THE MAIN OPERATIONS OF REORGANIZATION THROUGH MERGERS OF TRADING COMPANIES

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Abstract

Notwithstanding the optimistic forecasts issued by experts a couple of years ago, the economic predicaments of the European Union's member states, including Romania, are far from being settled. The extension of the economic and financial dowturn, the continuing process of globalization and the financial markets' volatility have imposed an unparalleled flexibility upon the economic agents, in that the amount of mergers and acquisitions has risen at a both national and international level. This background calls for a detailed but nonetheless approachable study of the reorganization of the trading companies though mergers, aimed mainly at the business environment. In order to reach the aforementioned objectives, the theoretical endeavor seeks to explore the relevant legal provisions, including the European Directives. The juridical and accounting operations of mergers, their legal consequences and concrete implications on the activity of the trading companies will also be analysed. Some particular approaches embraced by the legal practice are to be presented, as in Romania mergers are submitted to the control of the court. The study will have a positive impact on the economic agents, who are fostered to conclude this type of restructuring, by altering the line of thought shaped a few years ago, according to which mergers are difficult, isolated and sometimes even unacceptable operations.

Keywords: *Trading companies, mergers, stages, national legislation, European Directives*

JEL Classification: *K22, K33*

I. Foreword

In 2011 the European Commission has adopted „The Act on the Single Market", a set of 12 measures aimed at stimulating the economic growth and consolidating the faith in the Single European Market. Subsequently, in October 2012, the Commission has proposed a second set of measures, „The Act on the Single Market II", in order to ensure the accelerated development of the Single Market and the exploitation of the unused potential.

The documents emphasize that Europe must act urgently in the context of the financial crisis, in order to increase the degree of prosperity and to create new employment opportunities.

Due to the economic situation of the EU member states and other states, the reorganization by means of mergers and acquisitions remains a valid strategy for companies that incur financial predicaments, as well as for those that despite their economic potential cannot develop without the support of stronger companies.

The merger of trading companies is one of the various types of economic concentration, the latter describing a situation in which a small number of economic agents own a high market share.

Over the last few years, mergers have been seen as the perfect way to consolidate the companies' position on the market and to enhance their bargaining power as far as suppliers and intermediaries are concerned. This leads to greater efficiency through the cutting of fixed and variable costs. Another purpose of mergers is to speed up the decisional process.

Taking into account the important benefits that derive from mergers, the European Directive no 2009/109/EC of the European Parliament and of the Council amended the procedure of disclosure of the relevant documents that have to be drawn up in case of a merger and reduced the amount of duties related to the informing and reporting to shareholders or company associates. Romania transposed the Directive into its national law by means of the Emergency Government Ordinance no 2 /2012, although not without a certain delay.

Subsequently, the recodification of the Third Directive no 78/855/EEC on mergers of joint-stock companies (as it was amended through the Directive no 2007/63/EC and the Directive no

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2009/101/EC) has been accomplished by means of the Directive no 2011/35/EU of the European Parliament and of the Council on mergers of joint-stock companies, in order to ensure the further coordination prescribed by article 50 paragraph 2 of the Treaty on the Creation of the European Community.

At present, Romania has incorporated into its national legislation the European Directives, but the streamline of the decisional process at the level of the companies participating in the merger, as well as the legal procedures entailed by the reorganization are not totally familiar, partially due to the means of legiferating and construing the law.

Therefore, the present study aimes to identify the main phases of the reorganization by merger, according to the legal provisions applicable to companies incorporated in Romania, as well as to issue new doctrinary benchmarks, which take into account the entry into force of the new Civil Code.

The research commences with an overview of the current legal framework on mergers, the drafting of a general definition of the merger, the identification of its forms and proceeds with the exposure of the merger's phases and its effects. The conclusions are mainly dedicated to some proposals of amendment of the current legislation.

II. Legal framework

Prior to the enforcement of the current Civil Code, the merger of legal entities was regulated by the Decreee no 31/1954 on natural and legal persons[2]. Article 40 stated that the legal entity ceases to exist following consolidation, division or dissolution.

The merger of trading companies was mainly regulated by the provisions of Law no 31/1990, starting with 1997, together with division (articles 238-251[1]). Regarding the companies incorporated according to the provisions of Law no 15/1990 on the reorganization of the state-owned economic units as autonomous administrations and trading companies, the Government Ordinance no 49/1994 prescribed that they can also be restructured by merger, under the requirements of this legal act.

At present, the main laws that regulate the merger of trading companies, as well as the division, are Law no 31/1990, as *lex specialis*, and the Civil Code, as common law.

According to article 233 paragraph 1 and article 244 of the current Civil Code, the merger is one of the means of reorganization of the legal entities (along with division and transformation), as well as a means of terminating their activity. Following the interpretation of both legal texts, one can notice that, regardless of the type of merger, absorption or consolidation, namely the embedding of one/two company/companies or their union to form a new one, at least one of the companies that opted for this reorganization will be submitted the dissolution without liquidation and will loose its legal personality.

III. The concept of merger and its forms

According to the system of the Decree no 31/1954, the merger („the consolidation") was concluded through the absorption of a legal person by another one or by the amalgamation of several legal persons in order to create a new one (article 41 paragraph 1).

The legislator did not actually provide a definition of the merger, but attributed a general meaning to the notion of „consolidation", aimed at defining its two types, considered to be the absorption and the merger[3].

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[2] The Decree no 31/1954 was repealed on October 1st 2011, by the entry into force of the new Civil Code, according to article 230 letter h of Law no 71/2011 on the implementation of the Civil Code.

[3] Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil român. Subiectele dreptului civil,* ''Şansa'' Publishing House, Bucharest, 1992, p. 402.

Regarding Law no 31/1990, the legal definition of the merger in article 238 paragraph 1 is actually a presentation of its forms (absorption or consolidation), reproduced in article 234 of the current Civil Code.

Thus, it is still incumbent on the legal doctrine to supplement the legislative loophole.

In most cases, the juridical literature has formulated a common definition of the merger and division, as it has been evinced that, from a legal standpoint, both operations hold the same features and produce the same effects[4]. These are legal and technical operations or methods through which the company restructuring is accomplished, aimed at their adjustment to the requirements of the tradings activity and that entail the amendment of the company's constitutive act[5].

As far as we are concerned, the definition of the merger must comply with the current legal framework, namely with the provisions of article 291 of Law no 31/1990, as it has been amended by Law no 71/2011[6], in the sense that Company Law shall be supplemented by the provisions of the Civil Code and the Civil Procedure Code.

At the same time, a definition of the merger must briefly evince the elements of the analyzed type of reorganization, its legal forms, as well as the operation's effects.

Therefore, the merger represents the method of company restructuring that consists in the universal transfer of its patrimony towards other existing companies or thus to be incorporated and which results in the dissolution without liquidation of the company/companies that transfer its/their patrimony, as well as the allotment of shares/social parts of the absorbing/newly created company or cash payments to its/their associates.

The merger of trading companies may occur in 2 ways: absorbtion and consolidation.

By absorbtion, according to article 238 paragraph 1 letter a of Law no 31/1990, one or several companies are dissolved without liquidation and transfer their entire patrimony to one or more companies in exchange for the allotment of shares/social parts of the absorbing company and, possibly, a cash payment of maximum 10% of the par value of the shares/social parts thus alloted to the shareholders/associates of the absorbing companies.

The consolidation, according to paragraph 1 letter b, is accomplished through the transfer of the patrimony of several companies dissolved without liquidation to a newly created company and has the same consequences as far as the allotment of shares/social parts and cash payments are concerned.

Common law (article 234 of the Civil Code) prescribes that the merger is operated through the absorption of a legal person by another legal person or through the mix of several legal persons in order to create a new entity[7].

The Romanian Tax Code[8] defines the merger operation (as well as the division and asset transfer) in article 27^1 paragraph 3, thus incorporating the provisions of the Directive no 90/434/EC on the taxation of mergers, divisions, asset transfers and exchanges of securities between companies of different member states, amended by the Directive no 2005/19/EC.

The merger may be concluded between companies of the same type or of a different form.

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[4] Ion Băcanu, *Fuziunea şi divizarea societăţilor comerciale,* in ''Company Law Magazine'' no 4/1995, p. 33

[5] Stanciu Cărpenaru, *Tratat de drept comercial român,* Universul Juridic Publishing House, Bucharest, 2012, p. 249. In the same sense, see also Cristian Gheorghe, *Drept comercial,* CH Beck Publishing House, Bucharest, 2010, p. 91; Ion Băcanu, *Noua reglementare a fuziunii şi divizării societăţii comerciale,* in ''Company Law Magazine'' no 5/1999, p. 17.

[6] Point 7 of Law no 71/2011

[7] About the reorganization of the legal persons according to the new Civil Code, see also Ioana Nely Militaru, *Dreptul afacerilor. Introducere în dreptul afacerilor. Raportul juridic de afaceri. Contractul,*Universul Juridic Publishing House, Bucharest, 2013, p. 77.

[8] Law no 571/2003 on the Tax Code, published in the Official Gazette of Romania no 927 from 23 december 2003, with the subsequent amendments. According to the Code, the cash payment of a maximum 10% of the participating titles' value representing the capital of the absorbing or newly created company can be made, in the absence of the par value, at the accounting par value equivalent to these titles.

IV. General presentation of the merger's stages

The doctrine[9] has considered that the first stage of the merger is represented by the passing of the resolution on the approval of this form of restructuring by the General Meeting of Shareholders/Associates, according to the provisions of article 239 of Company Law.

Other authors have evinced that the merger onsets with the drawing up of the merger project by the officers of the companis involved in the merger[10].

In general, the following stages of the merger have been identified:

- the drawing up of the merger project;
- the approval and the publication of the project;
- the creditors' opposition to the merger project;
- the informing of the associates on the merger;
- the resolution of the General Meeting of Associates on the merger's approval.

Some authors[11] have considered that the merger only has two stages, the resolution on the drawing up of the merger project and the decision of the general meeting on the merger.

In our opinion, the merger comprises three main operations: the drawing up and the publication of the merger project, its approval in the general meeting and the endorsement by the court of the petition on the ascertainment of the merger's legality.

V. The drawing up and the publication of the merger project

The restructuring through merger is decided, according to article 239 paragraph 1 of Company Law, by each company, under the conditions required for the amendment of the constitutive act.

Following the resolutions of the general meetings, the officers of the participating companies draw up a common merger project.

The mandatory elements of the project are prescribed by the law, namely article 241:

- the form, name and headquarters of the companies involved in the merger;
- the substantiation and the mergers' requirements;
- the conditions that the allotment of shares/social parts to the beneficiary company (absorbing or newly created) must comply with;
- the date at which the shares/social parts grant their owners the right to participate to benefits;
- the exchange rate of the shares/social parts and the amount of the potential cash payments;
- the amount of the merger premium;
- the rights bestowed by the absorbing or newly created company to the owners of shares that grant special rights and those who possess other securities or the measures proposed regarding them;

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[9] Smaranda Angheni, Magda Volonciu, Camelia Stoica, *Drept comercial*, forth edition, CH Beck Publishing House, Bucharest, 2008, p. 209; Grigore Florescu, Zaira-Aida Bamberger, Cristina Florescu, *Dreptul societăţilor comerciale,* Universul Juridic Publishing House, Bucharest, 2010, p. 128-131; Sorana Popa, *Drept comercial. Teorie şi practică judiciară,* Universul Juridic Publishing House, Bucharest, 2009, p. 192; Dumitru Dobrev, *Reorganizarea persoanei juridice,* in the work *Noul Cod civil. Studii şi comentarii,* vol. I, First and Second Book, The Romanian Academy, The Juridical Research Institute, The Private Law Department ''Traian Ionaşcu'', Universul Juridic Publishing House, Bucharest, 2012, p. 550.

[10] Stanciu Cărpenaru, *cited work,* p. 251 and next ones.; Maria Dumitru, *Dreptul societăţilor comerciale,* Institutul European Publishing House, Iaşi, 2010, p. 250 and next ones.; Cristian Gheorghe, *cited work,* p. 93-95; Ion Turcu, *Tratat teoretic şi practic de drept comercial,* vol. II, CH Beck Publishing House, Bucharest, 2008, p. 489 and next ones.; Vasile Nemeş, *Drept comercial,* Hamangiu Publishing House, Bucharest, 2012, p. 165.

[11] Smaranda Angheni, Magda Volonciu, Camelia Stoica, *cited work,* p. 209. For a brief presentation of the merger stages of trading companies, see Silvia Lucia Cristea, *Dreptul afacerilor,* third edition, Universitară Publishing House, Bucharest, 2012, p. 179-182.

- any special benefit awarded to the experts that examine the merger project and to the members of the administrative or controlling bodies of the companies involved in the merger;
- the date of the financial situations of the participating companies, used for the drawing up of the merger's requirements;
- the date at which the absorbing company's transactions are deemed as those of the absorbing or newly created company from an accounting standpoint.

Furthermore, the project will comply with the provisions of article 243^1 paragraph 1, in the sense that it is imperative to grant rights to the absorbing company (at least equivalent to those that they used to have at the absorbing company/companies) to the owners of securities, other than shares, which carry special rights, except when the alteration of the aforementioned rights is approved by a meeting of the owners of these securities or individually by these latter or if the owners may obtain the redemption of their titles.

The legal practice has dismissed on several occassions the petitions in ascertainment of the merger's lawfulness, as the reorganization project did not comprise the requirements of the distribution of shares/social parts of the absorbing company to the shareholders/associates of the absorbed one[12], the maintenance of the same participation to the company's capital and the cancellation of the participating titles to the absorbed company, respectively[13].

The merger project has a contractual nature, as it has been evinced in the doctrine[14], as it is drawn up by all the offficers of the participating companies and it is signed by the legal representatives of the companies.

Experts in audit and accounting assist to the drawing up of the merger project.

The substantiation and the merger's requirements must comprise: the legal ground of the operation, the means of concluding the mergers and its effects, the economic justification and the conditions under which the merger will be conducted.

The method of performing the merger and its effects will be concretely recorded, specifying the patrimonial transfer, the situation of each company during the merger, the participation to the shareholding of the absorbing or newly created company, etc.

According to Law no 31/1990, the merger project will be signed by all the concerned companies' representatives and is lodged with the trade register where each company had been incorporated. The project will be endorsed by the director of the trade register office or by the person that the latter has assigned[15].

The publication of the project has to be conducted at least 30 days before the General Meetings of Shareholders/Associates that decide upon merger.

Following the incorporation of the Directive no 2009/109/EC into national law[16], the division project must be accompanied by a statement of the companies on the publication method, as this can also be made on the company's website during a period of at least one month before the extraordinary general meetings that are to decide upon the merger. According to article 242 paragraph 2^2 of Law no 31/1990, the company is compelled to ensure the technical requirements for the continuous, uninterrupted and free of charge display of the mandatory documents for a period of at least a month, which concludes no sooner than the end of the general meeting that decides upon the merger. This latter has to prove the publication's continuity and to ensure the security of its own website, together with the authenticity of the disclosed documents.

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[12] Sentence no 2183 of 1 March 2010, file no 2217/3/2010, the Bucharest Tribunal, the sixth trading department, not yet published; likewise, decision no 38 of 2 April 2010, file no 2466/3/2010 and decision no 106 of 25 June 2010, file no 25444/3/2010, also unpublished.

[13] Decision no 82 of 31 May 2010, file no 25661/3/2010, the Bucharest Tribunal, the sixth trading department, not yet published.

[14] Ion Băcanu, *Fuziunea şi divizarea societăţilor comerciale,* in ''Company Law Magazine'' no 4/1995, p. 36

15 Pursuant to the provisions of the Emergency Government Ordinance no 116/2009, enacted for the streamline of the submission of applications in the trade register by companies, the division project is no longer authorized by the delegated judge in order to be published in the Official Gazette of Romania, the court's control being confined to the restructuring's legal aspects, until the entry into force of the Law on Trading Registrars.

[16] Through the Emergency Government Ordinance no 2/2012 on the amendment and completion of Law no 31/1990.

If the company chooses to publish the division project on its website, the trade register office of company incorporation will publish it on its website free of charge.

These provisions are aimed to ensure a higher protection of third parties' interests during the reorganization process, being also applicable to crossborder mergers.

In february 2012, the National Office of the Trade Register has implemented a new informational system that ensures the premises for the interconnection with the other states, members or not of the European Union. The trade registers from the EU states use the same informational system.

A few years ago, the European Commission has drafted a bill for the interconnection of the member states' trade registers.

This endeavour has resulted in the enactement of the Directive no 2012/17/UE, aimed at the improvement of the crossborder access to the information on companies.

According to the European act, a system of interconnection of the registers is to be created, consisting of: *the register of each member state, the platform* (that will distribute the information of each member state's register in a standardised form of a message and in all the EU languages) and *the portal* (the electronic access point).

Romania must incorporate the directive in its national law by 7 July 2014.

According to Company Law, The National Office of the Trade Register must send to the National Tax Administration Agency a notice of submission of the project within 3 days from the reception of the merger project, following the conditions stipulated in a cooperation agreement concluded between these two institutions.

As the merger process may infringe on the rights of the creditors of the concerned companies, Company Law expressly prescribes that they are entitled to oppose the drafted terms of the merger.

According to article 243 of Law no 31/1990, any creditor that possesses a liquid and outstanding claim, which is prior to the publication of the merger project, but not yet matured and whose settlement is jeopardized by the merger is entitled *to oppose the merger* within 30 days from the publication of the project.

The filing of the opposition does not suspend the execution of the decision of the general meeting upon merger and does not impede the performance of the necessary operations[17]. The competent court that is called to decide upon the opposition is that of the company's headquarters and the claim is settled by an emergency and priority procedure. At present, by the enactment of the new Civil Procedure Code and Law no 76/2012 on its implementation, the court decision regarding the opposition can be appealed within 30 days from its disclosure.

In the legal practice, the provisions of article 243 have been interpreted in a variety of ways, according to the specific elements of the case. Thus, in the case of a merger by absorbtion, the opposition filed by the Administration of Public Finances against the merger decision has been deemed insubstantial, regardless of the fact that the absorbed company had incurred debts towards the general consolidated budget, provided that the project stipulated that the absorbing company will be held jointly liable towards all the creditors of the absorbed company for the debts contracted prior to the merger[18].

[17] Paragraph 3 of article 243 has been modified by point 4 of the Emergency Government Ordinance no 90/2010. Prior to this ordonance, the filing of the opposition by creditors used to impede the performance of the merger until the date at which the court decision remained irrevocable.

[18] Sentence no 9061 of 27 October 2006, Bucharest Tribunal, the sixth trading department, in *Culegere de practică judiciară în materie comercială pe anii 2005-2006,* Wolters Kluwer Publishing House, Bucharest, 2008, p. 77. In the same sense, see decision no 516 of 12 March 2007, Bucharest Court of Appeal, the fifth trading department, in *Culegere de practică judiciară în materie comercială pe anul 2007,* vol. I, Wolters Kluwer Publishing House, Bucharest, 2009, p. 144. The judicial review court has held that a universal transfer of the absorbed company's patrimony operates within the reorganization, which results in that the creditors and debtors of this latter become the absorbing company's creditors and debtors.

VI. The approval of the merger project in the General Meeting of Shareholders/ Associates

The final decision regarding the division is made by the general meeting of each company that participates to the merger.

Prior to the convening of the general meeting, the law stipulates, in order to safeguard the shareholders'/associates' interests, *the obligation to inform* them about the requirements that the merger must comply with and about the consequences that this latter will produce.

To this end, the officers of the concerned companies will draw up a written report that comprises, according to article 243^2, detailed clarifications on the merger project, the legal an economic justification of the operation, the criteria upon which the shares are allotted and information regarding the drawing up of the expertise on contributions in kind. Moreover, the officers' report will describe any special predicaments encountered during the valuation.

The officers of the companies involved in the merger or those of the restructuring companies must inform the general meetings over any substantial changes in the rights and liabilities that occurred between the drawing up of the merger project and the general meetings that decide upon it.

According to article 243^2 paragraph 5, the company's officers report and the notice regarding the changes in the rights and liabilities are no longer necessary, provided that all the shareholders/ associates/owners of other securities that grant voting rights in each of the participating companies thus decide.

Apart from the officers' report, pursuant to article 243^3, the director of the trade register or the person appointed by the General Director of the National Office of the Trade Register will designate one or several independent experts, acting on behalf of each company, who will draw up a written report for the shareholders/associates after the close examination of the merger project.

The failure to submit the independent expert's/experts' report following the examination of the merger project has represented for the jurisprudence[19] a ground for dismissal of the petition in ascertainment of the reorganization's lawfulness and of the demand on the entry of the merger statement into the trade register.

The experts' report must comprise the following elements:

-if the exchange rate of the shares/social parts is fair and reasonable;

-the method(s) used to determine the proposed exchange rate and whether this/these are adequate for the situation at issue;

-the figures that resulted from the application of this/these method(s);

-the experts' opinion regarding the weight attributed to this/these method(s) in obtaining the final figure;

-the predicaments encountered during valuation.

Starting from 30 april 2008[20], not even the experts' report and the informing of the general meetings will be required provided that the aforementioned conditions are complied with.

The ever growing number of mergers in the form of acquisitions (when the absorbing company owns at least 90% of the shares/social parts of the companies participating to the merger) has determined the European legislator to recommend to the member states to streamline the operations as much as possible.

Thus, according to article 243^5 of Company Law, incorporated through the Emergency Government Ordinance no 2/2012, starting with 2 march 2012, if the merger by absorbtion is concluded by an absorbing company which owns 90% of the shares/social parts/other securities that grant their owners voting rights in the general meetings of the companies, the company's officers report and that of experts will not be drawn anymore, as well as the information of the general meeting and of associates before the convocation of the general meeting which approves the merger, as far as financial situations and the censors'/auditor's report is concerned.

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[19] Decision no 129 from 13 July 2010, file no 32205/3/2010, Bucharest Tribunal, the sixth trading department, not yet published; likewise, decision no 135 from 13 July 2010, file no 32736/3/2010, also unpublished.

[20] Following the enactment of paragraph 5 of article 243^2 by the Emergency Government Ordinance no 52/2008.

With the abovementioned exception, the associates of the companies which merge have *the right to be informed,* in that several documents stipulated by article 244 paragraph 1 of the law will be made available to them, at the company's headquarters, at least a month prior to the convocation of the general meeting.

Another consequence of the Directive no 2009/109/EC, the Romanian law currently prescribes that the yearly financial situations will no longer be drawn up and made available to the associates if they are published continuously on the website of the companies involved in the merger, during at least a month prior to the general meeting, until its conclusion.

The associats are entitled to obtain free of charge, on demand, copies of the documents, even through electronic post, provided that they had endorsed this means of communication.

The General Meeting of Associates of each concerned company will decide upon the operation within 3 months from the publication of the merger project, following the requirements prescribed for its valid convocation and the amendment of the constitutive act.

Pursuant to the legal provisions, starting with 2 march 2012, the approval of the merger by absobtion in the general meetings when the absorbing company owns all the shares/social parts/titles that grant voting rights in the absorbed companies is no longer necessary, under the following conditions:

- each concerned company has performed the publication of the merger project at least a month prior to the date at which the merger starts to take effect;
- the shareholders/associates of the absorbing company had the possibility to consult the relevant documents that must be placed at their disposal either at the company's premises or on its website during the month prior to the date at which the merger starts to take effect;
- one or several of the shareholders or associates of the acquiring company who owns at least 5% of the subscribed capital has the legal possibility to convene the general meeting in order to analyse the merger.

Furthermore, if the same conditions are fulfilled, the approval of the merger in the general meeting is no longer necessary, provided that the absorbing company owns at least 90% of the shares/social parts/titles which grant voting rights in the absorbed companies.

VII. The approval by the court of the demand in ascertainment of the merger's lawfulness

The proceedings before the court are conducted pursuant to the provisions of Company Law, Trade Register Law, the Methodological Regulations on the procedure of drawing up the trade registers, performance of recordings and disclosure of the information, approved by the Order of the Ministry of Justice no 2594/2008, the Emergency Government Ordinance no 116/2009 for the implementation of some measures regarding the activity of registration of the statements into the trade register.

Pursuant to the general provisions of article 37 of Company Law, the control of the lawfulness of the acts and facts which must be entered into the trade register is carried out by a delegated judge.

Article 4 of the Emergency Government Ordinance no 116/2009 prescribes that the power to establish the lawfulness of the resolution regarding the operation and, if necessary, of the constitutive or additional act, as well as the power to decide upon the application on the entry of the relevant information concerning the merger into the trade register belongs to the court.

The demand on registration of the merger into the trade register, together with the relevant proofs that support it, are lodged with the trade register, which must refer them to the court of the competent jurisdiction within 3 days from their reception.

In practice, the trade register's office of incorporation of the absorbing or newly created company submits to the tribunal by means of an official address the petition for the ascertainment of

the merger's lawfulness, together with all the documents that the claimant wishes to put forward in support of the application.

The documents that must join the petition addressed to the court are prescribed by article 148 of the Regulations approved by the Order of the Ministry of Justice no. 2594/2008.

Pursuant to article 150 of the Methodological Regulation of 17 September 2004, approved by the Order of the Ministry of Public Finances no 1376/2004, the court's decision on the registration of the merger is immediately notified electronically to the trade register of incorporation of these companies.

The claim is settled by an emergency and priority procedure, in the council chamber, by summoning the parties. The court decision is enforceable and subjected to appeal, according to the new Civil Procedure Code.

VIII. The legal effects of the merger of trading companies

The effect of the merger of trading companies, according to article 234 of the current Civil Code consists of the transfer of the rights and liabilities of the absorbed or merged legal person/persons to the absorbing or newly created entity[21].

As it has been evinced in the doctrine[22], the main effect of the merger is represented by the universal transfer of the entity's patrimony. The assets and rights of the absorbed/merged legal entity, as well as its liabilities are transferred to the absorbing or newly created person as a patrimonial unit and not as an individual title transfer.

In the matter of trading companies, this effect is prescribed by article 250 paragraph 1 letter a, noting that the rights and liabilities will be transferred according to the allotment requirements set forth in the merger project. The transfer operates *ex lege* and concerns the relations between the participating companies and between these latter and third parties.

Following a merger, the dissolution without liquidation of the absorbed or merged companies occurs and they cease to exist (article 250 paragraph 1 letter c).

The associates/shareholders of the absorbed/merged companies will become associates/ shareholders of the absorbing or newly created company.

The law precludes from exchanging shares/social parts issued by the absorbing company for the ones in the absorbed company, regardless of whether they belong to the absorbing or absorbed company (article 250 paragraph 2).

In the light of the provisions of the new Civil Code, the merger of trading companies represents one of the means of their reorganization, thus the prescriptions of Law no 31/1990 will be complemented by the provisions of article 240, as common law, on the termination of some contracts.

It follows that the contracts concluded prior to the merger will continue to produce effects if they were signed considering the features of the company/companies submitted to the reorganization process, except when the contract specifically indicates otherwise or if the maintenance or the distribution of the contract is conditioned by the agreement of the interested party. In this latter case, the interested party will be notified or informed by registered letter, with acknowledgment of receipt, in order to express his consent wihin 10 working days fom the communication of the notification or information. In the absence of an answer in the aforementioned interval, the interested party's refuse to consent to the heiress company maintaining or taking over the contract is presumed.

If the transfer's object also consists in immovable assets, the ownership over these and the other real rights will be acquired only by entering them into the land register, performed under the reorganization act concluded in authenticated form, or the administrative act of reorganization, accompanied, if necessary, by the certificate of registration of the newly created legal person.

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[21] The text incorporates the provisions of article 46 of the Decree no 31/1954 on the natural and legal persons, presently repealed.

[22] Gheorghe Piperea in *Noul Cod civil. Comentariu pe articole. Articolele 1-2664*, coordinators Flavius Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, CH Beck Publishing House, Bucharest, 2012, p. 233.

According to the legal doctrine[23], the real and personal effects of the ownership transfer over immovable assets become opposable to third parties starting from the date of the entering into the land register.

IX. Conclusions

During recessionary times, the reorganization by means of mergers and acquisitions is mainly aimed at maintaining the company's effectiveness and profitability. On the other side, mergers may constitute the result of a new corporate strategy or the desire to take advantage of a business opportunity through accessing new markets or extending the company's scope of operations.

The thorough knowledge of the merger operations, as they have been gradually streamlined by means of national laws that aligned with the Community acquis is essential with a view to foster the economic agents to resort to this reorganization method.

All the European directives are aiming at the harmonization of the member states' legislations, without compelling these latter to enact a uniform law on trading companies. The main benefits of the enactment on the matter of trading companies through directives are related to the fact that they leave member states a certain degree of arbitrary will in implementing them and that they may be relied upon by private persons (companies and individuals) against member states and public authorities.

Furthermore, one must take into account that almost a decade ago, trading companies have taken precedence over states as far as the development of the global economy is concerned. They act across the national borders of the states in which they had been incorporated and have seized the states' decisional power, representing the main stimulus of the economic progress.

At present, considering the aforementioned trends, but also the entry into force of the new Civil Code, some amendments of Law no 31/1990 are necessary, first of all by the enactment of the 3 types of company reorganization: the merger, the division and the transformation (article 233 paragraph 1 of the Civil Code).

Thus, Title VI of the law should be termed „The reorganization of the companies", the transformation will be dealt with in a separate chapter, and the dissolution is to be joined to liquidation in Title VII, as it constituites the first phase of termination of the company's existence.

Although they involve similar operations, the company's merger and division should be enacted in separate chapters, as the legislator's tendency to achieve a type of „codification" of these two reorganization methods has resulted in the enactment of some inconsistent articles, difficult to corroborate. We also take into consideration that the European legislator has deemed to maintain the provisions on merger and division in separate acts, even if certain directives establish common obligations for the participants to the operation as well (Directive no 2007/63/EC, Directive no 2009/101/EC). What is important is that the Directive no 2011/35/UE constitutes the codified text only in the matter of the joint-stock companies' mergers.

„Mergermania" (the trend forescasted by a prestigious British publication ever since 1990) has reached its global peak in 2010. Transactions such as mergers and acquisitions have swept important and diverse areas, like banking, insurance, aeronautics, national defence, car constructions, service provision, so on and so forth.

The reorganization by mergers may represent an answer for the recovery of the companies or the strengthening of their presence on the market, even in recessionary times, however not on the long term, as it has been proven by the latest economic facts.

The return to organic growth, resource savings and technological progress, together with an improved management of the day-to-day affaires of the business, represent viable solutions for overcoming the existent financial difficulties and lead to a sustainable development and an activity specialization of the companies that seek to become major players on the market.

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[23] Dan Chirică, *Tratat de drept civil. Contracte speciale*, CH Beck Publishing House, Bucharest, 2008, p. 324

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