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Research Article

CONSIDERATIONS REGARDING THE LEGAL NATURE OF MERGER-COMPARATIVE LAW ASPECTS

Viorel Bănulescu*

Academy of Economic Studies- Bucharest, Romania

A R T I C L E I N F O

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A B S T R A C T

The problem of the legal nature of the merger has constituted a subject of debate and controversy in the literature and jurisprudence. The attempt to define the legal nature is a difficult step because merger is a complex process. This article presents the main currents of opinion and theories in the field from Europe and U.S. Also, this article aims to analyze the connections and differences between these theories and to present the strengths and the vulnerabilities aspects concerning the currents of opinion.

INTRODUCTION

The determination of the legal nature of the merger is an act of utmost importance,so the success of this approach depends on a correct understanding of this complex operation, as well as the decision to adopt incidents rules in this field. In the Romanian doctrine, the attempts to identify the legal nature of merger have generated numerous classifications of the merger, but none of them has been able to provide a clear explanation regarding the legal nature of the merger. This is due to the fact that when we talk about the legal nature of the merger, we actually refer to a set of very complex phenomena, which include multiple aspects that have to be defined. So,"the task of interpreting the legal nature of the merger consists essentially in selecting from the multitude of aspects that characterize this operation, the one or ones that can be considered defining. Such selection is inevitably variable from author to author if not, to some extent, subjective or even arbitrary."[1] Consequently, exposure to different theories developed over time, on the concept of merger, necessarily implies achieving a classification that is required for shaping the existing points of view, that are highlighting in the same time,the different approaches of interpretation. In the literature there have been outlined three main theories on the legal nature of merger.

Corresponding author:* **Viorel Bănulescu
Academy of Economic Studies- Bucharest, Romania

The traditional theory

The traditional theory refers to an interpretative current that is based on the 'institutional' concept of the society and which sees the merger as an limitation-constitutive phenomenon, part of a successful operation. The supporters of this theory give absolute value to the society as law subject independently of association/shareholders. According to this theory, the merger operation leads to the termination of the merging companies, followed by the formation of new companies that incorporate the heritage of the merged companies through a successful operation. According to the current of opinion,the termination of the company and formation of new companies are components of the same operation.The merger constitutes such a way termination of the existence of a legal person, without distinguishing whether it is about merger by acquisition or consolidation. Since both in the first as well as in the second case, at least one legal person involved in the merger will cease to exist.

For most promoter authors of this theory,the merger delivers a universal succession namely, the transmission from a subject to another of the rights and obligations held.In other words, according to this theory, the operation of merger generates a universal transmission[2], through which its active and passive assets are transferred to the[3] acquiring company or to a company newly established by the act of merger,the latter

[1].Speronello, F,"La scissione di società fra tipicità ed autonomia negoziale:un caso di "assegnazione" di quote della scissa ".*Giurnale commerciale*,vol.2,2001,p.287

[2].Boroi, G.*Civil law.General Part.People.* Ed.All Beck, Bucharest 2011,p.402
[3]Lefter C.Limited company in comparative law, Ed.Didactică and pedagogica R.A.,Bucureşti,1993,p.137

taking over the responsibility for all transferred obligations.[4] The patrimony is a legal universality, which creates a close link between the elements that form it,meaning between active and passive. Therefore,the liability becomes inextricably linked to the asset,while being transmitted in the same time with it.[5] It should be noted that the beneficiary company does not have the quality as the third party, but the quality of universal successor, assuming all obligations of the company or companies that merged and became part of the contracts that are taken over. Therefore, the traditional theory adds the hypothesis of universal succession[6] through merger,based on the assumption that hereditary succession is not the only hypothesis of universal succession that exists in the legislation. It should be noted that although the broadcast in case of a merger is assimilated to mortis causa succession, it has certain features, primarily related to the content of the transferred assets. Regarding the active part of the heritage, in principle, the contracts intuitu personae will not be automatically forwarded.

In relation to the causal link between succession and termination of companies, the "traditional" theory can be divided into two currents of opinion. The first refers to the merger as a mortis causa succession, through which the company that results from the merger incorporates the rights and obligations of the companies which have ceased to exist, thereby creating a direct and logical link between this hypothesis of inheritance and hereditary succession (the termination of existence becomes the cause of inheritance).

The second current of opinion considers the merger operation as succession inter vivos, which has its foundation in the merger act, being seen as an act of negotiation or as an executive act in the decision to realize the merger (the succession becomes the cause of the termination of existence). The qualification of the merger as a fundamentally transferring operation is considered by the supporters of the traditional thesis as being consistent with the content of 78/855/C.E.E. Directive with the community rules in general, with the subsequent ones to this directive and with its national rules of application. Both in the French and Spanish legislation,the transfer of assets is seen as the key element of the merger operation. Directive 2011/35/U.E. through article.19 supports the traditional theory, since the law sees as right effects of the merger, the transfer of assets between the merging companies as well as the transfer in relation to third parties, of all the assets and liabilities of the acquired company by the acquiring and not least, the fact that the absorbed company ceases to exist. In the Romanian legislation, according to art. 244 N.C.civ. The merger is presented as being one way of terminationof a legal person, without making a distinction between merger by acquisition or by consolidation. In the case of the merger, at least one legal entity will cease to exist and will send all its assets[7] and liabilities to the beneficiary company of the merger or to the newly created company.

In the Romanian doctrine,the merger is referred as a universal succession showing that"the phenomenon of merger achieves a universal succession similar to the mortis causa universal succession and it generates the existence of a subject that is new center of the future legal links in which will participate the subjects who merged in the new form. The main effect of this operation is represented by the the pre-existing heritage societies confusion, the entity resulted from the merger being solely and directly liable for the debts of the permanently fused subjects through the effect of the merger.(...) Being a succession with universal title,the merger by absorption forwards to the acquiring company the legal situation of the acquired company. All legal relationships,assets and liabilities are transferred to the acquiring company, which maintains its legal personality and continues its work in a new production complex. The weak point of the traditional theory is the fact that the sequence between the entities - assimilated in particular to the mortis causa succession - is strongly influenced by an "anthropomorphic" understanding of the companies. The theory that resembles the merger with the mortis causa succession, remains faithful to an"institutional"vision of the companies,treating the company as"a tremendous human being".

Thus, the merging company dies and the beneficiary company inherits it as the heresies inherit the deceased. This anthropomorphic conception of the society and its social relations, involves distortions in the interpretation of the merger effects. As a result, the assimilation of the termination of the existence of a merged society with a succession mortis causa would involve the violation of the legal regulations with respect to the termination of the acquired company and the sequence with its universal heritage by the acquiring company. An example of this is the fact that the associates/shareholders of the acquired company will not become associates/shareholders of the absorbing company unless this effect is provided within the negotiations in the preparatory phase of the merger. If instead, the merger would be considered as being a result of an agreement of will and the termination of the merged companies would be regarded as a continuation of a report within the new created company, then there would not appear the need to[8] resort to the institution of succession. In addition, if for individuals,the mortis causa succession is the result of an undesired event (death), in case of the merger, however, the termination of the company is the result of a manifestation of willingness from the part of the companies that take part in the merger, carried out with a particular purpose. From the analysis of the regulation of the two law institutions, it can be seen the fact that there are many differences between them in terms of the functions that they fulfill, the effects they produce and the means of achieving them.

The transformative theory

Unlike the traditional theory,the transformative theory is based on the contractual concept of the company, and in this regard, it hightlights the position and interests of the shareholders /associates about their activity within the company, resizing the importance of the company as law subject, distinct from its shareholder/associates, and revealing at the same time,the profound nature of the merger. In the Italian doctrine,this

[4]RUPERTO, C.,*La successione universale tra vivi nel nostro diritto*,in *Riv. dir.comm.*,1950,I,p.129
[5]ASCARELLI, T.*Appunti di diritto commerciale: società commerciali*, Roma,1933, p.265
[6]MARZIALE, G.*La fusione delle società nella disciplina comunitaria,* in *Le società*,1986, p.976
[7]Stan, I.N."*Merger and division of commercial companies"*.Magazine of commercial law, nr.6,2000,p.110
[8]Tantini, G."Transformazione e fusione di società"în *Trattato di direto commerciale e di direto pubblico dell'economia,* F. Galgano,1985,p.275.

theory began to take shape in the early 60s, its promoters stating that the merger should not be seen as an hereditary operation, but its ground is the mutual change of the statute of the companies participating[9] in the merger, that is completed, in care of a merger through consolidation, by assimilating different social positions in the company statute[10] that result from the operation, or in case of a merger by absorption,by adapting the statute of the absorbed company in the one of the absorbing company. It is considered that through the merger operation, a correspondence objective is created between different statutes and therefore the obligation of achieving all the reports by one entity[6]. Consequently, the merger by absorption, in a technical and legal regard, would be nothing more than a phenomenon of the union of the two groups and the two heritages, which the societies achieve through changes in the statute, whose negotiation is an act of training and the act of merger represents the final and conclusive moment.

However, the theory as formulated remains within the limits of the traditional perspective, given that, on the one hand it is considered that the essence of the merger consists in the statutory mutual change of the societies participating in the merger and on the other hand, continues to classify the merger, on a subjective level, as a hereditary operation[7]. Transformative theory is based on the objective fact, considered to be the one that characterizes the operation,of the continuity between activity of the merging companies and the activity of the beneficiary companies.

As a result, the effects of the merger have gained the second place as importance. Thus, they are not considered as basic elements for the characterization of the legal nature of the merger, neither the merger termination of the corporations as subjects of law nor the establishment of another company (beneficiary), nor the transfer of the assets of the merged companies to the new company[8]. In the view of the supporters of this theory, the essential elements in defining the legal nature of the merger are the work carried out by the companies according to their activity and their organization, which in the event of a merger,there would not have any possibility of continuity, much less in case of termination of the existence, but they will continue to exist, experiencing modifications as a result of the merger. Therefore, the merger is legally qualified as a particular modification of the progress of rules of the activity, in the doctrine,reference being made generally to"amendments to the articles of association"respectively to "amendments to the company contract. Thus, the merger is viewed as a mere modification of the production activity designed to promote adaptation of the"system to activity"and not the adaptation of the"system to subject".As a result,the company is seen as an organized activity,being considered objectively and not subjectively.

Consequently,the essence does not lie in any transfer of assets or rights between subjects, as it represents the joining structures of the participating companies. Therefore, the merger will be within the system, oriented towards"activity"[11], given that it is a phenomenon that has nothing in common, neither logically nor legally or conceptual with the classic system of private law oriented towards the "subject"[12]. In the specialty literature, it is stated in particular,that the transformative event leads to the society contracts unification by their mutual integration and through it, the extinctive effect is limited with regard to a legal entity that the society represents, occurring in fact, only a loss of individuality. The transformative theory is also supported by the Romanian doctrine, which states that the merger operation of the companies is equivalent with the modification of the articles of incorporation.This opinion implies that the merger operation is governed both by the provisions of the common law from the contract law, with regard to the principles governing the reorganization of the companies and also with the ones of the Companies Law 31/1990, particularly on issues related to the the[13] formal requirements and requirements of publicity that must be met for the establishment of companies. In the Romanian legislation,it is considered that the merger creates a double change,on the part of the company as at least one company loses its legal personality, ceasing its activity through dissolution without liquidation, and on the other hand,an amendment to the articles of incorporation of the acquiring company.The merger is therefore assimilated as importance with the amendment of the articles of incorporation, whereas, according to the Article 239 of the Companies Act 31/1990,the decision to merge is taken by each company in accordance with the conditions set for the amendment of the articles of incorporation.

Also by the provisions of art.248, it is mentioned the fact that the merger involves the amendment of the articles of association by imposing obligations regarding the registration of the modifying act of the articles and memorandum of association in the Trade Register office and its publication in the Official Gazette. The modifying act mentioned in the content of article 248 is, in fact, the decision of the Company Shareholders' General Assembly(associations), of the aquiring company. Matters that may be changed in the articles and memorandum of association are multiple, ranging from change of the object of activity, company's name or the head office to changes in the registered capital or the legal form of the company.It should also be noted the fact that not any merger automatically determines the amendment of the articles and memorandum of the beneficiary association, the most relevant case is the absorption of a subsidiary by the parent company, thus there is a high probability that the articles and memorandum of the association are not modified. This aspect is actually a weakness of the transformational theory that assimilates the amend of the articles and memorandum of the incorporation. Also, the allocation of shares to the shareholders of the societies that cease to exist, corresponding to the transferred heritage through merger, has as basis the universal succession that underlies the traditional theory.From the perspective of transformational theory, the merger consists in the modification of the society contracts, by realizing the continuation of legal reports of participation of the company's associates that cease to exist within the new or the acquiring company that results from the merger. As a result, when it is stated that the merger does not generate any translated action to the companies involved but only a modification of contracts society, it is implicitly admitted that companies, regarded as

[9]RICCI, E.F.,*Gli effetti della fusione di società sul processo pendente* .Riv.dir.proc.,2007,p177

[10]Simonetto,E."Della trasformazione e della fusione delle società",în *Commentario del codice civile*, a cura di A.Scialoja şi G.Branca,Bologna-Roma,1976,p.110,

[11]FERRO-LUZZI P., *I contratti associativi*, Milano,1971,p.202

[12]Angelici,C.,*Attività e organizzazione. Studi di diritto delle società*,Torino, 2007,p.233

[13]Şerban,S.,*"A point of view about the legal nature of the merger operation of the commercial companies".* Law, nr.9,1992,p.22-26

legal persons are not considered real legal entities as individuals, but organized structures in order to promote the common interest of shareholders[11]. Therefore, the denial of the translational nature of the merger actually involves the minimization of the importance of the institution as a legal entity.

The contractual theory

A branch of the transformational theory is represented by the contractual theory according to which the merger does not represent a phenomenon of succession between entities,but causes a unification between commercial groups. Therefore, in this perspective, the merger does not lead to the termination of the merging companies, even if the loss of the individuality of the companies occurs that participate in the operation by the unifying effect of company contracts[17]. In the Romanian doctrine, from the perspective of the contractual theory,in fact, it is[14] considered that the merger is actually a contract under two suspensive conditions. Thus, the first condition is to approve the merger project and implicitly the merger operation by every general meetings of the participating companies. The second condition is represented by the control of legality of the merger project and of the merger, which is conducted by the judge ruling on the merger closing. A result of this control,the merger[15] is recorded in the Trade Register,the recording date represents the moment from which the effects of the merger towards the parties and third parties take place, unless the parties have expressly provided otherwise. Another argument which supports the contractual nature of the merger theory is that the companies that cease existence become associates of the receiving company of the merger, by joining its partnership agreement. The merger agreement negotiated by the participating companies and approved by the general meeting of these is the contract between the association of these companies that sets the merger terms. The possibility of introducing actions in the invalidity[16] of the merger as governed by Article 251 of the Companies Act 31/1990 is likely to support the contractual nature of the merger. In the Romanian literature there is no uniform opinion regarding the type of contract that the merger represents. Thereby, in the first opinion,the merger is assimilated to an exchange contract under which the parties may agree to pay a cash payment in order to achieve the contractual balance.We consider that the perception of the fusion as an exchange contract is explained by the fact that[17] under this agreement the company which ceases to exist acquires in exchange for its assets, shareholdings for its shareholders (associates) in the company that took over its assets. This qualification of the merger is considered to be limiting because the merger is a contract more complex than the swap contract. Another opinion is the one that assimilates the merger with an unnamed contract.A critique of the theory of the contract is determined by the paradox that it generates. Thereby the merger agreement is concluded initially by several parties as later it will remain only[18] a contractual part. In reference to this situation,an analogy can be made to a marriage contract following which it is constituted a single entity, the family. The specific difference is that, if the marriage contract can be terminated at any time, the merger agreement can not be terminated, only within the period prescribed by law.

The legal nature of merger in the U.S. law

In the U.S.doctrine, the matters concerning the legal nature of mergers are analyzed in a pragmatic manner which differentiates pointedly from the dogmatic approach specific to the civilist legal system. Thus,the elaborated theories that analyze in a exhaustive manner the nature and effects of the merger from the civilist legal system area, are not very agreed in the common law system where priority is given to the analyzes oriented towards the practical aspects of this operation. When the process of the merger is analyzed, aspects of balance of power between the beneficiary company and the company that ceases to exist are taken into account and a special attention is paid to all the aspects related to the contractual balance. It is therefore acknowledged the nature[19] of the mergers but at the same time,the modifying function[20] on companies involved in the concentration operation. Another author sees the merger[21] as a process of succession emphasizing that through this character it differs from other operations through means of which the acquisition of assets of some companies is realized. On the other side there are authors who have an approach more pragmatic as regards the legal nature of the merger, considering that it is actually a mechanism for purchase of assets of companies and not an extinct or modifying process that affects the legal person. Thus, according to these authors,the merger with the purchase of stocks and assets constitute three specific methods of companies to acquire. On the other hand, it should be noted that in the American law,the concepts of fusion and merger do not overlap, they are not equivalent in terms of structure and functions. Thus, in a very rigorous sense, the"merger"concept refers to what is known in the European law as fusion by creating a new company and for merger by absorption it is resorted to the term consolidation. Even in situations in which the merger is merely considered a method of the companies to purchase, the generated effects are the ones described in the model of universal succession, so that the legal personality of the target company ceases. The target company ceases as a separate subject of law by integrating in the structure of the acquiring company so we can observe the extinctive effect of the merger on the legal personality of the incorporated entity.Regarding the effects of the merger in relation to the receiving company, the universal and automatic transfer of the heritage of the company incorporated is admitted, in a similar manner which occurs between[22] *de cujus* and his heirs. In some cases,the universal succession which takes place between the companies involved in the merger was expressly limited by the decisions of some courts that have found the heritage in question included contractual intransmissible relationships.The courts have therefore decided for the merger to be used as a vehicle through which only freely concluded conventions to be transfered between the parties on the basis of autonomy of will and binding character.

[14]Popa,S.,Commercial law,legal theory and practice,Ed.Universul Juridic,Bucureşti,2009,p.191
[15]Angheni S.,C.Stoica,M.Volonciu,Commercial Law,Ed.C.H.Beck,Bucureşti 2008.,p.210
[16]Piperea Gh.,,Commercial Law,Vol.1, Ed.C.H.Beck,Bucharest,2008,p.293
[17]Hinescu A.*Theories about the legal nature of merger of companies, European Legal Studies and Research*, Timişoara, 2012
[18]Hinescu A.The merger of companies,Ed.Hamangiu,Bucureşti 2016,p.47
[19]COATES,R.,GILSON J.,*Cases and materials on corporations*, Bologna,1995,p.905
[20]CLARK R.C.,Corporate Law,Boston-Toronto,1986,p.632
[21]GEVURTZ F.,*Corporation Law*,St.Paul,2000,p.644
[22]GEVURTZ F.,*op.cit.*,p.644

SECTION 3. CONCLUSIONS

As we have seen, the complex nature of the essential elements of the merger and the effects produced by it, has led to the appearance of many theories regarding its legal nature.The problem that most of the authors who have studied the phenomenon of the merger came up with, was choosing from the multitude of aspects of this operation, the one that best reflects its profound nature.Therefore, two main theories have appeared regarding the legal nature of the merger: the traditional theory and the transformational theory. While the traditional theory was developed around the translative effect of the merger through which the merger could be similar to a universal succession,the transformational theory has concentrated on the effect of modifying the structure of the companies involved in the merger and the changes that occur in their articles of association.The inflexibility to the possibility of coexistence of these effects has made these theories to be limited and to be easily subject to the opponents'criticism.From the theories of conciliation,the most important is the contractual theory, that have accepted the existence of several effects of the merger, considering that the merger has the nature of a contract between the participating companies

An initial analysis shows that the patrimonial transfer that occurs in case of a merger seems identical to the one which operates between de cujus and his heirs.By examining the two processes, we can identify the similarity aspects and also the differentiation elements that are more important than the first. The element of similarity between the two ways of transferring the heritage is the fact that in both cases there is a change of holder's rights and obligations contained in the universality that is the subject of the conveyance. As a result of this fact,we can compare the situation of the acquiring company with the ones of the successors in case of death of the individual.However the transmission that operates in case of the merger is not synonym and much less equivalent to the one that occurs in case of universal succession. So,this is determined by the fact that the two institutions of civil law are based on completely different elements. The universal succession is determined by the death of an individual who is an unpredictable material event that escapes human will.In conclusion, the legal succession is based on a fact that is actually a person's death.Contrary to the legal succession,the decision of merger is adopted along the social life of the entities involved in the operation of economic concentration. The adoption of the decision will determine the binding legal effects that will materialize in the transfer of the heritage from the company that ceases to exist to the beneficiary company of the merger.In the case of merger, the transfer of heritage is produced by a legal act. The merger can not be achieved unless at least one of the companies involved is terminated for the pre-existing or for the future one. As a result of the merger by absorption, the shareholders respectively the associates of the company that cease to exist will gain this quality in the acquiring company. If this effect does not occur,the operation in question can not be characterized as constituting a merger by acquisition. In the specialized literature of U.S.A, the aspects related to the legal nature of the merger are addressed and analyzed in a pragmatic manner clearly different compared to the corresponding literature in E.U. In the analysis process of the merger, there are specifically addressed issues concerning the relations of power between the involved companies. In the opinion of an author,the merger has a nature and also a modifying function. Therefore, priority is given to the contractual theory which is presented in the European literature.

In the Romanian law, the legal nature of the merger is analyzed from the perspective of the translative theory, as well as the transformational respectively the contractual theory. An argument that supports the contractual nature of the merger is represented by the possibility of bringing the action for nullity of the merger, as governed by Article 251 of the Companies Act 31/1990. The translative theory (Limitation)is grounded in the Romanian doctrine based on the provisions of article.244 N.C.civ of the Companies Act according to which the merger is regarded as a termination manner of the legal person, whether a merger by acquisition or by setting a new company. Regarding the modifying nature (transformational) of the merger, it results from the interpretation of the provisions of the Article 239 of the Companies Act 31/1990 according to which the merger is decided by each company under the memorandum of association. We consider that the merger has a complex legal nature which combines contractual nature elements with elements on which the traditional theory is based,but more preponderant are the former.

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