

MERGER OF COMMERCIAL COMPANIES IN THE CONDITIONS OF THE FINANCIAL CRISIS

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Abstract:

The merger is considered to be the classic form of restructuring, in the opinion of some authors it represents a concentration of capital in order to survive. Unlike other forms of concentration, the result of merger is the creation of a new company with legal personality or assets to the companies in various forms of association.

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The main operations that are encountered in practice, when the company intends to increase its activity volume to achieve a concentration of economic, technical, human capital, are, besides equity acquisitions from other companies, clusters, alliances, interest sharing, changes in the internal organization, internal restructuring by modifying the articles of association and the fusion or division operations.

Merger has the effect of dissolution without liquidation of the company/companies which cease to exist and the universal transmission of assets and liabilities to the recipient company or companies, in the condition in which they are found at the time of the merger, in exchange for assigning their shares or social shares to the company/companies associates which will cease to exist and, eventually, a sum of money which cannot exceed 10% of the nominal value of the shares and the social shares assigned.¹

In the view of several authors, the merger is defined as being “the operation by which a concentration of commercial companies is achieved and they may have the same or different legal structures”.²

The merger represents a combination of enterprises, the legal provisions in connection with mergers differ from one state to another, this operation means a combination of enterprises in which:

a) the assets and liabilities of one of the companies are transferred to the other and the first company and dissolved.

b) the assets and liabilities of both companies are transferred to a third company, and both original companies are dissolved.

If the first version refers to a merger by absorption which is characterized by the fact that one of the merging companies continues its activity, the second version corresponds to the merger by fusion that involves the legal disappearance of the merging companies and the emergence of a new one that takes over the assets of the disappeared companies.

¹ Feleagă N., Malciu L., *Provocările contabilității internaționale la cumpăna dintre milenii. Modele de evaluare și investiții materiale*, București, Editura Economică, 2004

² Precupețu E., *Despre fuziunea societăților comerciale*, Revista de drept comercial nr.6/1993

Merger can also be achieved between different forms of companies; the merger can be achieved even if the dissolved companies are in liquidation, with the condition that they haven't started the distribution among associates.

The effects of the merger of enterprises are the following: the dissolution without liquidation of enterprises which cease to exist; transfer of enterprises' assets (assets and liabilities) which cease to exist to the enterprise receiving the contribution; achieving the quality of associates of the enterprise receiving the contribution by the associates of enterprises which are dissolved.³

The merger operation will be established by each company, under the conditions set for the amendment of the articles of association of the Constitution of the company, and:

- for merger by absorption in the acquiring company there is a capital increase by contribution of assets and in debts, at the absorbed company there will be recorded the dissolution and the entitlement to shares of the absorbent company to the shareholders of company being absorbed.

- for merger by fusion to the new company there will be recorded in the formation of contribution in assets and in debts, while in the case of the companies that disappear there will be recorded the dissolution and the entitlement to shares or social shares of the new company to the shareholders or associates of the disappeared companies.

The managers of the companies involved in the merger have the obligation to draw up a merger project which will include:

- form, name and registered office of each of the companies involved in the merger;
- justification and conditions of the merger;
- conditions of shares' allocation in the acquiring company;
- the date on which the shares or social shares emitted as a result of merger give the holders the right to participate in profits and any special conditions that affect this right;
- the exchange rate of shares or social share and the amount of any cash payments;
- the amount of the merger premium;
- the rights conferred by the acquiring company to the shareholders which have special rights and the holders of other securities besides shares, or the measures proposed concerning them;
- any special advantage granted to the experts appointed by the delegate judge in order to examine the merger project and drawing up a written report to the shareholders and members of the administrative or control bodies of the companies involved in the merger;
- the date on which the financial statements of the participating companies were approved, which were used to determine the conditions of the merger;
- the date from which the transactions of the company being acquired will be considered, from an accounting perspective purposes as belonging to the acquiring company.

The merger project signed by representatives of the companies shall be deposited at the Trade Registry Office accompanied by a statement from the company that ceases to exist as a result of the merger, about how they decided to extinguish liabilities.

³ Uher Marina, Nagy Cristina Mihaela, Cotleț Bogdan -Tax And Accounting Procedures In The merger Of Insurance Companies, ANALE. Seria Științe Economice. Timișoara, Vol. XVII, 2011, p. 554

The creditors of the companies taking part in the merger may object to the merger project, objection which suspends the merger's execution until after the court's decision becomes irrevocable, except in cases where the debtor company proves the payment of debts or offers guarantees accepted by creditors or concludes with them an agreement for debts' payment.

In the case of the merger of securities holders, other than shares, which confer special rights, they must receive within the acquiring company rights at least equivalent to those held in the company being acquired, except the case in which the alteration of the rights in question is approved by a meeting of the holders of such securities or individual by holders of such securities, or in the case in which the holders have the right to obtain a redemption of their securities.

The procedure for merger is carried over time in the next six successive phases as follows:

- the first phase consists in preparing the draft for the merger project;
- the second phase consists in endorsing and publishing the merger project;
- in the third stage, after the project's publication, takes place the monitoring of enforcement against third parties;
- the fourth phase consists in adopting the decision regarding the merger by the extraordinary general meeting of each of the companies involved in the merger process;
- the fifth phase consists in preparing the documents for registering with the Trade Register of the mention of merger;
- the final phase consists in the removal from the Trade Register of the commercial companies which cease to exist as juridical persons, but without liquidation.

Merger operations have implemented several types of merger, trying to achieve their classification, we may say:

a) depending on the legal methods of achievement, we distinguish:

- merger by reunion or fusion or creation merger is the result of the operation by which two or more companies associate to form an economic ensemble through the complete transmission of the merging company's patrimony to the company that will be constituted;
- merger by absorption, also called statutory merger, is the operation through which a company fully acquires another company that disappears;
- merger as a means of internal restructuring is a way by which groups restructure to reduce the number of component companies or for the liquidation of companies remaining without a field of activity or for the elimination of companies that register losses.

b) if we are considering the relation between companies involved in the merger activity:

- horizontal merger implies the involvement of competing companies which usually produce the same product;
- vertical mergers is achieved between partner companies such as supplier-customer;
- congener merger involves the participation of commercial companies that are complementary by their field of activity.
- conglomerate merger is achieved between companies from different branches of activity, the purpose being the diversification of activities with a minimum risk.

c) in economic terms, a traditional classification can be made:

- annexation mergers characterized by the supremacy of a company upon other and consist in transfers of power and control through patrimonial mutations, in legal terms we discuss about merger by absorption;

- combination mergers characterized by combining two or more companies for the purpose of the creation of a new company, in legal terms we are talking about merger by fusion.
- internal restructurings which have as an object the legal remodeling of the power within a group without changing the dominant control or modifying the internal organization.

d) if we are considering the motivations underlying the merger, we distinguish the following categories:

- development merger carried out for economic reasons which may take place between companies from the same branch or from different branches;
- salvation merger is based on legal or financial reasons and is achieved in order to avoid bankruptcy or liquidation of companies which are badly managed, but which have advanced technology and superior equipment;
- merger carried out for reasons of a social nature aims at avoiding unemployment or where appropriate to support the development of sectors which are facing crisis situations.

CONCLUSIONS

In the current economic crisis conditions, the merger of commercial companies as a concentration of capitals provides the financial and technical resources for carrying out the company's activities.

The creation of a single company offers the possibility of obtaining unique sales markets, setting products prices, their performance in terms of superior quality and maximum efficiency.

The merger of companies avoids liquidation of companies, leads to the improvement of bad management in unprofitable companies, the opportunity of refurbishment without additional investment through the simple communion of capitals.

The new company creates a new picture for the business partners and employees of the company, as well as for the products that will be made.

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