

Some aspects concerning the reorganization of companies within the context of the legal regulation in force

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Abstract

The merger, division and separation of companies, within the meaning of Law no. 31/1990 republished, represent from a juridical point of view ways of reorganizing the companies with legal personality, through which there are accomplished, in an economic perspective, a number of strategic options for restructuring, rationalization of internal organization of the participating entities, the concentration of activities and capital in order to better respond to economic realities. Aware of the importance of these operations, the legislator has been working constantly to create a coherent legal framework adequate to achieve them, by simplifying the applicable procedure and eliminating any obstacles or constraints, at least of a legislative nature.

Equally, given that companies governed by Law no. 31/1990 republished are legal persons, the juridical regime applicable to mergers, divisions and separations involving these companies has to be defined and interpreted in the broader context of the general regulation applicable to the reorganization of legal persons, as it is contained in the new Civil Code.

Keywords: *companies, reorganization, merger, division, separation*

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1. Introduction

Although by the adoption of the new Civil Code², the Romanian legislator has intended to accomplish the unification of private law, in company field it contains only the general regulation applicable to all companies, while maintaining, outside the Civil Code, the special legislation applicable to different categories of companies with legal personality. It is mainly the case of legal provisions contained in the Companies Law no. 31/1990³. This objectionable legislative option that does not take into account the example of other modern legislations of monist approach, such as the Italian system of law, creates a number of difficulties both to the interpreter and the practitioner regarding the necessary relations and correlations which must exist between the general rules applicable to companies and the special regulation. Equally, within Title IV - The legal person of Book I – About persons, the Civil Code regulates the legal person and these legal provisions

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² Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

³ Republished in the Official Gazette of Romania, Part I, no. 1066/17.11.2004.

may also be applicable in the silence of the special law regulating the companies with legal personality.

In the same manner, we should emphasize that the legislator continues to successively amend the legislative framework applicable to companies having legal personality, especially the Law no. 31/1990 republished, in a continuous attempt to improve the legal regulation. Although these endless amendments of Law no. 31/1990 republished creates the impression of lack of a global vision of the legislator in the field of companies with legal personality, they are mainly explained by a desire to simplify the legislation and eliminate legislative constraints, which should generate ultimately the efficiency of the activities of companies and increase their competitiveness. In addition, many of the amendments to Law no. 31/1990 republished are imposed by the duty to comply with the obligations incumbent on Romania as member state of the European Union within the meaning of transposing the directives adopted in this matter.

Concerning the reorganization of companies governed by Law no. 31/1990, the juridical operations of merger, division and separation are regulated by Law no. 31/1990 republished, with subsequent amendments, in articles 238-251¹. The legal regulation in this matter has been changed recently, for the purpose to improve it by simplifying some procedural issues, following the adoption of Government Urgent Ordinance no. 2/2012⁴ amending and supplementing Law no. 31/1990 on commercial companies, as well as Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure⁵.

It should be emphasized that the law regulates together these juridical operations because of similarities that exist between the legal regime applicable to each of them. Moreover, according to article 250¹ of Law no. 31/1990 republished, separation of a part of the patrimony of the company follows the legal regime of the division, and therefore all legal provisions concerning the division are equally applicable to the operation of separation.

In addition, the new Civil Code contains, in articles 232-243, an express regulation of the reorganization of legal persons and these legal provisions may be applicable in the silence of the special law regulating the companies with legal personality.

In this context, given that it can be observed at first sight a certain disparity between the two regulations, particularly in terms of terminology, we consider that an analysis of the legal provisions in this matter it is extremely useful both theoretically and practically.

⁴ Published in the Official Gazette of Romania, Part I, no. 143/02.03.2012. This regulation transposes into Romanian law the Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions, published in the Official Journal of the European Union L259/02.10.2009.

⁵ Published in the Official Gazette of Romania, Part I, no. 365/30.05.2012.

2. The juridical nature of the operations of merger, division and separation

Within the meaning of article 239 paragraph 1 of Law no. 31/1990 republished, the legislator treats the merger, division and separation as amendments of the constitutive act of the companies involved in the operation⁶.

It should be mentioned that in juridical doctrine prior to the entry into force of the new Civil Code there was no unitary point of view on the legal nature of merger or division. Thus it was argued that the merger and division are cases of amendment of the constitutive act⁷, ways of reorganizing a commercial company⁸, technical-juridical methods through which the restructuring of commercial companies is achieved⁹, cases of transformation of commercial companies and complex forms of reorganization and termination of legal persons¹⁰. This diversity of opinions likely had its origin in the fact that within the previous regulation of civil law in this field, contained mainly in articles 40-44 and 46-50 of Decree no. 31/1954 on natural and legal persons¹¹, the legislator did not expressly use the expression „reorganization of legal persons“, which is a creation of the doctrine and jurisprudence.

Although Law no. 31/1990 republished expressly provides that the merger, division and implicitly the separation are decided „under the conditions laid down for the amendment of the constitutive act of the company“, we believe that this wording does not explain the legal nature of these operations. In such a situation, the best solution is obtained by taking into account the legal regulation concerning legal persons, as it is contained in articles 232-243 of the new Civil Code. Thus, according to article 233 paragraph 1 Civil Code, along with transformation, the merger and division are, from a juridical point of view, ways of reorganization of companies.

In this context, we believe that some clarification is necessary, especially of a terminological and conceptual nature.

Thus, according to the Civil Code, the reorganization of legal persons can be achieved by merger, division or transformation. However, according to article 234 Civil Code, the merger has two forms, namely absorption and fusion, while, within the meaning of article 236 paragraph 1 Civil Code, division may be total or partial.

⁶ O. Căpățână, *Societățile comerciale*, Lumina Lex Publishing House, Bucharest, 1996, p. 210.

⁷ O. Căpățână, *op. cit.*, p. 210.

⁸ S. Angheni, M. Volonciu, C. Stoica, *Drept comercial pentru învățământul economic*, Universitara Publishing House, Bucharest, 2005, p. 247.

⁹ St. Cărpenaru, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2009, p. 265.

¹⁰ E. Precupețu, M. Danil, *Despre fuziunea societăților comerciale*, in *Revista de Drept Comercial* no. 6/1993, pp. 50-51.

¹¹ Published in the Official Bulletin no. 8/30.01.1954.

Instead, within the current version of the text of article 238 paragraph 1 of Law no. 31/1990 republished¹², taking the example of the European directives in the field¹³, the legislator do not use anymore the terms „absorption“ and „fusion“, although it regulates essentially the same forms of merger as those contained in the Civil Code. However, taking into account the provisions of article 238 paragraphs 2 and 2¹ of Law no. 31/1990 republished, according to which the division is an operation whereby the patrimony of a company, which ceases to exist, is divided between two or more existing or newly created companies, it results that this normative act actually regulates under this denomination only the total division, unlike the general rules contained in the Civil Code.

Moreover, the Law no. 31/1990 republished originally introduces in this matter the concept of separation.

Thus, according to article 250¹ of Law no. 31/1990 republished, the separation represents the detachment of part of the patrimony of a company that does not cease to exist and the transmission of that part as a whole to one or more existing or newly created companies. The legislator regulates two forms of separation, as follows:

- separation in the benefit of associates/shareholders, when the associates/shareholders are those who receive, in exchange for the part of the patrimony that is transferred, social parts or shares in the recipient companies;
- separation in the benefit of the company, when the social parts or shares of the recipient companies, corresponding to the part of the patrimony that is transferred, are allocated to the company from which the separation has occurred¹⁴.

De lege lata, taking into account the current wording of article 238 paragraph 2 of Law no. 31/1990 republished, as well as article 250¹ of the same normative act, it seems clear the legislator's intention to regulate two different operations, even though they have identical juridical regime and therefore the legal terminology in this field is undoubtedly the division (equivalent of the total division) and the separation.

¹² Within the wording provided by Government Urgent Ordinance no. 82/2007 amending and supplementing Law no. 31/1990 on commercial companies and other incident normative acts, published in the Official Gazette of Romania, Part I, no. 446 / 29.06.2007.

¹³ In particular Council Directive no. 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and the transfer of the registered office of an SE or SCE between Member States, published in the Official Journal of the European Union no. L225/20.08.1990, as amended by Council Directive no. 2005/19/EC of 17 February 2005, published in the Official Journal of the European Union no. L58/04.03.2005. These acts were subsequently repealed by Council Directive no. 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and transfer of the registered office of an SE or SCE between Member States, published in the Official Journal of the European Union no. L310/25.11.2009.

¹⁴ See A.M. Lupulescu, *Reorganizarea societăților comerciale în contextul integrării europene. Strategii și cadru juridic*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 152.

In this sense, it can be easily observed from the wording of the above-mentioned legal texts a regrettable discrepancy, both of terminological and conceptual nature, between the general rules on the reorganization of the legal person contained in the Civil Code and the special regulation provided by Law no. 31/1990 republished. Thus, in relation to the concept of „separation in the benefit of associates/shareholders“, the equivalent of partial division within common law, *de lege ferenda* the intervention of the legislator would be required in order to replace this expression, the more so as the European legislative texts in the matter¹⁵ refer expressly, in connection with the same operation, to the concept of partial division.

Moreover, the form of separation in the benefit of the company, in correlation with the possibility of the company transferring a part of its patrimony to become itself an associate of the recipient company/companies, provided by our legislation following the amendment of Law no. 31/1990 republished by Law no. 441/2006, does not correspond to the general rules contained in the Civil Code, but it is consistent with the institution of „transfer of assets“, as regulated by the Directive 2009/133/EC¹⁶. In this respect, it is incomprehensible the option of the legislator for the expression „separation in the benefit of the company“, since the concept provided by European legislation is that of „transfer of assets“¹⁷.

3. Some procedural aspects concerning the accomplishment of the operations of merger, division and separation

Since the operations of merger, division or separation affect the legal status of the participating companies, the decision thereon shall be taken by each company.

¹⁵ According to the definition contained by article 2 letter c) of Directive no. 2009/133/EC, previously cited, partial division means „an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities“.

¹⁶ In this respect, according to article 2 letter d) of Directive no. 2009/133/EC, previously cited, „transfer of assets means an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer“.

¹⁷ Within French law, this institution is referred to as partial contribution of assets. Traditionally, French law has experienced only this solution, namely a company makes the contribution of part of its patrimony to another company and receives in exchange shares issued by the recipient company - see G. Ripert, R. Roblot, *Traité de droit commercial*, tome 1 - volume 2, Les sociétés commerciales, LGDJ, Paris, 2002, p. 662. Recently, under the influence of European texts and the example provided by other legislations of the Member States, French doctrine has admitted the existence of the operation of partial division, even in the absence of any legal definition - see in this respect P.-Y. Chabert, *La figure de la scission partielle en droit français*, in „Rev. Sociétés“, 2005, p. 759.

Thus, taking into account that the merger, division and implicitly the separation are treated by law as amendments of the constitutive act of the participating companies, all legal conditions specified in this respect must be fulfilled in order to achieve them. Therefore, the decision on the merger, division or separation is taken by the general assembly of associates/ shareholders of each of the participating companies, under the conditions of quorum and majority laid down for amending the constitutive act.

However, from a procedural point of view, in addition to the general requirements for the amendment of the constitutive act, in case of merger, division or separation some additional conditions must also be fulfilled.

Thus, according to the provisions of Law no. 31/1990 republished, the operation of merger, division or separation starts with the drawing up of a project in this regard.

The obligation to prepare a project of merger or division is expressly provided by article 241 of Law no. 31/1990 republished. The merger or division project records the conditions for accomplishing the operation and is prepared by the administrators or members of the directorate of participating companies, containing the compulsory mentions provided by law (art. 241 letters a-k), which refer essentially to the explanation and detailed presentation of the operation and the conditions for its realization.

The merger or division project shall be filed with the office of the Register of Trade where each participating company is incorporated. In all cases, except in the case of separation, in order to protect the creditors of companies that cease to exist, the merger or division project must be accompanied by a statement from the company which ceases to exist following the fulfillment of the operation, on the ways used to cover its liabilities.

In order to protect the interests of third parties, in case of merger or division the formalities of publicity required by law must be fulfilled. Thus, the merger or division project shall be published in the Official Gazette of Romania, Part IV, in full or as an extract. According to article 242 paragraph 2¹ of Law no. 31/1990 republished, this formality of publicity can be simplified if the participating companies have their own websites, meaning that publication in the Official Gazette will be replaced with publishing the project on the website, noting, however, that in such a case all necessary steps should be taken in order to guarantee the security and integrity of documents published in this manner.

The control of the operation of merger, division or separation is achieved, according to article 243³ of Law no. 31/1990 republished, by one or more experts who will give their professional opinion on the merger or division, drawing up a written report to the associates/ shareholders. However, for simplifying the merger or division operation, the law allows the exoneration of the obligation to undertake this specialized control, to the extent that this decision is taken unanimously by the associates of the participating companies.

The merger, division or separation is definitively decided by the general meeting of each of the participating companies, under the conditions of quorum and majority required by law for extraordinary meetings. As an exception, in order

to protect shareholders/associates, the decision is taken unanimously, regardless of the legal form of the company, when the merger or division has the effect of increasing the obligations of shareholders/associates of one of the participating companies (art. 247 of Law no. 31/1990).

In order to allow the associates/shareholders of the companies involved in the operation to knowingly decide on the merger or division, the law stipulates the obligation of the administration bodies to provide them, at least one month before the date of the extraordinary general meeting, a number of documents related to the operation of merger or division (art. 244 of Law no. 31/1990 republished). In this respect, it should be mentioned that the administrators or members of the directorate of participating companies are required to prepare and make available to associates/shareholders a written report explaining the merger or division project and its legal and economic foundation, especially concerning the exchange rate of shares (art. 243² of Law no. 31/1990).

Following the relatively recent amendments of Law no. 31/1990 republished by Government Urgent Ordinance no. 2/2012, it was provided the possibility of simplifying the merger, division or separation operation, including in relation to the obligations of administration bodies of the participating companies. The requirement to draw up the report of the administrator can be removed by unanimous decision of the associates of participating companies. At the same time, the obligation to provide the shareholders, at the registered office, with the documents referred to in article 244 of Law no. 31/1990 republished is no longer necessary if they are published on the website of participating companies for an uninterrupted period of at least one month.

If following the merger, division or separation a new company is created, it must be set up according to the procedure provided by law for the agreed juridical form of company. The constitutive act of the company which is created in this manner will however be approved by the general meeting of the company which ceases to exist after the operation (art. 246 paragraph 2 of Law no. 31/1990), without the need of convening a constituent assembly¹⁸.

From a procedural point of view, after the decision of the general meeting regarding the merger or division, some formalities must be fulfilled, which vary according to the nature and consequences of the operation concerned.

In accordance with the provisions of article 248 of Law no. 31/1990 republished, as the merger by absorption has the effect of increasing the registered capital of the absorbing company, the constitutive act of that company should be amended under the conditions of the law and the modifying act is registered in the Register of Trade at the headquarters of the absorbing company, being also published in the Official Gazette of Romania.

It should be mentioned, however, that the division has also the effect of increasing the registered capital when parts of the patrimony are transferred to existing companies, and this case seems to have been neglected by the legislator, who uses the expression „absorbing company” within the text of article 248 of Law

¹⁸ M. Șcheaua, *Legea societăților comerciale nr. 31/1990 comentată și adnotată*, second edition, Rosetti Publishing House, Bucharest, 2002, p. 306.

no. 31/1990 republished¹⁹. Or maybe this wording does not result from an inadvertence of the law, but the legislator has intended to treat the companies that acquire fractions of the patrimony of the divided company as absorbing companies because, as stated in the French doctrine²⁰, for the fraction of patrimony it receives, each benefiting company has the regime of an absorbing company.

In case of separation, the Register of trade will register the mention of reducing the registered capital of the company. Equally, in case of merger by fusion, division or separation, the newly formed company must be incorporated in the Register of trade. On the date of incorporation of the new company or the last of the companies that are set up, the companies which cease to exist are erased by the Register of trade of its own motion.

Following the European model, also provided by the legislations of Member States, the Law no. 31/1990 republished, in the wording resulting from the amendments introduced by Government Urgent Ordinance no. 2/2012, establishes a simplified merger procedure, derogating on procedural aspects from the common law legal regime applicable to the merger, when this operation refers to the merger by absorption of a subsidiary, owned either 100% or at least 90% by the absorbing parent company.

Thus, according to article 246¹ of Law no. 31/1990 republished, in case of the merger by absorption between the parent company and a 100% owned subsidiary, the approval of the operation by the general meeting of associates of participating companies is no longer required. However, one or more associates of the absorbing company, holding at least 5% of registered capital, may request the convening of the general meeting in order to approve the merger. Nevertheless, in this case, the merger project shall be drafted in a simplified form, meaning that it should no longer contain stipulations concerning the conditions of allocation of social parts or shares of absorbing company, the date starting from which they grant the right to participate in sharing the profits or the exchange rate of social parts or shares and the eventual merger premium. Equally, according to article 243⁴ of Law no. 31/1990 republished, the administrators of participating companies have no longer the obligation to inform the associates through the report on the operation, prepared in this respect. The law no longer requires any obligation to carry out professional control on the merger through the report of the experts.

In case of merger by absorption between the parent company and a 90% owned subsidiary, the legislator has also introduced a simplified regime applicable to the operation, meaning that it must not be approved by the general meeting of associates of participating companies unless one or more associates of the absorbing company, holding at least 5% of its registered capital, request the approval, and the report of the administrators or the professional report of experts are no longer prepared.

Equally, in article 246² of Law no. 31/1990 republished the legislator has provided the case of a simplified division, when this operation is performed for the benefit of existing companies that hold together 100% of the registered capital of

¹⁹ See A.M. Lupulescu, *op. cit.*, p. 158.

²⁰ M. Cozian, A. Viandier, F. Deboissy, *Droit des sociétés*, 19e édition, Litec, Paris, 2006, p. 671.

the divided company. Thus, in this case the division operation must not be approved any longer by the general meeting of associates of the divided company.

4. Conclusions

The merger, division and separation of companies, within the meaning of Law no. 31/1190 republished, represent from a juridical point of view ways of reorganizing the companies with legal personality, through which there are accomplished, in an economic perspective, a number of strategic options for restructuring, rationalization of internal organization of the participating entities, the concentration of activities and capital in order to better respond to economic realities. Aware of the importance of these operations, the legislator has been working constantly to create a coherent legal framework adequate to achieve them, by simplifying the applicable procedure and eliminating any obstacles or constraints, at least of a legislative nature.

Equally, given that companies governed by Law no. 31/1990 republished are legal persons, the juridical regime applicable to mergers, divisions and separations involving these companies has to be defined and interpreted in the broader context of the general regulation applicable to the reorganization of legal persons, as it is contained in the new Civil Code.

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