any creditor[3] who owns a debt previous to the publication of the project and which is not due at that exact moment[4],can introduce action in opposition under the conditions provided in art.62 in the same normative act. By analysing the legal text, it is observed that the Romanian legislator provides equal protection all creditors of the companies taking part in the fusion operation, and whose debt is previous to the project's publication, but under settlement. In this regard, it can be cited from law practice the sentence no.9061/18.09.2006 pronounced by Bucharest Court, section IV commercial.

Analysing the evidence in the case, the Court ascertains that: "the applicant did not prove the existence of the debt that is invocated in the action introduced. "Furthermore, in the content of the sentence, the Court mentions that "because in the merging process it is specified that the new company answers jointly for any debt appeared after the merge, the applicant can recover its debt from the patrimony of the absorbing company. In consequence, for these reasons, the Court seized will reject[5] the request of opposition of the applicant creditor."

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[1] Viorel Bănulescu – Doctoral School, Field: Law, Bucharest University of Economic Studies, viorel_banulescu@yahoo.co.uk

[2]St.D.Cărpenaru, S.David, Gh.Piperea, Legea societăților comerciale, Comentariu pe articole, 5th edition, Ed.C.H.Beck, Bucharest, 2014, p.932.

[3] S.Angheni, C.Stoica, M.Volonciu, Drept Comercial, 4th edition, Ed.C.H.Beck, Bucharest, 2008, p.209.

[4] I.Adam, C.N.Savu, *Legea societăților comerciale, Comentarii și explicații*, Ed. C.H.Beck, Bucharest 2010, p.887.

[5] Sentence no. 9061 / 18.09.2006 issued by the Bucharest Court of Commercial Section IV.

2. *Locus standi*: categories of creditors who can invocate this right, limits:

The introduction of the action in opposition implies the fulfilment of the conditions thoroughly described in art.243 and 62 in the Law of companies 31/1990. Therefore, in order to be able of introducing the action in opposition, the creditor must prove the existence of a debt, which has to be previous to the date of publication of the merging project, and not due. In the motive I have cited above, the instance rejected the action in opposition, supporting this decision on one hand through the fact that the applicant was not able to prove the existence of the debt, and on the other hand, through the reason that in the project of the fusion it is specifically mentioned that the resulting company will answer equally for the debts occurred after the merge.

By analysing art. 243 in the Law of societies 31/1990, we notice that only the creditors of the companies that are engaged in the fusion with a debt previous to the date of the publication of the merging project, but not due, can make an opposition to the merging project. The creditors who are the holders of a debt previous to the date of the project's publication, but due, are excluded, therefore, they are not allowed to introduce the action in opposition, as they are estimated to have had the sufficient means to protect their debt right previous to the publication of the merging project. In this regard, we can cite the decision of the Court of Craiova which stated that the locus standi to introduce an action in opposition in the fusion project is owned by the creditors of the societies involved in the fusion who have a sure debt, cash, previous[6]to the publication of the merging project and not due at that certain moment.

The simple possession by a creditor of the society in question of a debt previous, certain, cash, but not due at the moment of the project's publication is not sufficient for justifying the introduction of the action in opposition.

Thereby, a creditor who owns a debt that meets all the condition mentioned above has to prove the prejudice he would undergo in the case where the fusion is realised in order to be able to introduce an action in opposition. In this regard, we can cite from the judiciary practice a decision sentenced in the Bucharest Court. In this situation, the judge rejected as unfounded the action in opposition introduced by the accuser, as the accuser could not prove the damaged caused by the fusion, mentioning that the debtor company is absorbed, together with its entire patrimony. Thereby, the reason of rejecting the action introduced by the applicant creditor is represented by the fact[7] that the output can be recovered from the absorbent company.

Regarding the situation of the creditors who own debts subsequent to the publication of the merging project, they are considered to not be able to introduce the action in opposition, assuming that they became aware of the fusion, and they signed contracts with the societies involved knowledgeably and at their own risk, after which they will protect their rights on the path of an action with contractual liability, on the ground of the juridical documents signed with the companies involved in the fusion. We can cite, in this case, from the juridical practice, a decision sentenced by the Bucharest Court[8], section IV commercial.

In this case, the Court establishes that: "according to the law, creditors who own a not due debt previous to the fusion project's publication are not protected by the legal text, as it is presumed that they had the possibility of realising the debt." Moreover, protection is not provided to creditors who own debts subsequent to the publication of the merging project.

From the analysis of the legal texts incident in this matter we can draw the conclusion that the right at opposition belongs only to the social creditors, and not to the personal creditors of the associates, whose debts are previous to the publication of the merging project in the official gazette of Romania, part IV.

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[6] Decision No 162/2012/1. 02. 2012 delivered by the Court Dolj Civil Section II.

[7] Bucharest Court, Section VI civil, sent.civ. no 2828 of 06.03.2012, unpublished in A.Hinescu, *Fuziunea şi divizarea societăţilor Practică judiciară adnotată*, Ed. Hamangiu, Bucharest, 2015, p.153-156.

[8] Sentence nr.8942 / 3 / 16.05.2008 issued by the Bucharest Court of Commercial Section IV in Simona Petrina Gavrilă, *Legea societăţilor comerciale nr.31/1990. Practică judiciară*, Ed.Hamangiu, Bucharest, 2009, p.570-572.

In principle, the associates of the companies concerned do not have an open way for opposition, as these persons do not have the quality of the third party in relation to the company. The companies' associates who modified the constitutive documents have the possibility to introduce the action of annulment of the decision taken by the General Assembly according to the dispositions of the art.132 in the Law of societies 31/1990.

In this regard, we can cite a decision taken by the Court of Dolj. In this case, Court determined that, considering the object of the opposition-which is the guarantee of satisfaction the debt,the law maker took into account only the creditors who intended to obtain adequate guarantees or an immediate payment of the debt, and not the shareholders of the societies involved in the merge, even though they would be the creditors of the society for dividends. The associates of the societies involved in the fusion who are dissatisfied with the distribution of the dividends have the right to an action[9]of cancelling the decision of the General Assembly that approved the fusion.

However, in the literature[10] of specialty it is mentioned the fact that an associate will have locus standi to introduce opposition in case of also cumulating the position of social creditor.

In the opinion of another author, the shareholder will not be able to introduce the action in opposition, even if he is in the position of creditor of the assimilated company after the fusion where they voted in favour of the decision. Thereby, the Court seized[11]with an action in opposition by a shareholder who voted in favour of the fusion will reject it as lacking interest. In the situation where the shareholder missed or did not vote against the decision concerned, they have the right to an action of cancellation.

We appreciate as just the opinion expressed in literature which claims that the shareholder can accumulate the two actions in opposition and annulment, but this possibility must be conditioned. Therefore, in order for the action in opposition to be introduced by the shareholder in the situations where the exercise of its right would not equate the cancellation of their vote from the General Assembly or it would mean the renouncing of the action of annulment of the decision from the adoption of which they have[12]absented or have voted against as it was opined in literature.

As it is provided in paragraph 8, article 243 from the Law of societies, the creditors of the societies involved in the merge can make an opposition against the decision of the General Assembly which refers to the modifications of the constitutive document with the condition that it concerns other aspects in addition to the aspects that derive or have any connection with the merging process.

Furthermore, according to the final paragraph, the dispositions of the present article do not apply to debts such as the wage rights emerged from the individual or collective work contracts which respect the conditions stipulated in par.1,art.123 from the Law of societies, the protection of which is realised according to the dispositions of the Law 67/2006 concerning the protection of employee rights in case of a transfer of the enterprise, unit, or parts of them, and other laws applicable in the matter.

Regarding the term of introducing the opposition, we mention that, according[13] to art.243 of the Law of societies, it is of 30 days. We also mention that, according to the dispositions of art.243 from the New Civil Code, the documents through which was the reorganisation can be attacked in opposition by the creditors, and any persons interested within 30 days since the date they took note of the approval of the reorganisation. By analysing the content of the two articles mentioned above, we can identify certain aspects of distinction. Thus, regarding the categories of people who have locus standi of introducing action in opposition, in addition to the creditors, in art.243 from the New Civil Code, there are included other persons interested. We observe, therefore, that the circle of persons who can introduce action in opposition is wider according to the regulation introduced by the New

[9] Decision No 162/2012 /1.02.2012 pronounced by Dolj Court civil section II.
[10] A.Hinescu, op,.cit.,p.218
[11] St.D.Cărpenaru, S.David, C.Predoiu, Gh.Piperea, *Legea societăților comerciale Comentariu pe articole*, 3rd edition, Ed.C.H.Beck, Bucharest, 2006, p.206-207.
[12] A.C.Mataragiu, *Fuziunea. Instrument de restructurare a societăților comerciale*, doctoral thesis, 2012, p.126.
[13] C.Gheorghe, *Drept comercial român*, Ed.C.H.Beck, Bucharest, 2013, p.506.

Civil Code in comparison with the Law of societies 31/1990.Another difference that can be noticed is the moment from which it is calculated the term of 30 days.

3. The procedure of the action in opposition of the creditors: component institutions, effects of the sentence of the action

As I have mentioned above, the Law of societies mentions that the action in opposition can be introduced in a period of 30 days from the date of the merging project's publication in the General Gazette of Romania, while the New Civil Code requires that the period begins at the moment when the person concerned took notice of the approval of the reorganisation.

We assess that it is necessary that the Romanian law maker merge the text of the two articles, even in the context in which the dispositions in the Law of societies are applied with priority, as a special law, as per the principle *specialia generalibus derogant*. The request of opposition is submitted at the Trade Register[14] which, within 3 days since the date of the submission, mentions it in the register and forwards it to the competent Court, where it will be judged urgently.

In literature, it is appreciated that in case the request of opposition was forwarded to the competent Court after exceeding the period, this will not affect the material and procedural rights of the parties. Therefore, the official who has faultily fulfilled his obligation by forwarding the request to the Court after the deadline will suffer administrative sanctions, but this will not affect the settlement of the action[15]in opposition.

We mention that with the modification brought to the Law of societies 31/1990, the action in opposition can no longer have the rightful deferring effect of the fusion, as it was provided in the old regulation.

However, regarding the deferring effect of the introduction of the action in opposition, in literature, it is assessed that it is maintained if it is founded on the dispositions of art.61 and 62 in the Law of societies.

Thus, in the situation in which the creditors introduce the action based on art.61 and 62, it is opined that the Court can admit the partial suspension of the action attacked, which is concerning the modification of the constitutive [16]document which generates prejudices for the creditor, but not the part which concerns the fusion, and which does not enter under the incidence of the art.61, as resulted unequivocally from the analysis of the dispositions of art 243(8)in the Law 31/1990.

Although from a legal perspective this opinion is just, we assume that, regarding the fact that in many cases the fusion is accompanied by the modification of the constitutive document, the partial suspension of the decision is, in fact, equivalent to its total suspension. The opposition is judged in the council chamber with the citation of the parties, being applicable the dispositions of art. 202(1) from New Civil Procedure Code.

The decision concerning the opposition is the subject only of the appeal at the Court of Appeal. In accordance with the disposition of par.5, art.243, the Court will reject the opposition when, after analysing the financial and operational situation of the society or the societies succeeding the debtor societies in rights and obligations, will result that it is not mandatory to grant adequate guarantees or new guarantees, and, if necessary, the society proves the payment of the obligations or the signing of an accord for the payment of the debts.

The Court will also reject the opposition if there are already guarantees or adequate privileges, or if the creditor refuses the settlement of guarantees according to paragraph 5 within the period established by the Court through closure.

In the situation where the debtor society or its successor makes an offer during the trial to establish guarantees, the Court sentences a closure through which it will offer a period for their establishment, if they are thought as being necessary and adequate.

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[14] St.D.Cărpenaru, S.David, Gh.Piperea, *Legea societăților comerciale. Comentariu pe articole*, 5th edition, Ed.C.H.Beck, Bucharest, 2014, p.882.
[15] M.Șcheaua, *Legea societăților comerciale nr.31/1990 comentată și adnotată*, Ed.Rosetti, Bucharest, 2002, p.137.
[16] A.Hinescu, *Fuziunea societăților*, Ed.Hamangiu, Bucharest, 2016, p.224.

The Court will approve the opposition, and will compel the defendant company to pay the debt immediately or in a certain period of time, if the debtor company does not offer the adequate guarantees or the privileges or, even if it offers them, it does not form them for reasons that are imputable for it within the period established by the Court through closure. The decision of admission of opposition sentenced by the Court is enforceable.

4. Particular aspects of the action in opposition in the French and Italian law. Similarities/differences regarding the Romanian system of law

By analysing the regulations in the field, we observe that, as the Romanian law, the French system of law contains legal stipulations established for the protection of the creditors in the case of the realisation of fusion operations between societies. Between the two legislations there are both similarities and differences. Thereby, French law provides in favour of the creditors of the societies involved in the fusion the right to information regarding this operation.

Furthermore, French regulations in the field include dispositions destined to protect the creditors from the negative effects the merging process can have on them. These dispositions are addressed to usual creditors, or to the bonds and the competition of the society. The measures of protection provided by the French law are different, as it concerns the usual creditors or the bonds of the debtor societies involved in the fusion.

Therefore, in French law, the protection of the creditors can be expresses through the exercise of the right to introduce the action in opposition, or through the right to request the annulment of the fusion operation.

A different aspect in comparison to the situation present on the Romanian regulation is the fact that in the French jurisprudence is admitted in an indirect manner that an employee can introduce action in opposition as it was shown in the previous section. Thus, we can cite the French Court of Cassation which funded the solution of rejecting an action in opposition, introduced on the base of the dispositions of art.381 of the Law from 21st June 1966 (art.L.236-14,C.com.fr.).The Court rejected the action in opposition with which it had been seized for the reason that the complainant employee, to whom it had been undone the labour contract, could not prove the existence of a sure, liquid and demandable debt previous to the publication of the merging project that would allow the judge of the case to secure the refund of the debt. *Per a contrario*, the action in opposition of the employee is admissible to the extent that they can prove the prejudiced suffered from the realisation of the fusion operation.

Also concerning the *locus standi*, we can cite a decision of the Appeal Court of Versailles[17]. From 11th February 1993, in which it is stated that the right of opposition "can only be useful to a social creditor owner of a sure debt emerged after the publication of the fusion project", and that "a potential and hypothetic debt cannot paralyse the operation of the universal transfer of the patrimony."

It can be observed that the jurisprudent position in this matter is that of excluding from the application field the creditors with conditional debts or debts affected by a term, reserving this possibility only for the creditors who can prove that in the day of the project's publication they own a previous debt which is sure, unaffected by the arrangements.

These aspects lead to the conclusion stated in the French doctrine, that in the vision of the French Court of Cassation, the opposition is not a protection measure, but on the contrary, one of execution.

Unlike the Romanian law, in the Italian law system, the opposition to fusion can be introduced within 2 months from the publication of decision approving this operation, as it is provided in the dispositions of art.2503 from the Italian Civil code. It must be mentioned that before the year 1991, the period of the introduction of opposition was of 3 months, but, for reasons related to the celerity of the operation, it has been decided upon the period of 2 months.

[17] C.A Versailles, 11 fevrier 1993, *Droit de sociétés*, juillet, 1993, n.136.

Another specific element in the matter of opposition in the Italian law is that of the introduction of the action in opposition which has as a deferring effect on the fusion operation. However, in accordance with the dispositions of art.2503 from the Italian Civil code, the judge seized with an action in opposition can discover that the fusion was produced to the extent that the society has formed in advance a sufficient debt in favour of the oppose creditor. We notice that in the Italian law, the suspension of the fusion is allowed, while in the Romanian law system the deferring effect of the action's introduction is an exception. The action in opposition can be introduced by both the social creditors and the personal creditors of the associates, respectively the shareholders of the society involved in the fusion.

As it is to be proven below, in the Italian law, the right to opposition targets an extended area of types of debts in relation to the French system, respectively the Romanian law. Therefore, in the Italian legislation, in contrast to the situation in the Romanian and French regulation, the right to opposition concerns all types of social, mortgage and privileged debts, of debts under conditions, and litigious debts. Furthermore, unlike the Romanian and French legislation, personal creditors of the shareholders, respectively of the associates, have the possibility to introduce action in opposition. We can discover that, unlike the situation in the Romanian and French law systems, the right of opposition is not limited to cash debts, so much that any debt can justify the introduction of an action in opposition. To conclude, in the Italian law system, the domain of application of the action in opposition from the perspective of debts and the holders is more extended in comparison to the French and Romanian law.

The judge seized with an action in opposition will assess the opportunity and the substantiation of the request introduced by the opposing creditor. Regarding the substantiation of the request in opposition to the fusion, in the Italian law, it is based on the patrimonial insufficiency of the society resulted or of the gainer, and, in consequence, this fact determines the prejudicing of the patrimonial guarantees of the opposing creditor.

5. Conclusions

By analysing in comparison the legal dispositions which regulate the action in opposition, we can estimate that the creditors' protection systems in the Italian law is more efficient and more adequate, if related to the situation existent in the French and Romanian law. As a first argument for sustaining this point of view is the fact that the term of introduction of the action in opposition is of 2 months. In this regard, we mention that in the Romanian legislation, the action in opposition can be introduced in a period of only 30 days from the date of the fusion project's publication. Furthermore, as I mentioned above, the introduction of the action in opposition has a deferring effect on the fusion. Another element justifying this conclusion is the fact that in the Italian regulation, the action in opposition can be introduced by the social creditors, but also by the personal creditors of the associates of the societies involved in the fusion. Withal, in the Italian law, the right to opposition targets a more extended area of the types of debts in comparison to the situation in the French and Romanian law. Therefore, in the Italian legislation, the right to opposition concerns all types of social, mortgage or privileged debts, debts under conditions, litigious debts. We judge that the right to opposition as it is regulated in the Romanian law does not assure an adequate protection for the creditors. Thereby, we can substantiate this conclusion firstly on the fact that the action in opposition can be introduced in a period of only 30 days from the publication of the merging project, and we consider it a too short term, and secondly, the conditions requested for the introduction of the action in opposition are restrictive, so much as they exclude certain categories of creditors, and, therefore, too little categories are allowed to introduce an action in opposition.

Furthermore, as it was mentioned above, the action in opposition does not generate anymore the fusion's suspension, only under certain circumstances which depend on the subjective appreciation of the judge seized with the action in opposition, so as it is not realised anymore a real and effective protection of the creditors prejudiced.

Another relevant aspect is that in the matter of guarantees that need to be formed by the debtor company, by lack of objective criteria of appreciation of their sufficiency character, the judge's right of appreciation is arbitrary. We consider that the Law of societies 31/1990 should provide a set of criteria based on which to be realised an objective determination of the guarantees' sufficiency character that the debtor company should establish.

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