„NICOLAE TITULESCU" UNIVERSITY

PhD THESIS

Mergers in Romanian and European Law

SUMMARY

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1. Issues approached by the scientific endeavour

The perpetual and extensive expansion and globalisation of modern society causes an increasing need on the companies carrying out economic activities to adapt to this dynamic economic and social environment.

Certainly, besides the general causes that have been mentioned, this trend has some specific determinants, such as the definite interdependence aspirations of the economies of the world's states, caused by the unprecedented increase in the rate of international trade, the inflow of foreign capital and the explosive development of science and technology.

These developments of the economic environment, as well as the recent legislative evolutions in national and international law confirm the conclusion that the company merger procedure becomes in business terms an essential instrument for satisfying the increasing needs of these expansion societies, both in matters of competition and in an economic perspective.

2. Scientific support and the research methodology

As a means for making the most of the strategy of specialisation, vertical integration or diversification of, *inter alia*, production means and capital, mergers lie at the heart of industrial and technological policy. Above other purposes, mergers are a vehicle for companies to attain their development goals as regards the economic activity. The implementation of this complex mechanism mainly involves economic and legal consequences.

For this reason, in order to put together a relevant picture of the mechanisms that support company mergers, a thorough research undertaking was necessary, which addresses the diverse issues associated with such an instrument, within a multidisciplinary – historical, legal, and economic – endeavour. Due consideration was also given to the importance of the actions preceding the solution of company merger, actions concerned with negotiations, economic engineering, financial and tax related considerations.

In the drawing up of this thesis, I have used various research instruments, more precisely, the national and EU developments, the case law of national and European courts, the specific literature, and also practical cases and working hypotheses.

With regard to the scientific research process, I have applied complex and various qualitative methods involving advanced research in the area of legal sciences, including the historical method, the historical-theological method, the critical-

comparative method, the logical method, the deductive-inductive method, or the analogical method.

I have given particular importance to historical research, being convinced of the relevance of an organised, controlled endeavour, where its core elements assume the validity of the expressed ideas and treating the historical subject in its intrinsic actuality.

For this reason, this research was not limited to an analysis of the merger process at present, through transversal research methods, but it pursued instead the legal institution concerned in its evolution in time through longitudinal research methods.

3. The structure of the thesis

With regard to the actual organisation of this work, the thesis is divided in seven chapters, and these are further divided into sections, with their subsequent divisions.

Chapter 1 describes some essential aspects referring to the transformation of companies with regard to the general conditions and the effects of this legal institution. The conclusions on the transformation of companies have been rendered both in their domestic dimension, and also in a comparative law perspective, which may be a source of inspiration for perfecting the existing legislation and the interpretations in the Romanian doctrine and jurisprudence.

The transformation of companies with regard to their economic activity, which basically takes place through an amendment of their articles of incorporation, under the law, is seen as a convenient solution, possible to be achieved with a minimum of negative consequences.

This is the start point for completing a merger, the legal framework which includes rules of general law, applicable to the merger operation where there are no specific rules. Therefore, the approach of the topic of company transformation at the beginning of the scientific endeavour may provide a sound basis for elaborate constructions at legislative, doctrine and jurisprudence levels with regard to company mergers.

Chapter 2 deals with the issue of merger with a view to the notion and the forms that this operation can take.

The methodological rigor for a thorough knowledge of mergers required to research this notion - in this research paper - also in a historical perspective.

The appearance of such a technical and legal instrument is consubstantial with an economic evolution different than the one that had existed by the Early Middle

Ages. The gradual accumulation of capital in the hands of a few narrow social groups conditioned the birth of some economic realities favourable to the development of such a means for enterprise growth.

The historical construction of mergers in Europe could be depicted, in this work, back to the 16th – 17th centuries, based on data referring to the first mergers which led to the establishment or, accordingly, the development of colonial medieval companies. This is the case of the Dutch East India Company[1], the East India Company[2], and Companie d' Occident[3].

The thesis shows that the first mergers on the Romanian territory began to be signalled in the 19th century in connection with insurance companies or people's banks.

These historical representations of the first mergers were put in the context of the economic and legal realities of the territory where they manifested, noting that they preceded the legislative recognition of the institution of merger.

Therefore, the recognition of the context which led to the appearance of mergers is such as to confer identity to this notion, and its analysis in retrospect is able to highlight the position of the institution in the present law and also its inseparable connection with the evolution of social and economic realities.

The notion of merger was then presented by differentiating it from other restructuring operations, such as internal restructuring, assignment of shareholding and assets, acquisitions of companies with a leverage effect and European companies. For a correct definition of the legal institution discussed, I have also highlighted its legal notion by setting out advanced theories of the doctrine: extinctive-successional, transformative-extinctive and purely transformative, and also the criticism of these theories and the challenges of their independent application.

I have also indicated the types of mergers deriving from the application of the following criteria: the industrial and financial strategy; the competition-economic

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[1] In Dutch, "Verenigde Oostindische Compagnie", it was established in 1602 by the union of six independent companies in the Netherlands. These companies began their trading activities with spices from the East Indies in 1595 and they shared for this purpose the territory lying east from the Cape of Good Hope and west from the Strait of Magellan.

[2]"The United Company of Merchants of England trading to the East Indies", also known as "Honourable East India Company", a British colonial company set up in 1702, following the signing of a tripartite merger agreement (called "amalgamation"), on 22 July 1702, by two colonial companies and by the state – Great Britain.

[3] In a France conquered by the economic ideas of John Law, Compagnie d' Occident was set up on 28 August 1717 through a decision of the Finance Council registered with the Parliament on 6 September 1717. This referred to some commercial privileges given for 25 years, including privileges which had previously belonged to other four companies: Deuxieme Compagnie du Mississipi or de la Louisiane, Deuxieme Compagnie du Canada or du Castor, Quatrieme Compagnie du Senegal and Compagnie royale de Guinee or de l'Assiente. In May 1719, Compagnie d' Occident took up Compagnie française des Indes Occidentales, Compagnie des Indes Orientales, du Sénégal, de Chine, de Barbarie et de la Mer du Sud and changed its name into Compagnie perpétuelle des Indes. This elaborate financial operation orchestrated by John Law was authorised by an edict, called by the 18th century authors the „Edict of reunion". See Henry Weber, *La compagnie française des Indes, 1604-1875*, Arthur Rousseau, Paris, 1904, p. 303.

criterion; the motivation of the economic strategy; the legal form of the participating companies; the applicable law system; or the conveyance of patrimony and the living conditions.

Chapter 3 highlights the legal conditions for the completion of a merger, with regard to the general principles governing this matter and also with a description of the operation through the phases of the legal and economic process: the preliminary phase, the decision in principle, and the draft terms of merger. Attention was also given to the means used to protect the shareholders of the companies participating in a merger and the creditors.

The procedure stipulated by the law for carrying out such a reorganisation involves a series of successive steps: drawing up the draft terms of merger, the endorsement and publication of the draft terms of merger and division, the settlement of any possible oppositions to the draft terms, informing the shareholders with regard to the merger and the decision of the General Meeting on the merger.

Of course, before taking these legal steps, companies go through a preliminary, non-public phase, i.e. the phase of negotiations, which is preceded or ends with a decision in principle on the merger, which mandates the directors to negotiate and, possibly, to issue the draft terms of the merger.

Chapter 4 lays out the effects of the merger for the relations between the participating companies and also for their shareholders.

The main legal consequence of such an operation is determined by the dissolution without liquidation of the company that ceases to exist. The other legal effects of a merger, expressly provided for by Article 250 paragraph (1) points a)-c) of Law 31/1990, derive from this one and refer to the universal conveyance of the patrimony of the dissolved company to the beneficiary company or companies; the allotment of shares of the beneficiary company or companies to the shareholders of the company being dissolved, and that the absorbed company or the combining companies cease to exist the moment they are stricken off from the Trade Register.

As regards the effects of mergers for the shareholders, these may be summarised by saying that in case of a merger through absorption the shareholders of the absorbed company or companies may become shareholders of the absorbing company, while in the case of a merger through combination, the shareholders of the company that ceases to exist become shareholders of the newly established company. More precisely, the shareholders of the company or companies that convey their patrimony receive shares in the beneficiary company of the operation in accordance with the allotment rules laid down by the draft terms of the merger.

This chapter also presented some aspects referring to the date when the merger starts to produce effects between the parties and in relation to third parties, as well as the particular aspects of the merger effects deriving from the connection between the merging companies or from some titles conferring specific rights.

The protection of the employees of the participating companies was debated in a distinct part, in consideration of its critical nature for the success of the operation.

Chapter 5, which is dedicated to the nullity of mergers, analyses this cause of ineffectiveness both in a theoretical perspective – its legal nature – and in a practical perspective, specifying the causes, the procedure and the effects of the nullity of a merger.

In the thesis, I have shown that the nullity of a merger is both a *cause of ineffectiveness* and a *sanction* which deprives the operation of the effects contrary to the legal rules proclaimed for a valid completion of the reorganisation process for the involved company/companies. As such, nullity intervenes only when the legal rules governing the conditions of validity related to the substance or the form of the operation are disregarded.

From the legal regulation of the nullity of mergers, more precisely the provisions of Article 251 paragraph (1) of Law 31/1991, we can infer the *judicial nature* of the nullity of the concerned operation. Therefore, the legal text expressly provides that the nullity of a merger may be declared exclusively through a court decision, excluding expressly the possibility of an amicable nullity in this matter.

Furthermore, I have analysed the cases of nullity regarding the lack of judicial/administrative review and the situation when the decision of one of the General Meetings that voted the draft terms of merger is void or voidable.

In connection with the term for declaring the nullity, I have specified that this is a term of extinctive prescription and that it is subject to the institution of suspension, interruption and reinstatement of the prescription term, considering that the law does not provide to the contrary.

The regulation of cross-border mergers in the European Union was presented in **Chapter 6**, which is divided in several sections concerned with the history of the regulation, the notion and the forms of mergers, the process of carrying out a merger and the legal consequences of these mergers.

The harmonisation of rules at EU level with regard to cross-border mergers has gone through a long and laborious process.

The rationale of a supra-state approach of the institution of merger resides in the need to protect the interests of shareholders and third parties which would have required the introduction of provisions concerning mergers in the domestic law of the

Member States, evoking especially the right to information for the shareholders of the merging companies and for creditors, including for holders of debentures, the need to extend the warranties recognised for shareholders and third parties in connection with the mergers, so as to ensure the legal certainty of the legal and economic relations established between the companies involved in a merger.

The structure of this chapter follows, in the main, the methodological steps adopted with regard to a domestic merger.

The final part of the thesis, **Chapter 7**, represented the control of company mergers in a competition law perspective.

Mergers are able to positively influence – by themselves – the markets where they operate, and this may eventually lead to general wealth – the ultimate goal of the establishment of a single market.

Even if mergers cannot be forbidden *ex ante*, a system for controlling them has gradually imposed in the legal systems of the world states.

Starting from this hypothesis, I have developed the rationale of such a regulation, and also its history in the world and in the European region, as well as the present legal framework in the EU and in Romania. The particular complexity of the theme dealt with by this chapter required the use of appropriate research methods. The analysis conducted starting with the history of the regulation in this field both in the EU and in other legal systems of states considered relevant in terms of competition law was such as to ensure a solid edifice for the knowledge of the control of concentrations.

In order to create a detailed picture of this regulation, I indicated definitions for the terms "undertaking", "concentration" and "relevant market", I specified the conditions of a prior notification, and then I detailed the actual control proceedings and the applicable terms. A significant part of this chapter was dedicated to the control exercised by the Court of Justice of the European Union on the decisions made by the Commission, and the control by the Court of Appeal with regard to decisions made by the Competition Council.

Finally, in every chapter, due consideration was given to the remarkable importance of the concerned institution of law, which made it possible to see that a company's need to grow needs to be accompanied by a sustained effort to rationalise the regulations. Therefore, I have defended the idea of supporting, in Romania, an extensive process for the refinement of the legislative framework in this area and I have put forward concrete conclusions for its amendment.

4. Contributions and proposals *de lege ferenda*

Compared to the dissolution of a company and the establishment of a new legal entity, that takes into consideration the current interests of the shareholders, company transformation appears preferable most of the times, for considerations which are easy to understand. The arguments in support of this idea can be easily deducted from **Chapter 1** of this thesis, which refers to the effects of the transformation of a company resulting from the survival of its legal person.

In order to support the conclusions on the refinement of the existing legislative framework, I have proposed adjustments to the Law 31/1990 as follows.

First, I have considered it useful to amend Article 193 paragraph (3) of the law, so that it has the following content: "[if] the legally established meeting cannot adopt a valid decision because they do not have the quorum required under the law or the Articles of Incorporation pursuant to the provisions of Article 192 paragraphs (1) and (2) of the Law, the meeting subsequently convened may make decisions on the agenda, irrespective of the number of shareholders and the part of the share capital represented by the shareholders who attend the meeting, unless the Articles of Incorporation provide otherwise".

The positive effects which such a legislative adaptation could draw refer, in my opinion, to a settlement of the controversies between doctrine and judicial practice, with regard both to the correlation of Article 193 with Article 192 paragraphs (1) and (2) of the Law and to the possibility to derogate, through the Articles of Association, from the rule laying down the conditions for taking a decision if a new meeting is convened.

Secondly, I have deemed that Article 3 of Law 31/1990 should have one more paragraph with the following content: "(4) In case that, prior to the amendment of the Articles of Incorporation of the company, the shareholders who had been liable for the social obligations to the extent of the issued share capital became members of a general partnership (*asociați în societate în nume colectiv*) or active partners of a private or public limited partnership (*asociați comanditați în societatea în comandită simplă sau în societatea în comandită pe acțiuni*), paragraph (2) also applies to the social obligations contracted before the amendment, unless the creditor has expressly consented, through an authentic deed, to the amendment of the Articles of Incorporation of the company".

Another recommendation for the amendment of Article 3 of Law 31/1990 is to add a paragraph with the following content: "(5) If, prior to the amendment of the Articles of Incorporation of the company, the shareholders who had unlimited and joint liability for the social obligations became silent partners in a private or public limited partnership (*asociați comanditari în comandită simplă sau în societatea în comandită pe acțiuni*), shareholders of a public company (*acționari în societatea pe acțiuni*) or

shareholders of a private limited company (*asociați în societatea cu răspundere limitată*), paragraph (2) also applies to the social obligations contracted before the amendment, unless the creditor has expressly consented, through an authentic deed, to the amendment of the Articles of Incorporation of the company".

These proposals *de lege ferenda* aimed at the legislative establishment of some conclusions formulated in the course of the thesis, after consulting the doctrine and the case law in this area, conclusions which are consistent with the idea of making a predictable and unequivocal legal framework.

Of course, perhaps the most appropriate recommendation would be that the legislator should dedicate an ampler chapter to this issue, adopting some of the legislative solutions which have been already successfully implemented in the legislations of other states with a longer tradition in respect of the coding of company law.

Therefore, we could see that the transformation of companies is largely regulated in the French law, the Belgian law or the Spanish law, to the benefit of the addressees of law and practitioners.

Taking into account the considerations above, I have concluded that current regulations are perfectible and that it is necessary to amend them when practical needs certainly requires it.

Chapter 2 was intended to provide an introduction to the issues related to mergers, highlighting the notion, their legal nature, and their forms.

A special contribution of this work is an ample history of mergers, which seemingly is not found in the specific doctrine, the Romanian or the foreign one, at least in a linear approach which covers a few centuries and different states.

Therefore, the beginnings of mergers have been traced back to medieval companies, and the mergers that led to the establishment of the Dutch East India Company in 1602, The United Company of Merchants of England trading to the East Indies in 1702, Compagnie d'Occident in 1719 are proofs that I have used to argue the old origin of this operation, on one hand, and that they have been important examples which led to the definition of some economic and legal limits for such operations, on the other hand.

Chapter 3 pursued a description of the merger process, in the light of the provisions of Law 31/1990, the domestic and European judicial practice and the doctrine in this field.

Seeing that there is a doctrine controversy concerning the need to have an express mandate given to the directors of a company for drawing up the draft terms of merger, I have proposed amendments *de lege ferenda* with regard to Article 241 and Article 242 paragraph (1) of the Law.

Following the analysis carried out with this work, the conclusion that can be drawn is that, given the diversification of the goals pursued through a merger, this operation is an efficient instrument for an important number of working hypotheses: the reorganisation of the structure of a group of companies, the establishment of a vertical or horizontal concentration scheme, the desire to develop of the absorbing company, capital injection, etc.

Irrespective of the objectives pursued, a merger involves a full union[4] between the participating companies, which determines profound legal, economic and financial transformations.

Precisely because the achievement of such a goal needs to be thoroughly planned, while observing the rights of creditors and shareholders, the merger process entails a series of successive steps, which are troublesome many times and which may take place over several months, the preliminary phase of negotiations delaying the operation, sometimes even for several years.

Of course, the success of a merger means not only the completion of the merger process, but, in the long term, the merger needs to ensure profit and a survival capacity in a competitive environment. For these reasons, the requirements of the procedure are manifold, and they presume, *e.g.*, the integration of the new assets in the single structure which results from the merger, the rationalisation of business activities, the implementation of new development strategies.

However, at present, given the existing concern at EU level for the creation of a coherent and effective framework for mergers, including through guarantees given to creditors, shareholders, employees, while ensuring the legal certainty in the relations between the involved companies, our country has the benefit of legal provisions which are not discouraging for the companies intending to engage in such a process.

Chapters 4 and 5 include an analysis of the effects of a company merger in terms of economic activity, as well as the nullity of such an operation in a double perspective, theoretical and practical.

Although the Romanian law includes an ample regulation of the mentioned issues, regulations are perfectible.

Therefore, *de lege ferenda*, I consider it necessary to specify and differentiate between the causes for de suspension, interruption and reinstatement of the extinctive prescription term provided for by Article 251 paragraph (3) of Law 31/1990. The causes governed by general law are not adapted to the specificity of the operation and do not relate to the subjects that may engage in annulment proceedings or proceedings for declaring the nullity of a merger. At the same time, considering the goals seeking

[4] M. Fleaureau, *Les fusions de sociétés d'assurances*, Thèse, Paris, 1933, p.1.

to maintain the legal security, the predictability and the creation of an attractive instrument for companies that intend to reorganise themselves, these causes which, in the end, determine the delay of the merger procedure must be stipulated by the law in a limitative way.

Chapter 6 looks into cross-border mergers under the rules of the European Union.

After a long period of stagnation, when the policy makers at European level did no more than seeing how the land lies with regard to cross-border mergers, after the adoption of the Regulation 2157/2001 and the Directive 2005/56/CE, the European mobility of businesses is finally encouraged.

However, the rules of the Directive 2005/56/CE have been appraised as being complex, but not comprehensive, and therefore companies choose from many alternatives in order to conquer new geographical markets, such as cross-border transformations[5].

We should notice that the success of any "supranational" instrument depends necessarily on the extent to which companies all over the Union will consider it a more convenient option than those existing in the national laws. Unequivocal provisions which provide answers with celerity to various issues raised in practice, the lack of major disadvantages compared to other instruments and the unconditioned recognition in all the jurisdictions of the Member States are essential ingredients for such an instrument to become preferable.

At present, the stakeholders have begun to report some satisfaction with regard to the rules of cross-border mergers, which they consider an important step towards a more vibrant and robust single market[6].

With regard to the whole of the Romanian regulation of cross-border mergers, the legislator has transposed quite faithfully the rules of the EU secondary legislation, except for the provisions referring to the nullity of the operation, which have been drawn up so as to mirror those referring to domestic mergers, omitting to see that, given the impossibility to declare or find the nullity of a merger[7] after the date when it becomes effective, they lack any practical applicability.

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[5]For details about this aspect, see Frank Wooldridge, "The 10th company law Directive on cross border mergers", *Company Law*, no. 27/2006, Westlaw UK, London, p. 310.

[6]On this, see *Study on the application of the Cross-Border Mergers Directive, conducted by the Directorate-General for the Internal Market and Services, European Union*, September 2013, available online at: http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf.

[7] On this, see Article 17 of the Directive 2005/56, which stipulates in the official Romanian translation that *fuziunea transfrontalieră care intră în vigoare în conformitate cu articolul 12 nu poate fi declarată nulă de drept*. Actually, checking the other language versions, we can see that no cause of nullity may produce effects

Consequently, I have proposed *de lege ferenda*, in this thesis, to repeal these dispositions, so as such provisions do not lead to a characterisation of the legal framework for mergers as being heavy, complex and far from the practical realities of the operation.

Chapter 7 reflects, separately, the European and the domestic dimensions of the control of company mergers.

The originality of this thesis is highlighted in this part of the work, which employs the most recent developments related to jurisprudence, doctrine and, especially, the case practice of the European Commission within the merger control mechanism.

The competition law systems have multiplied exponentially over the last decades, and this has lead, *inter alia*, to a better control of concentrations. Nevertheless, the relatively limited experience, temporally and quantitatively, of the European Union and of the Member States in this area, compared to that of the USA, the fact that company law, generally, and the control of mergers, especially, need to adapt to the technological and industrial developments quickly and efficiently, determines the importance of regular legislation review.

Moreover, I have shown the unreliability of the actual possibilities related to the application of the measures for reinstalling the situation prior to a concentration, provided by the law as principal measures: the dissolution of the merger, and the assignment of the acquired shares or assets, respectively.

In my opinion, the dissolution of a merger is a measure derogating from the regime of the ineffectiveness of the operation in general law, not being necessary to consider it a form of the nullity of a merger provided for in Law 31/1990, but a distinctive legal institution, in spite of an unfortunate terminology, as well as a fragile fate, given by a significant inapplicability in practice. This is because if the merger takes effect this means that the dissolution of the absorbed company or participating companies has already taken place, without liquidation, and it/they has/have been stricken off from the Trade Register. But such effects are irreversible in the current status of the legislation.

De lege ferenda, I have proposed that the proceedings of merger dissolution are either thoroughly regulated and correlated with the legal dispositions applicable in a particular case with regard to the Trade Register and the Companies Law or this sanction should be dropped out, in consideration of a new system of sanctions, more effective ones.

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after the date when a cross-border merger is completed. Therefore, see the French version: „[l]a nullité d'une fusion transfrontalière ayant pris effet conformément à l'article 12 ne peut être prononcée", the one in English: „[a] cross-border merger which has taken effect as provided for in Article 12 may not be declared null and void".

From the analysis of the extensive case practice of the European Commission, and especially reflecting at the duration of the phased proceedings, I have concluded that it would be necessary, in order to render the whole process more effective, to discourage the Phase 2 of the proceedings. This phase unnecessarily delays, in some cases, the final decision on the merger, since it lasts for a few months. But if the situations which lend themselves to a subsequent analysis were better selected, there would be a better use of the resources of the Commission. Putting this idea in practice could be possible by suggesting to the concerned parties to drop out the notification submitted in the first phase. It would be possible to encourage them as desired by enhancing the means available to the Commission in the first phase of the proceedings, especially through optimal access to the information that is necessary for an analysis.

5. Limits of the scientific endeavour

It is my opinion that this work could be an ambitious starting point for future research in the fields related to financial and tax law and intellectual property law. A thorough presentation of the consequences of mergers in these areas has been limited by a relatively high consumption of the resources used for this endeavour and also by the anticipated amplitude of research in these fields.