CROSS-BORDER MERGER IN ROMANIAN LEGISLATION

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I. Introduction

According to Emergency Government Ordinance no°52/2008\(^1\) for the modification and completion of Law no 31/1990 concerning trade companies and for the completion of Law no° 26/1990 concerning the Trade Register, in the history of Romanian law, a new type of legal institution emerges, that is, the cross-border merger of trade companies, a legal alteration determined by Romania’s necessity to carry out its obligations as a member of the European Union, so that it can transpose the community’s directives into its own legal system, on the basis of article 249 from the European Community’s Instauration Treaty. The Directive 2005/56/EC concerning cross-border merging of stock trading companies, adopted by the European Parliament and the European Council of 26 October 2005\(^2\), is to be found among the adopted directives whose transposition into Romanian legislation concerning trade societies is highly important, also being exercisable in other Member States, starting with their publication in the Official Journal of the European Union, its transposition’s dead-line into each legislation being the 15\(^{th}\) of December 2007.

On the one hand, it must be specified from the very beginning that Directive 2005/56/EC does not aim at every type of company settled by Law no° 31/1990, which has been re-edited, including all its subsidiary amendments and additions, although it has been achieved through the modification of trade societies’ law.

On the other hand, the regulation of cross-border merger is an irrefragable novelty in Romanian legislation, even though there has always been a main wording, that is, art. 46, Law no° 105/1992, concerning international law relations\(^3\), exercisable to all juridical entities that are of different nationalities and that decide to reorganize through merger.

Therefore, Law no° 31/1990, Chapter III. The statute of cross-border merger is different from the main enactment included in Law no° 105/1992, further exercisable for the merger of juridical entities that are of different nationalities, as well as to trade companies that have different shapes than those aimed at by the directive and its enactments, including all its subsidiary amendments and additions.

Leaving aside Romania’s obligation to settle the directive of cross-border merger, which is also an obligation of all the members of the European Union, it is important to acknowledge the motives and the objectives which were taken into account by the competent authorities when creating Directive 2005/56/EC of the European Parliament and of the Council, of 26 October 2005.

II. The motives and objectives of Directive 2005/56/EC

As it emerges from the exposition of motives for the directive, economically speaking, in the European Union, the adoption of enactments concerning cross-border merger is caused by the necessity of achieving a single, functioning market throughout the European Community.

This purpose is tangible only to the extent of the cooperation and consolidation between capital markets in the European Union. Where the reorganization of capital markets and cross-border merger is concerned, this clearly expressed goal is achieved either through absorption, when, most commonly, the absorbed companies cease to exist, or through merger, where each society participating in the process ceases to exist, thus becoming a new trade company.

Therefore, in the process of creating a single market, which is the main purpose of the directive, the cooperation and consolidation procedures have clear-cut dimensions.

Another point in motivating cross-border merger is represented, on the ground of generally accepted limitations, the right to settle down in any member state of the European Union, when achieving the free movement of capital, services, as well as that of labour.

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\(^1\) M. Of. No° 333/2008
Through its effects, cross-border merger must respect the rights and interests of all categories of social creditors, be they shareholders / associates, employees (labourers) of the companies involved in the process, or third parties which, during the merger, have legal differences with these trade societies.

Special consideration must be given to employees’ rights, others than participation rights, that remain under the jurisdiction of a state’s own legal system, and which are specified in Directive 98/95/EC of the Council, concerning mass dismissing¹, of 20 July 1998.

Thus portraying one side of economic bunching, cross-border merger must be achieved by taking into account internal legislations², as well the regulations concerning righteous competition throughout the European Community, on the basis of Regulation 139/2004.


1. **Terminological Frame**

In order to separate cross-border merger from any other means of reorganizing juridical entities of different nationalities, the legislator defines the legal institution of cross-border merger of trade companies by using the following phrase: “according to the present law”⁶, in art. 251 paragraph (1) from Law no˚ 31/1990 re-edited, with its subsidiary amendments and additions.

2. **Key parts of the merger**

Directive 2005/56/EC concerning cross border merging refers to capital markets. However, taking into account Directive 68/151, the first directive of the Council, of 9 March 1968, for the coordination with the purpose to equate the guarantees required from companies in the Member States, according to art. 58, paragraph 2 of the Treaty, with the purpose of protecting the associates or third parties’ interests, the way it was modified in Romanian legislation, capital companies stand for shareholding societies, limited shareholding companies and limited liability companies⁷.

When applying the Directive, the Romanian legislator makes use of two criteria, that is, nationality and establishment for European companies.

On the one hand, the enactments in Law no˚ 31/1990, re-edited, with its subsidiary amendments and additions, the enactments concerning cross-border merging are applied to Romanian companies (Romanian juridical entities), shareholding companies, limited shareholding societies, limited liability companies, and according to the establishment criterion, European societies in Romania to whom EC Regulation 2157/2001, of 8 October 2001 concerning the status of European societies is applied. When it comes to European companies, it is to be specified that the enactments of Law no˚ 31/1990, Title VII, are exercisable only on the basis of their compatibility with the enactments of the Community’s Regulation.

As a main point, on the other hand, these types of companies can merge with trade societies that have social premises, or accordingly, central administration or a head-office in other states of the Union or in states belonging to the European Economic Space, further named member states and that are submitted to one of the juridical shapes as they appear in art. 1, in the Council’s Directive 68/151/EEC, the 9th of March, 1968, with its subsequent amendments, or European societies whose premises are elsewhere.

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¹ JOL 225, 12.08.1998, p. 16
² JOL 24, 29.01.2004, p. 1
³ A merger is the process through which: a) one or more companies, and of which at least two are under the legislative rule of two different Member States, are dissolved without going into liquidation and they transfer all of their assets to another company in exchange of the allocation to the shareholders / associates of the absorbing or the absorbed company, social parts to the first of them and maybe, to a cash payment of maximum 10% of the nominal value of the share, of the social parts thus distributed; b) several companies and of which at least two are under the legislative rule of two different member states, are dissolved without going into liquidation and then transfer all of their assets to a company which they form in exchange to the allocation to its shareholders / associates of shares and, maybe to a cash payment of maximum 10% of the nominal value of the shares/social parts thus distributed; c) a company is dissolved without going into liquidation and transfer all of its assets to a company that holds all of its shares/social parts or other titles, giving vote rights in the general assembly. The cash payment can be above the value of 10% if the legislation of at least one of the member states which the companies participating in the merger or the newly founded company belong to, allows that this percentage is topped.
⁴ JOL 65, 14.03.1968, p. 8.
However, according to article 251, point 2, Law no’ 31/1990, re-edited, with its subsequent amendments and additions, the types of societies described in paragraph 1 of art. 251, can merge with different types of companies as long as they have social premises or accordingly, central administration or a head-office in other member states, if they have legal representation and private patrimony is their only way to ensure social obligations. At the same time, these entities (trade companies), must be submitted to publicity formalities, similar to those appearing in Directive 68/151/EEC of the Council.

The main text concerning the types and forms of trade societies that can be the object of cross-border merger, also contains exceptions appearing in point 3 of the same article. According to this enactment, mass investment in real estates and private investment funds regulated by Law no’ 297/2004 concerning capital markets with its subsidiary amendments and additions cannot be submitted to cross-border merger, this latter one is regulated in Chapter III in Law no’ 31/1990, re-edited with its subsidiary amendments and additions.

At the same time, the entities that have as main activity mass investments of capital provided by the consumer and function in the system of risk allocation are not submitted to the analyzed regulations, having the possibility to buy their titles back, directly or indirectly, as requested by the issuing holder, titles which are part of the company’s shares.

3. Characteristics of cross-border merger

Cross-border merger is a complex process where both procedural and material, substantial aspects combine.

If procedurally speaking, the steps that are followed do not imply any kind of problems, as long as legal enactments are taken into account, hereby mentioning art. 251-251 in Law no’ 31/1990 re-edited; materially speaking, this complex phenomenon can lead to a number of difficulties, its first effect, we believe, the most important, being the repercussion related to the universal transmission of the absorbed company to the one that has taken it over (where absorption merger is concerned) or to the newly-founded company (when speaking about merger through consolidation).

Speaking not only about nationally different companies that are involved in the merging process, but also about those that at the moment of the process were implicated in legal differences with those societies, the universal transmission of assets automatically generates private international legal relations.

On the one hand, those companies’ patrimony is made up of movable and fixed assets, assets to which international private laws are exercisable and which are located on a different territory than that where the general transmission of goods will be enacted.

At the same time, the taking over of contracts belonging to the absorbed company by the absorbing one or by the newly generated society, either as a creditor or as proper debtor, might cause difficulties through the changing of one party’s nationality or because the establishment of the assets or contract’s execution are on a different territory than that of its social premises or central administration of those specific companies.

Where the transmission of patrimony is concerned, one must focus on another repercussion of the merger, that is, the special enactments, exercisable to certain contract categories, such as: license and active consolidation contracts, except the existence of a licensor’s agreement or consolidation members’ agreement, or that of a rental contract, where its transfer is strictly forbidden.

As regards French legislation, when speaking about lease contracts, one can decide in favor of legal actions, in order to ensure further guarantees from the absorbing company, even though the owner cannot stand against the contract’s transmission to the latter.

Attention must be paid to intuitu personae contracts, such as: broking, distribution, consultancy contracts that cease to exist or become null and void when the trade company ends its activity. Before the adoption of Directive 2005/56/EC, French doctrine and legislation have enhanced these “legal restraints”, on the ground of national legislations’ homogeneity in the case of merger.

To conclude, cross-border merging is a novelty in the area of legal institutions that raises many theoretical and practical issues. This paper is only a mere challenge in the study of cross-border merger process, the legislation’s means to defend the rights and interests of all categories of directly or indirectly involved creditors, when it comes to cross-border merger.

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