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THE NEW UNION REGULATION REGARDING THE ISSUE OF MERGING THE JOINT-STOCK COMPANIES

Elise-Nicoleta VÂLCU[1]

Abstract

The imperative of issuing a union legal instrument that would regulate the issue of the joint-stock companies, was necessary because of the predominance of their activities within the economies of Member States and because they frequently extend beyond the borders of any Member State.

The coordination of the legislation of the Member States regarding the establishment of joint-stock companies, as well as regarding their merger or division, is extremely important in order to ensure an equivalent minimum protection for the shareholders or the creditors of such companies, also to maintain the rights of their employees pursuant to the provisions of Directive 2001/23/EC.

Therefore, the union co-lawmaker drew up Directive (EU) 2017/1132 of the European Parliament and of the Council on 14 June 2017 regarding some aspects of the company law, directive applicable to joint-stock companies, thus ensuring the legal certainty in the relationships between the companies involved in a merger. Also, by the union rule, they aim at guaranteeing the coordination of the legislations of the Member States in order to prevent the creditors to achieve their interests, including the holders of bonds and of other titles who may invoke some rights over the merging companies.

Key words:

Merger, absorbed company, acquiring company, new company, cross-border merger, debts.

I. Introduction

Although there is no union coded company law, we can surely say that a process of legislative harmonization in this regard was covered, creating minimum rules that include areas such as protection of shareholders' interests, communication of information on mergers and

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divisions, enforcement of certain obligations to management bodies regarding the protection of employees', creditors' and thirds' rights etc.

We think that Directive (EU) 2017/1132[2], analysed here, is a legislative reformation of the union framework on the issue of coordination of the decisions of internal law of the Member States regarding the establishment of joint-stock enterprises, the maintenance, increase and decrease of the share capital, their merger and division in order to ensure an equivalent minimum protection to the categories determined by shareholders, creditors, thirds and employees. We mention here, to support the paper on the necessity of such reformation at union level, the Resolution on 13 June 2017 of the European Parliament regarding the cross-border mergers and divisions, by which the legislative body drew attention on the long and complex procedures necessary to achieve a cross-border division.

II. Provisions inserted in Directive 2017/1132 on „merger by absorption" and „merger by establishing a new company"

This directive regulates aspects regarding the merger by absorption of one or more companies by another company and the merger by establishing a new company.

For this union rule, "*merger by absorption*" means the operation by which one or more companies are dissolved without liquidation and which transfer all their assets and liabilities to another company, in exchange for issuing to the company shareholder or to the absorbed companies, shares to the acquiring company and eventually for a cash payment of maximum 10% from the nominal value or, if not, from the accounting equivalent of such shares.

[2] Directive (UE) 2017/1132 of the European Parliament and of the Council on 14 June 2017 regarding certain aspects of the company law; by enforcing this directive, it was annulled: Directivae 2005/56/EC of the European Parliament and of the Council on 26 October 2005 regarding cross-border merges of joint-stock companies; Directive 2011/35/EU of the European Parliament and of the Council on 5 April 2011 regarding r of joint-stock companies; Directive 2012/30/EU of the European Parliament and of the Council on 25 October 2012 on coordination, for equivalence, of the guarantees imposed to the companies in the Member States, according to article 54 second paragraph from the Treaty on the functioning of the European Union, for the protection of the associates' or thirds' interests, for the establishment of joint-stock companies, and for maintaining and amending their share capital.

Merger by absorption.

The contents of art.89 para.2 of this directive state that the merger by absorption can be achieved if one or more of the absorbed companies are in liquidation, provided that such condition is limited to the companies that have not started to distribute their assets among shareholders yet.

For the same union rule, "*merger by establishing a new company*" means the operation by which several companies are dissolved without liquidation and transfer all their assets and liabilities to a company they establish, in exchange for issuing to their shareholders, shares to the newly-established company and eventually for a cash payment of maximum 10% from the nominal value or, if not, from the accounting equivalent of such shares. As in the case of "*merger by absorption*", the contents of art. 90 para.2 state the exception according to which it is allowed the merger by establishing a new company achieved when one or more companies cease to exist or are under liquidation, provided that this option is limited to the companies that have not started to distribute their assets among shareholders yet.

In case of *merger by absorption* they consider the following steps:

• drawing up of the merger project by each of the companies that are to merge and its publication;

• approval of the merger project by the general shareholders' meetings of the merging companies and drawing up of the detailed written report;

• publication of the merger project;

• examination of the merger proposal by experts;

•protection of the interests of creditors and bond holders of the merging companies;

• effects of merger by absorption;

• nullity of merger by absorption.

a) The start of the procedure of merger by absorption takes place at the same time with the drawing up, in writing, by the administrative or management bodies, if any, of the merging companies, of the merger project that should contain:

• the legal status, name and headquarters of the merging companies;

• the exchange rate of shares and the value of eventual cash payments;

• the conditions of assignation of shares to the acquiring company;

• the date from which owning such shares grants the shareholders the right to participate in benefits, and any special conditions affecting such right;

• the date from which the transactions of the absorbed company are considered as belonging to the acquiring company from an accounting point of view;

• the rights granted by the acquiring company to share holders, granting special rights also to title holders, other than shares, or the measures proposed in this regard;

•any special advantage granted to experts, members of administrative, management, supervision and control bodies of the merging companies.

The directive regulates a situation of exception, i.e. the one in which the merger by absorption is achieved by a company owning 90% or more, but not all the shares or other titles that grant a right to vote in the shareholders' general meetings of the absorbed company or companies, if the publicity conditions for the acquiring company are met at least one month before the date established for the general shareholders' meeting of the absorbed company or companies, meeting that is about to decide on the merger project.[3]

In such a situation, the Member States, through the domestic rules of implementation of this directive, should not impose the approval of the merger by the general shareholders' meeting of the acquiring company.

Moreover, in such a situation of exception, the following are no longer compulsory steps to get through:

drawing up the written report, publication of the merger project and its examination by independent experts, if the minority shareholders of the absorbed company exercise the right that their shares be acquired by the acquiring company, requesting in exchange the value of their shares.

In case the members of administrative or management bodies of the absorbed company commit some errors, the Member States should provide, by internal rules of transposition of this directive, the civil liability towards the shareholders of the absorbed company. The experts charged with drawing up the report will be liable from a civil point of view, in the same extent, for mistakes committed in performing their activity.

b) At least one month before the date of the general meeting that is to decide on the merger project, all shareholders have the right to examine at least the following documents at the headquarters office:

• the merger project;

[3] see also art.113 of Directivae 2017/1132

• the annual accounts and reports of the merging companies for the previous three financial years;

• if any, an accounting situation drawn up not earlier than the first day of the third month before the date of the merger project, if the most recent annual accounts were made for a financial year concluded more than six months before such date;

Once the previous documents were examined, the members of the general meetings of the company/companies that is/are to merge submit the merger project for approval. In this regard, it is provided that, for the validity of the approval decision, they need a majority of at least two thirds from the votes corresponding to the shares or to the subscribed share capital represented. Nevertheless, the Member States, by their provisions of transposition, can provide that a simple majority of votes is enough if at least half of the share capital is represented[4].

c) The merger project should be published under the ford provided by the legislation of the Member States, for each of the merging companies, at least one month before the established date when the acquiring company general meeting is to decide on the merger project. Nevertheless, the merging company is exonerated from the publicity obligation if, for a continuous period starting at least one month before the date established for the general meeting that is to decide on the merger project and ending not earlier than the end of such meeting, it makes the merger project available on its own website, for free.

The Member States can request that such publication be made on the central electronic platform or any other internet page designated in this regard, situation in which they can make the companies pay some special fees for such publication.

d) For each of the merging companies, an administrative or judicial authority shall appoint one or more experts that are to act on behalf of the merging companies, but independently from them. Such experts can be natural or legal persons or companies, according to the legislation of each Member State.

Their actual activity relies on that fact that they analyse the merger proposal and draw up a written report for shareholders. Following the relevant information and documents, the experts should:

[4] If there are more types of shares, the decision on the merger is object to a separate vote, at least for each category of shareholders whose rights are affected by such operation; see in this regard art. 92 para.2 of Directive 2017/3211

• mention in each case if, in their opinion, the Exchange rate of the shares is accurate and reasonable;

• indicate the method or methods used to obtain the proposed rate for the share exchange;

• indicate if such method or methods is/are adequate for such case, mention the values obtained by the use of each of these methods and issue an opinion on the relative importance granted to such methods in order to obtain the value decided.

e) The legislations of the Member States should provide an adequate protection system of the creditors' interests of the merging companies, whose debts are previous to the publication date of the merger project and are not due at the publication date. But what debts should be considered? We think that they are to agree on both debts previous to the publication date of the merger project and debts that are not due at the publication date.

e) Pursuant to art.105 of the Union rule, a merger has the following *ipso jure* effects:

• The transfer, both between the absorbed and the acquiring company, and also regarding the thirds, all the assets and liabilities of the absorbed company towards the acquiring company;

• the shareholders of the absorbed company shall become shareholders of the acquiring company;

• the absorbed company shall cease to exist.

f) The nullity of the merger by absorption can be invoked in the following situations:

- ✓ it operates only as a result of issuing a judicial sentence in this regard;
- ✓ the annulment procedures cannot be initiated after the expiry of a six-month period from the date when the merger is opposable to the person invoking the nullity or if the situation was remedied;
- ✓ if the irregularity that can lead to the annulment of a merger can be remedied, the competent court shall grant the companies involved a period of time to remedy the situation;
- ✓ the judgment issuing the nullity of the merger does not jeopardise by itself the validity of the obligations in its charge or in the benefit of the acquiring company, engaged before the publication of the judgement and after the date when the merger becomes effective;
- ✓ the companies taking part in the merger have joint and indivisible liability for the above-mentioned obligations of the acquiring company.

Merger by establishing a new company.

In case of the merger by establishing a new company, "the merging companies" and "the absorbed company" mean the companies that cease to exist, and "the acquiring company" means the new company.

Also for the *merger by establishing a new company,* they have to get thorugh the steps mentioned in this directive for *the merger by absorption,* respectively:

• drawing up of the merger project by each of the companies that are to cease to exist. Thus, pursuant to art. 109 para.2 of the directive, the merger project and, if contained in a separate document, the articles of association or the articles of association project and the memorandum of association or the memorandum project of the new company should be approved by the general meeting of each of the companies that are to cease to exist;

• approval of the merger project by the general meeting of each of the companies that are to cease to exist and drawing up the detailed written report. There is an exception from the requirement of drawing up the merger report by the general meeting, situation in which one or more companies is/are dissolved without liquidation and transfer all their assets and liabilities to another company, if all the shares or other titles of the absorbed company or companies belong to the acquiring company and/or to the persons holding such shares or titles on their behalf and also on behalf of the acquiring company;

• publication of the merger project;

• examination of the merger proposal by experts;

• protection of the interests of the creditors and of bond holders of the merging companies;

• effects of the merger by establishing a new company;

•nullity of the merger by establishing a new company.

Cross-border mergers[5] of companies.

The cross-border mergers operate in case of joint-stock companies established in accordance with the law of a Member State, which have the registered seat, the central administration or the headquarters within the European Union, provided that at least two of them should be regulated by the law of different Member States (hereinafter named "cross-border mergers").

The cross-border mergers are only possible between the types of companies that can merge based on the domestic law of such Member States. Thus, although the text of the directive does not identify specifically the types of cross-border mergers, making reference to national regulations, we conclude that the two types of mergers fall under this regulation, respectively the merger by absorption and the merger by establishing a new company.

Pursuant to the domestic law of the Member States, the merger can be forbidden due to public order reasons, regarding the protection of the creditors of the merging companies, of the debt holders and of the security holders or share holders, as well as of the employees, regarding their rights arisen before the merger[6].

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[5] "Merger" means an operation by which: a) one or more companies which, following a division without liquidation, transfer all its assets and liabilities to another existing company, the acquiring company, in exchange for issuing to shareholders of some securities of shares representing the capital of the other company and, if any, by making some cash payment not exceeding 10% from the nominal value or, if there is not a nominal value, from the accounting value of such securities or shares; b) two or more companies which, following a division without liquidation, transfer all its assets and liabilities to a company they set up, the new company, in exchange for issuing to shareholders of some securities of shares representing the capital of the new company and, if any, by making some cash payment not exceeding 10% from the nominal value or, if there is not a nominal value, from the accounting value of such securities or shares; c) a company which, following a division without liquidation, transfer all its assets and liabilities to the company owning all the securities or shares representing its capital. See in this regard art. 119 of Directive 2017/1132

[6] Pursuant to the provisions of Directive 2001/23/EC of the Council from 12 March 2001 regarding the maintenance of the workers' rights in case of transfer of enterprises, units or parts of units, information and examination become effective only in cases when they realize it in due time, before the amendment at the unit level takes place. Concretely, the assignee and the assignor should inform the representatives of such employees, affected by the transfer, concerning: a) the transfer date or the proposed transfer date; b) the reasons for transfer; c) the legal, economic and social consequences of the transfer for workers; d) the measures envisaged regarding workers. The assignee should offer such information to the representatives of employees in due time, before making the transfer. At the same time, the assignor, in his turn, should offer information to the representatives of his own employees before them being directly affected by the transfer, concerning the maintenance of their

Common project of cross-border merger. The Union rule regulates the obligation of drawing up a common project by the companies that are to merge and, implicitly, that are to cease to exist, giving birth to a new company. This project should contain at least the following elements:

a) status, name and headquarters of the merging companies and those proposed for the company resulting after the cross-border merger;

b) the rate applicable to the exchange of the securities or shares representing the capital of the company and the value of ay cash payment;

c) the ways to distribute the securities or shares representing the capital of the company resulting after the cross-border merger;

d) the possible effects of the cross-border merger on the work force;

e) the date when owning the securities or shares representing the company capital gives the holders the right to take part in the profit, as well as all the special conditions affecting such right;

f) the date when the transactions of the merging companies are considered as belonging to the company resulting after the cross-border merger, from an accounting point of view;

g) the memorandum of association of the company resulting after the cross-border merger;

h) information regarding the assessment of the assets and liabilities that are transferred to the company resulting after the cross-border merger;

i) the accounting data of the merging companies used to establish the conditions of the cross-border merger;

j) all the special advantages granted to the experts examining the common Project regarding the conditions of the cross-border transaction or of the members of administrative, management, supervision or control bodies of the merging companies.

Publication of the common project of cross-border merger. The common project of cross-border merger is to be published according to the law of each Member State, for each of the merging companies at least one month before the date of the general meeting that is to decide in this regard.

Any of the merging companies is exonerated from the publication obligation for a continuous period starting at least one month before the established date for the general meeting that is to decide on the cross-border merger project and ending not earlier than the end of such meeting, if it

employment and of their work conditions after the transfer. In case the assignee or the assignor estimates some measures concerning their employees, each of them, separately, should consult with the representatives of their employees within a reasonable period of time, so that they could reach an agreement.

makes the common project of such merger available on its own website, for free.

As an exception, the Member States can request that the publication be made by the means of the central electronic platform. Alternatively, the Member States can request that such publication be made on any other webpage than the central electronic platform, a reference offering access to that webpage is to be published on the central electronic platform at least one month before the date when the general meeting is scheduled. Such reference contains the date of publication on the webpage of the common project of cross-border merger ans is available to the public for free.

Report of the management or administrative body. The management or administrative body of each merging company should make a report to be submitted to the members, explaining and justifying the legal and economic aspects of the cross-border merger and the implications of the cross-border merger over the associates, creditors and employees. The report is made available to the associates and the representatives of the employees or, if there are not such representatives, to the employees themselves, until the completion of one-month period before the date of the general meeting. In case the management or administrative body of any of the merging companies receives, in due time, a notification from the representatives of their employees, based on the domestic law, such notification shall be attached to the report.

*Report of independent expert***.** For each merging company, an independent expert should make a report, intended for associates, that is made available at least one month before the date of the general meeting. In order to draw up such report, the experts have the right to obtain all the relevant information and documents from the merging companies. After taking note of such reports drawn up both by the management or administrative body of each merging company, and by the independent expert, the general meeting of each merging company shall decide on the approval of the common project of cross-border merger.

Control of lawfulness of cross-border merger. At the request of each merging company, pursuant to the applicable domestic law, each company is issued a certificate indisputably certifying the legal fulfilment of the acts and procedures previous to the merger, by a competent authority that can be, if any, the court of law, notary public or another authority authorised pursuant to the domestic law. Also, the same national authority, respectively the court of law, notary public or another authority authorised pursuant to the domestic law, is competent to verify the lawfulness of the cross-border

merger regarding the procedural part concerning the accomplishment of the cross-border merger and, if any, the formation of a new company following the cross-border merger.

Effects of cross-border merger. The contents of the directive identify effects distinctly, having as sole criterium the type of merger. Thus, in case of a merger by absorption, we have the following effects: a) all the assets and liabilities of the absorbed company shall be transferred to the acquiring company; b) the associates of the absorbed company shall become the associates of the acquiring company; c) the absorbed company shall cease to exist; d) no share of the acquiring company cannot be exchanged with shares of the absorbed company owned either by the acquiring company or by a person acting in his/her own name, but for such company, or by the absorbed company or by a person acting in his/her own name, but for such company.

The cross-border merger achieved by establishing a new company shall have the following effects: a) all the assets and liabilities of the merging companies shall be transferred to the new company; b) the associates of the merging companies shall become the associates of the new company; c) the merging companies shall cease to exist; d) the rights and obligations of the merging companies arising from the labour agreements or from the work conditions, existing at the date of entry in force of the cross-border merger, shall be transferred, due to the entry in force of such cross-border merger, to the company resulting after the cross-border merger, at the date of its entry in force.

Conclusions

We consider that, by Directivae 2017/1132, the Union co-lawmaker succeeded in codifying the Union company law, even if only partially, regarding some aspects mentioned here.

Nevertheless, we see that the Union Member States continue to apply separate legislative acts in this field, at state level, but with national incidence. The latter ones are under permamnent amendment because of their compliance with the Union provisions in the matter, which are directives and regulations.

Lastly but not the least, through the harmonization of the company law, they seek to promote and guarantee the fundamental right regulated by art.16 from the Charter of Fundamental Rights of the European Union, the

freedom to conduct a business within the limits provided in art.17[7] of the Charter.

References:

Directive (EU) 2017/1132 of the European parliament and of the Council on 14 June 2017 regarding some aspects of the company law

Directive 2001/23/EC of the Council on 12 March 2001 regarding the maintenance of the workers' rights in case of the transfer of enterprises, units or parts of units

Regulation (EC) no. 2157/2001 of the Council on 8 October 2001 regarding the Statute for a European company (SE)

Directive 2001/86/EC of the Council on 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

[7] The ownership right.