

# NATIONAL AND CROSS-BORDER MERGERS. CONCEPTUAL DEMARCATIONS

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## **Abstract**

Since any analysis of an complex institution as merger, and respectively of cross-border merger implies, first of all, a conceptual delimitation, the present paper intends, starting from various definitions and classifications provided by legal provisions and doctrine, to outline a complete definition, specific for mergers and cross-border mergers that will include all their characteristic elements and will also capture their complex character. Taking into account that the definition of the merger and, respectively, cross-border merger depends on the legal view through which a conceptual delimitation is sought, the program does not stop only at the delimitation of cross-border merger from the view of general applicable regulations, but also tries to delimitate this concept by reference to other special regulations. In this respect, this paper makes a delimitation between the merger regulated by the New Civil Code, the merger regulated by Law no. 31/1990 under its both forms (i.e. domestic merger and cross-border merger) and Law no. 21/1996.

**Key words:** reorganisation, merger, cross-border merger, economic concentration.

**JEL Classification:** K22, K33

## **1. Evolution of merger and cross-border merger notion from general national regulations perspective**

Considering their development dynamics, the companies have to adapt to variations imposed by economic context, and particularly to adopt appropriate forms to their business nature and significance. Due to the fulminant economic environment variations and development of industries, the readjustment requirement of the companies to new conditions<sup>2</sup> is a must. The needs concerning readjustment to economic development requirements may trigger reorganization, consolidation of activities of certain companies in order to create a more powerful company, by means of these operations providing a better use of resources, the improvement of business profitability and even the rescue of the companies under difficult circumstances.<sup>3</sup>

### **1.1. Merger – restructuring method of legal entities as per Decree no. 31/1954 and New Civil Code**

The initial reorganization regulation for legal entities was included in Decree no. 31/1954<sup>4</sup>, currently annulled by the regulations of the New Civil Code<sup>5</sup> (NCC or New Civil Code). This was regulating the merger (by means of amalgamation) as method of ceasing to exist of a legal entity capacity together with spin-off and dissolution procedures. In this line, according to articles 40-41 from decree no. 31/1954 “*The legal person ceases to exist by amalgamation, spin-off or dissolution procedures*” “*the amalgamation is performed by absorption of a legal entity by another legal entity or by means of merger of several legal entities in order to form a new legal entity*”.

Although the merger was deemed as a reorganization method from doctrine perspective, and not only as a method of existence cessation of the legal entity, up to the New Civil Code entering into force, this concept– *i.e.*, reorganization of legal entities – was, in fact, a creation of the legal practice and doctrine, not being expressly regulated by the Romanian legislator.

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<sup>2</sup> Ioan Adam, Codruț Nicolae Savu, *Legea Societăților Comerciale, Comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2010, pg. 870;

<sup>3</sup> St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea Societăților Comerciale, Comentariu pe articole*, 4th edition, C.H. Beck Publishing House, Bucharest, 2009, pg. 919;

<sup>4</sup> Published with Official Gazette no. 8 as of 30.01.1954;

<sup>5</sup> Republished with Official Gazette, Part I, no. 505 as of 15.07.2011;

Currently, within Chapter V of the New Civil Code, art. 232 expressly defines the reorganisation process of the legal entity as being “*the legal operation which involves one or several legal entities having as effect the set-up, change or ceasing to exist process of the legal entity*”. Moreover, considering the provisions of the New Civil Code (a) the legal entity reorganization may be performed also by means of *merger*; (b) *the merger* is performed by means of absorption of the legal entity by another legal entity or by conglomeration of several legal entities in order to create a new legal entity. (art. 233-234 from the new Civil Code); (c) the legal entity’s existence came to an end, as the case may be, by ascertaining or proclaiming the nullity, by *merger*, full spin-off, transformation, dissolution or closing down or in any other way provided by the articles of incorporation or by the law.

The provisions herein above do not satisfactory define and explain the reorganisation and less the concept of merger of companies, the new regulations being limited to set forth a (a) fact where the legal reorganization operation may be performed either by merger having as effect their set-up, change or cessation, and that (b) the merger represents, at the same time, the legal entity cessation reason. Due to the lack of such definitions, the doctrine has the role to cover this *lacuna intra legem*<sup>6</sup>.

Therefore, as regards the reorganization generally, the doctrine considered it as (a) the legal operation comprising at least two legal entities and determining creating, changing and ceasing effects to these entities<sup>7</sup>, (b) the operation by means of which is intended the setting-up, change ore ceasing the existence of one or several legal entities<sup>8</sup>, (c) the consolidation process involving at least two legal entities which are therefore set-up<sup>9</sup>, (d) the legal operation involving two or several actual legal entities or which are set-up by means of this process, determining constitutive, extinctive and translative effects<sup>10</sup>, (e) the transformation cases of the companies or legal entities’ complex reorganization and ceasing to exist cases<sup>11</sup>, (f) the manner of fulfilment of economic and social needs dynamics, determining the legal representation of continuous improvement of free enterprise system<sup>12</sup>.

As regards the merger concept, this is defined by the legal doctrine generally as (a) the amalgamation of patrimonies of two or several legal entities ceasing to exist in order to create a new legal entity<sup>13</sup>, (b) the operation by means of which two or several companies are combined in order to create one company, the merger being performed either by absorption of one of them by the other, or by consolidation of two or several companies in a new one<sup>14</sup>, (c) as a form of reorganization of legal entities, reorganization and amalgamation of patrimonies and business method of legal persons, amalgamation mainly determining the ceasing to exist of the company, as the case may be, the absorbed companies (in case of merger by absorption), or of all companies involved in case of merger by consolidation (determining the creation of a new legal entity) and the transfer of the entire patrimony of the companies involved to the company which preserved its legal existence or to the new company<sup>15</sup>, (d) the transaction by means of which one or several companies involved ceases to exist, determining a surviving company, which may be a new set-up company in this regard or one of the current involved company<sup>16</sup>, (e) the transaction where the assets and

<sup>6</sup> Andreea Corina Târșia, *Reorganizarea persoanei juridice de drept privat*, Hamangiu Publishing House 2012, pg. 91;

<sup>7</sup> Ana Maria Lupulescu, *Reorganizarea societăților comerciale în contextul integrării europene*, Wolters Kluwer Publishing House, Romania, 2008, pg. 144;

<sup>8</sup> Fl. A Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil*, C.H. Beck Publishing House, Bucharest, 2012, pg. 232;

<sup>9</sup> Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, Universul Juridic Publishing House, reviewed and supplemented by M. Nicolae și P. Trușcă, Universul Juridic Publishing House, Bucharest, 2005, pg. 527;

<sup>10</sup> E. Lupan, *Drept Civil, Persoana Juridică*, Lumina Lex Publishing House, 2000, pg. 225;

<sup>11</sup> E. Precupețu, M. Danil, *Despre fuziunea societăților comerciale*, Revista de Drept Comercial no. 6/1993, pg. 51;

<sup>12</sup> Ernest Lupan, Szilrad Sztranyiczki, *Persoanele în concepția Noului Cod Civil*, C.H. Beck Publishing House, Bucharest, 2012, pg. 345;

<sup>13</sup> O. Ungureanu and C. Jugastru, *Drept Civil Persoanele*, Rosetti Publishing House, Bucharest, 2003, pg. 326 -327;

<sup>14</sup> I. Băcanu, *Fuziunea și divizarea societăților comerciale*, “Revista de Drept Comercial” no. 4/1995, pg. 12;

<sup>15</sup> Ioan Șchiau, Titus Prescure, *Legea societăților comerciale nr. 31/1990, Analiza și comentarii pe articole*, Hamangiu Publishing House, 2007, pg. 686-687;

<sup>16</sup> Octavian Căpățână, *Regimul juridic al operațiunilor de concentrare economică în dreptul concurenței*, “Revista de Drept Comercial, București”, no. 5/1999, pg. 11- 13;

liabilities of the acquired companies are transferred to the acquirer, the acquired company is dissolved without winding-up<sup>17</sup>, (f) the readjustment operation the current economic requirements, a reorganization operation which changes the extents of the companies representing a significant instrument for strategic or tactical decisions of management bodies of the companies<sup>18</sup>, (g) the technical and legal procedure for companies' restructuring process<sup>19</sup>.

Considering the forms of merger, we shall make the distinction between the merger by consolidation and merger by absorption.

The merger by consolidation consists in the amalgamation of two or several companies ceasing to exist in order to set-up a new company. In this line, the involved companies to merger process are dissolved without winding-up and their patrimony shall compose the new company's patrimony<sup>20</sup>, the merger by absorption consists in the absorption by one company of one or several companies ceasing their existence. As a result of merger by absorption, the absorbed company or companies are dissolved without winding-up and the absorbing company is increasing its patrimony with the patrimony of the absorbed companies.

The merger is considered a complex reorganization process from legal perspective, but from economic perspective is deemed as a consolidation technique of companies in order to achieve a better profitability, to increase the competition capacity and economic strength.

Considering the specific accounting regulations, more specifically the provisions of Order no. 1376/2004<sup>21</sup> the merger is the operation by means of which two or several companies separately decide the transfer of assets and liabilities to one of the existent companies or the settlement of a new company in order to consolidate their business.

Considering the above, a comprehensive definition of the merger should include the following elements: complex reorganisation operation, voluntary consolidation of patrimonies and amalgamation of activities involving the participation of at least two companies, determining (a) either the disappearance from legal point of view of at least one of the legal entities (merger by absorption), or the involved legal entities are ceasing their legal existence in order to create a new legal entity (merger by consolidation), (b) the transfer of all patrimony of the companies ceasing their existence to the company continuing its business or to the new company.

## 1.2. Merger under Company Law no. 31/1990

As per the provisions of Companies' Law no. 31/1990 (**Companies' Law** or **Law no. 31/1990**), as amended, the merger definition passed through several stages. Therefore, initially under Law no. 31/1990<sup>22</sup> no definition of merger was provided and also no distinction between the merger by absorption and the merger by consolidation was made. Subsequently, by amendments, supplements to the law and by means of Emergency Ordinance no. 32/1997<sup>23</sup> (GEO no. 32/1997) there were expressly inserted the two merger methods (by absorption and consolidation), and further the Law no. 441/2006<sup>24</sup> waived to this express distinction and provided additional elements allowing the existence of a definition of merger.

According to article 238 of Law no. 31/1990 as amended by Law no. 441/2006, the merger is defined as the operation by means of which: (a) one or several companies are dissolved without winding-up procedures and fully transfer their patrimony to another company, receiving in

<sup>17</sup> St. D. Cârpenaru, *Tratat de Drept Comercial*, Universul Juridic Publishing House, Bucharest, 2012, pg. 249 and St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea Societăților Comerciale, Comentariu pe articole*, 4th edition, C.H. Beck Publishing House, Bucharest, 2009, pg. 919;

<sup>18</sup> Ioan I. Bălan, *Restructurarea societăților comerciale prin fuziune, divizare sau aport parțial de active în reglementarea Legii nr. 31/1990*, "Revista Dreptul" no. 7/2000, pg. 58;

<sup>19</sup> St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, op cit, pg 919;

<sup>20</sup> St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea Societăților Comerciale*, same as above, pg. 929;

<sup>21</sup> Order no. 1376/2004 for the approval of Implementation Guidelines regarding the accounting records of the main merger, spin-off, dissolution and winding-up operations concerning companies, as well as the withdrawal or exclusion of certain shareholders within the companies and their taxation regime, published with Official Gazette, Part I no. 1012 as of 03.11.2004;

<sup>22</sup> Published with Official Gazette, Part I no.126 as of 17.11.1990;

<sup>23</sup> Published with Official Gazette, Part I no. 133 as of 27.06.1997;

<sup>24</sup> Published with Official Gazette, Part I no. 955 as of 28.11.2006;

compensation shares with the beneficiary companies and, eventually, a cash payment of maximum 10% of the nominal value of the shares allotted as such; or (b) several companies are dissolved without winding-up and fully transfer their patrimony to a new set-up company, receiving in compensation shares with the beneficiary companies and, eventually, a cash payment of maximum 10% of the nominal value of the shares allotted as such to the shareholders of the spin-off company.

Consequently, we may distinguish three elements of the merger (a) the involvement of several companies (b) dissolution without winding-up of the company/companies absorbed, consolidated (c) the transfer of patrimony in full to another company, the increase of share capital of the company continuing its existence and the allotment of shares to the beneficiary companies.

The definition provided by Law no. 411/2006 may be also found in the current Law no. 31/1990<sup>25</sup> (art. 238), the legislator defining the merger in a different manner than previously regulated (*i.e.*, GEO no. 32/1997), without expressly regulating the absorption and consolidation terms although, mainly it is described the same methods of merger<sup>26</sup>.

Disregarding the method of merger chosen – absorption or consolidation – in case of companies, either absorbed or consolidated in order to create a new structure, at least one of the involved companies is subject to dissolution without winding-up, losing its individuality as legal entity for the possibility of the absorbing company, respectively for the new company deriving from consolidation, to operate *sui generis* according to the purpose of its creation<sup>27</sup>.

From the above definitions we may note that (a) the merger as reorganization method, involves an amalgamation of companies where some of them are ceasing to exist in order to determine a sole company setting-up (b) the merger is a complex technical and legal procedure containing creating, changing or ceasing effects for the companies<sup>28</sup> and having as result<sup>29</sup>:

- (i) the dissolution without winding-up of the companies ceasing their existence;
- (ii) the full transfer of assets and liabilities between the legal entities ceasing their existence and the new legal entity;
- (iii) in compensation for the patrimony rights, the absorbing company or the new company set-up by consolidation allots shares in a certain proportion to the companies' shareholders ceasing their existence;
- (iv) finally, the absorbing company share capital is increased according to the value of the new shares issued<sup>30</sup>.

### 1.3. International merger vs. cross-border merger

Even from the beginning we consider preferably to make a chronological distinction between (a) previous period to Directive 2005/56/EC<sup>31</sup> regarding cross-border mergers (CBM Directive) in Romania by GEO no. 52/2008<sup>32</sup> and (b) the subsequent period to CBM Directive.

#### (a) Previous period to CBM Directive in Romania by GEO no. 52/2008

Prior to CBM Directive implementation, art. 46 of the Law concerning the regulatory framework for international private law relationships no. 105/1992<sup>33</sup> (Law no. 105/1992) expressly provided the possibility of merger performance between legal entities of different nationalities.

Considering the provisions of article 46 above mentioned, we may note that the international

<sup>25</sup> Republished with Official Gazette, Part I no.1066 as of 17.11.2004;

<sup>26</sup> Ana Maria Lupulescu, same as above, pg. 144;

<sup>27</sup> A. Hinescu, M. Jebelean, *Acțiunea în nulitatea fuziunii societăților comerciale din perspective noului Cod civil și a noului Cod de procedură civilă*, "Revista Română de Drept Privat" no. 6/2012, pg. 135;

<sup>28</sup> Gabriel Boroi, *Drept Civil. Partea Generală. Persoanele*, Ed. a IV-a revizuită și adăugită, Hamangiu Publishing House, 2010, pg. 448;

<sup>29</sup> Ioan Adam, Codruț Nicolae Savu, same as above., pg. 873;

<sup>30</sup> R.F. Popa, *Majorarea capitalului societății absorbante*, "Revista de Drept Comercial" no. 4/2003, pg. 165;

<sup>31</sup> Published with the Official Journal L 310 as of 25.11.2005, p. 1;

<sup>32</sup> Published with Official Gazette, Part I, no. 333 as of 30.04.2008. Initially, the Ministry of Justice prepared a legal draft for the transposition of Directive 2005/56/CE, but, the Government decided to regulate the cross-border merger by an emergency ordinance, taking into consideration that transposition deadline was overpassed with more than four months;

<sup>33</sup> Published with Official Gazette, Part I, no. 245 as of 1.10.1992;

merger in its initial form might be defined substantially as being the merger operation between two legal entities, particularized by the extraneity, international character conferred by the different nationality of the companies involved in the merger process.

Moreover, even the legal text does not make a distinction between them, the international mergers may be separated depending on the nationality of the companies involved: (a) European or cross-border mergers – represented by the mergers where at least one of the involved companies in the merger process was from an EU member state and at least one of the companies involved was a Romanian legal entity and (b) international mergers - represented by the mergers where at least one of the involved companies in the merger process was from non-EU state and at least one of the companies involved was a Romanian legal entity.

For this period, the delimitation between international and European mergers was performed strictly from terminological perspective, the legal in force regulations during this period having conjoint applicable regulations for both concepts, without any distinction whatsoever between the mergers involving EU member state companies and mergers involving non-EU state companies.

(b) *Subsequent period to CBM Directive in Romania*

After the GEO no. 52/2008 entering into force, we may distinct from conceptual perspective: (a) the mergers between **different nationality companies** regulated under art. 46 of Law no. 105/1992, article abolished by the New Civil Code and (b) the mergers between joint-stock companies, partnerships limited by shares, limited liability companies – Romanian legal entities – and European companies headquartered in Romania and companies **headquartered, as the case may be, with registered office or main office, in other EU member state belonging to European Economic Area**, regulated by article 251<sup>4</sup> of Law no. 31/1990.

Even if art. 46 of Law no. 105/1992 failed to make a distinction between the nationality of the involved companies in the merger process (*between EU member state companies and non-EU state companies*), in comparison with the provisions of art. VI. of GEO no. 52/2008 according to which “Article 46 from Law no. 105/1992 regarding the regulation of international private law shall not be applied to cross-border merger regulated by Law nr. 31/1990”, derives that starting with the entering into force date of GEO no. 52/2008, the provisions of art. 46 concerned only the mergers between Romanian companies and foreign companies save for those companies headquartered or, as the case may be, with registered office or main office, in other EU member states or states belonging to European Economic Area.

Considering the above, this means that in comparison with the previous period to CBM Directive implementation in Romania (a) the international merger concept, regulated by the Law no. 105/1992, had a more limited applicability area concerning all mergers between different nationality companies, **save for** the cross-border mergers which will have their own definition and regulation (b) the cross-border merger represents the merger performed at least between a Romanian company and another EU member state company.

#### **1.4. Cross-border merger according to the provisions of Law no. 31/1990**

As regards the cross-border merger within current regulations provided under the Law no. 31/1990, this may be explained depending on the conditions detailed under art. 251<sup>4</sup>. Considering these provisions, the cross-border merger may be defined as the operation by means of which:

- (a) one or several companies, where at least two of them are governed by the law of two different member states, are dissolved without winding-up and fully transfer their patrimony to another company in exchange of the allotment to their shareholders or to the absorbed companies of shares in the absorbing company and, eventually, for a cash payment of maximum 10% of the shares nominal value allotted as such; or
- (b) several companies, out of which at least two of them are governed by the law of two different member states, are dissolved without winding-up and fully transfer their patrimony to a new set-up company in exchange of the allotment to their shareholders or to the absorbed companies of shares in the new set-up company and, eventually, for a cash

- payment of maximum 10% of the shares nominal value allotted as such;
- (c) a company is dissolved without winding-up and fully transfers its patrimony to another company which holds the totality of shares or other titles and granting voting rights within the general meeting of shareholders.

Considering the above, we may say that the national legislation regulates three cross-border merger types:

- (i) one of the involved companies absorbs the others;
- (ii) all companies involved cease their existence and a new company is set-up;
- (iii) the absorption of a subsidiary by the parent-company, which may be performed by means of a simplified procedure without being required the issuance of new shares by the parent-company (simplified merger).

The first two types of mergers suppose the full transfer of their assets and liabilities to the absorbing company in exchange of the issuance to the shareholders of new shares or other titles representing the share capital of the absorbing company and for a cash payment of maximum 10 % of the nominal value or, in case of no nominal value, from the nominal accounting value of the respective titles or shares. The transfer of the assets and liabilities shall be effective from the involved company dissolution without winding-up procedure. Consequently, a dissolved company under winding-up procedure may not be involved in a cross-border merger<sup>34</sup>.

In line with the above, from the assessment of the provisions of article 251<sup>4</sup> of Law no. 31/1990 we may note that the national legislator tries to provide a wide definition, slightly comprehensive to the cross-border merger and the consequences of this process shall derive directly from it<sup>35</sup>.

Similarities between the regimes provided by this article regarding cross-border merger and the general law merger regulated by art. 238 of Law no. 31/1990 may also be noted; but these shall not be mixed, the cross-border merger – in contradistinction with the domestic merger – supposes:

- (i) the mandatory existence of extraneity elements – at least two of the companies involved in cross-border merger process shall be governed by two different member states legislation;
- (ii) the companies involved to cross-border merger process are limited by their legal form;
- (iii) the cross-border merger is distinguished by the general law merger also by its third express form of execution: the merger by absorption of a subsidiary by the parent-company, type of merger not provided by the general law merger<sup>36</sup>.

As regards the classification of cross-border mergers, depending on the destination country, more specifically by the country where the absorbing company or the new set-up company shall have its headquarters, we may distinguish (a) mergers as an emigration “outward mergers” (involving a movement of capital by means of a foreign company acquisition, a movement of the Romanian company in another EU state) respectively; (b) mergers as immigration or “inwards mergers” (which involves a foreign investment within domestic companies and a movement of the foreign company in Romania).

### **1.5. Cross-border merger – a method of exercising the freedom of establishment and a method of changing the company’s nationality**

The companies represent a major instrument of free movement, contributing to the efficient development of commercial trades. However, while big companies operates globally, the regulations governing the merger performance conditions and companies’ business are mainly national not answering to the economic and commercial extended framework where the development shall take place.<sup>37</sup>

The internal market development and the improvement of economic and social

<sup>34</sup> Dirk Van Gerven, *Cross Border Mergers in Europe*, vol I., Cambridge University Press, 2010, pg. 10;

<sup>35</sup> V. Muscalu, *Modificările aduse Legii 31/1990 prin OUG 248/2008. Fuziunea transfrontalieră (I)*, “Revista Dreptu” no. 4/2009, pg. 21;

<sup>36</sup> Ioan Adam, Codruț Nicolae Savu, same as above, pg. 928;

<sup>37</sup> Andreea Corina Târșia, same as above, pg. 181;

circumstances within the entire Union imply not only the removal of commercial barriers, but also the readjustment of production structures to European Community standards. For this it is essential that the enterprises with limited business to satisfying solely the local needs may imagine and carry out reorganization operations of their business at European level.

The commercial operations influenced by the integration process had, *inter alia*, effects over the companies. The legal entities are passing the borders of states in case of globalization holding the most important part in the global economy and politics<sup>38</sup>.

Considering these circumstances, the cross-border mergers are (a) significant operations for companies, for their business globalization and finally for the achievement of a single market (b) methods for cross-border structural changes of a company and movement method of companies<sup>39</sup> contributing to the efficient development of trades and to the achievement of a single market.

The contribution of the cross-border merger to the single market and its feature as a method of exercising the freedom of establishment expressly derives from Clause C-411/03 from 13.12.2005, SEVIC Systems AG<sup>40</sup> “*Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market.*”.

In addition, the cross border merger can determine a change in the company’s nationality, the doctrine highlighting the fact that such change operate through the change of the company’s headquarter<sup>41</sup>.

## 2. The merger concept according to competition law

As mentioned herein above under section 1, the merger involves a consolidation of patrimonies which may lead to the strengthening of the absorbing company’s position on the market or of the new company deriving from the merger. Due to the fact that strengthening may affect the market/the competition environment, the mergers as economic concentration shall be defined also from the perspective of competition regulations. From competition law point of view, the merger as business corporation form represents an interest not only from legal perspective, but mainly from the effects over competition.<sup>42</sup>

Generally, the economic concentration is defined as any transaction by means of which (a) one or several companies involved acquires the direct or indirect control over another independent company (b) an amalgamation of shares or assets of several companies within the patrimony of one legal person determining the control right over each of them and, consequently, the possibility to impose a joint market strategy.<sup>43</sup>

The provisions of article 9 paragraph (1) from Competition Law no. 21/1996<sup>44</sup> (**Competition Law**) define two methods of performing an economic concentration:

- (a) those derived from the merger of several previously independent undertakings [letter a)];
- (b) those deriving from taking-over the control [letter b)].

### 2.1. The economic concentration deriving from the merger of several previously independent undertakings

According to item 6 of the Competition Council’s Guidelines regarding the economic

<sup>38</sup> Daniel Mihail Şandru., *Drept comunitar. Integrarea Europeana*, Ed Universitaria, 2007, pag 127, 145, 195;

<sup>39</sup> The companies’ movement may be generally defined as the companies’ freedom to operate in different states and to choose the appropriate corporate law to their business needs.

<sup>40</sup> ECJ, 13 Dec. 2005, Case C-411/03 SEVIC Systems AG [2005] ECR I-10805;

<sup>41</sup> Aurelian Gheorghe, *Teoria conflictelor de legi in Noul Cod Civil*, Ed Coresi, 2012, pag 123;

<sup>42</sup> Ioan Schiau, Titus Prescure, same as above, pg. 722-723 and St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, same as above, pg. 687;

<sup>43</sup> O. Căpăţână, same as above, pg. 5;

<sup>44</sup> Republished with Official Gazette, Part I no.240 as of 03.04.2014;

concentration concepts, company involved, full operation and turnover (Guidelines)<sup>45</sup> “A merger as per art. 10 paragraph (1) letter a) (currently art. 9 paragraph 1 letter a) after Competition Law republishing) from the law, takes place when two or several undertakings merges resulting a new undertaking and the others cease to exist as individual legal persons. A merger also takes place in case an undertaking is taken-over by another undertaking, the latter keeping its legal identity, while the first ceases to exist as legal entity”.

The competition legislation does not make distinction between the merger types leading to the setting-up of an economic concentration. The economic concentration may be performed both as a result of domestic mergers and as a result of cross-border mergers. From the competition legislation perspective, the cross-border merger has also another meaning – therefore, the cross-border merger is deemed as an economic concentration performance method subject to several jurisdictions control, either due to the fact that the companies carry out their business in several jurisdictions, or because the transaction has effects from competition point of view in several jurisdictions. These transactions are frequently defined as multi-jurisdictional or global mergers.

The provisions above also include within merger category both types of merger – consolidation (the equivalent of taking-over in the text above), bringing also in this specific area the classical types of merger as provided under companies’ law.

As provided herein above, one of the qualifying conditions of a merger as economic concentration as per Competition Law no. 21/1996 is to involve (a) companies (undertakings as per Competition law<sup>46</sup>) and (b) the companies involved to be “independent undertakings”.

Unlike the regulations regarding the merger provided under Law no 31/1990 where the merger is not admitted otherwise than between companies, the merger as a method of setting-up an economic concentration implies a larger area of legal entities (e.g. companies – without any distinction of their legal form -, holdings, natural persons carrying out economic activities, freelancers etc.).

As regards the independence principle, the merger operations between companies in the same group (e.g. the merger between the parent-company and its subsidiary) do not lead to an economic concentration, the parent-company control pre-existing, the merger representing, in fact, the corollary of its dependence towards the parent-company.<sup>47</sup> Consequently, the merger regulated by art. 251<sup>4</sup> lit. (c) from Law no 31/1990 does not lead to an economic concentration as per the provisions of Law no. 21/1996, being assessed as a restructuration at the same group level.

Save for this condition of the merger involved companies’ independence, the competition law makes no other distinction regarding the involved companies. Therefore, from the merger as economic concentration perspective, there is no distinction between the Romanian or foreign companies, companies headquartered in Romania or abroad (within European Union or outside).

Even if such distinction is not provided, considering the criteria imposed by art. 9 -13 from Competition Law regarding economic concentration operations (disregarding their execution) we may note another condition imposed to the companies involved in the merger process as form of economic concentration execution according to competition law. Specifically, the transaction shall lead to a durable change of control and the involved companies to merger shall generate (for the previous year to transaction execution) a certain turnover threshold in Romania (from the business carried out in Romania) in a direct (direct sales) or indirect manner (by branches, subsidiaries).

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<sup>45</sup> Applied by Order no. 386/2010 for the implementation of the Guidelines regarding the economic concentration concepts, involved undertaking, full operation and turnover, published with Official Gazette, Part I no. 553 as of 05.08.2010.

<sup>46</sup> According to O. Manolache, *Regimul Juridic al Concurenței*, Juridica Publishing House, 1997, pg. 7: an undertaking represent an organised ensemble of resources which does not need a determined legal structure, it may be a natural or legal person, a group of at least two of them, operating as a durable economic unit;

<sup>47</sup> Mircea N Costin, Meda Borosteanu, *Fuziunea ca tehnică juridică de realizare a concentrării economice*. “Revista Română de drept Comerț” no. 9/2005, Lumina Lex Publishing House, Bucharest, pg. 16;

Thresholds of the turnover <sup>48</sup>	(a) <b>cumulated</b> turnover of the involved companies <sup>49</sup> exceeds the RON equivalent of EUR 10,000,000 <b>and</b>
	(b) when at least two of the companies involved achieved, in Romania, <b>each of them</b> , a turnover exceeding the RON equivalent of EUR 4,000,000.

Therefore it results that, in case of a merger as per the competition law, does not have any importance the headquarters or registered office of the involved companies, but the effect determined by their business within Romania, effect assessed depending on a quantifiable element i.e. the turnover in Romania of the involved companies in the merger process (as per the competition law by companies involved in the merger process, are considered both the involved companies directly in the merger process and the groups of companies to which they are part of).<sup>50</sup>

## 2.2. De facto mergers

The competition law also inserts special conceptual elements regarding the merger. Therefore, the provisions of item 7 of the Specifications mentioned herein above, refers to a new concept – the so-called *de facto merger*. According to these provisions, are deemed as de facto mergers those mergers where, in case of absence of de jure merger, the amalgamation of previously independent undertakings business leads to the setting-up of a sole undertaking. This aspect occurs mainly in case where two or several undertakings, preserving their individual legal capacity, agree by means of an agreement a joint economic management or approves the structure of a double listing. In case this situation leads to a de facto merger, in a sole economic entity of the involved undertakings, the operation is deemed an economic concentration

In order to represent a de facto merger a joint economic management shall exist between the involved companies. In case the joint management is not expressly provided by an agreement, there are a series of criteria which may determine the existence of such joint management (e.g. internal profits and losses set-off or an allotment of incomes within the group, as well as the joint liability of them or the external risks undertaking, exclusive contractual arrangements, cross-participations holding between the companies composing an economic entity).

References to de facto merger are also provided by the doctrine. The criteria for a de facto merger existence assessment, more specifically to what extent a merger is occulted by a transfer of assets are the following: (1) continuity at shareholding level; (2) cessation of business and dissolution of the selling company in a very short time (3) the undertaking by the purchaser of the obligations required for the continuous business carrying out and (4) management, staff and location continuity.<sup>51</sup>

The assessment of a transaction as a de facto merger exposes the purchaser to the successor's liability, the creditors of the sellers/seller being entitled to raise claims against the purchaser. Under this scenario, the courts of law may discern all legal protection means in case of a merger (the voting right, the right to lodge with the court the merger decision).

## 2.3. Economic concentration derived from control taking-over operations

As specified herein above, the merger represents only one of the economic concentration execution forms. The other economic concentration execution form is the control taking-over

<sup>48</sup> The turnover achieved in all industries shall be considered, not only the records for business domains directly involved in the concentration;

<sup>49</sup> The parties involved are determined depending on the transaction type/the control form, depending on the provisions of the Guidelines concerning the economic concentration, involved undertaking, full operation and turnover concepts, applied by Order no. 386/2010 published with Official Gazette, Part I, no. 553 as of 05.08.2010;

<sup>50</sup> For details regarding the companies' group please see Subsection 4<sup>1</sup> of the Guidelines concerning the economic concentration, involved undertaking, full operation and turnover concepts, applied by Order no. 386/2010 published with Official Gazette, Part I, no. 553 as of 05.08.2010;

<sup>51</sup> Edwin L. Miller Jr., *Mergers and Acquisitions, A step by Step legal Practice Guide*, Ed. John Wiley&Sons Inc, 2008, pg. 45;

operation. This operation may be performed by means of a shares sale-purchase agreement or by an assets sale-purchase agreement.

In case of control taking-over operations (a) the companies involved continues their existence as collective entities, decreasing their number of shareholders and increasing their share capital of the absorbing company or of the new set-up company by amalgamation; (b) the conglomeration implies accumulation of assets or shares by a holder, legal or natural person, different as legal entity from the companies acquired (c) the only changes occurred concerns the shareholding structure of the company subject to take-over procedure (the increase of shareholders number, the decrease of the partners number, changes regarding shareholding of the existent shareholders) and the control holder.

Considering the above, it results that while the merger is assessed as a legal action occurring directly between the companies involved in the process (*inter se*), changing their organizational structure, the control taking-over is the action of a legal entity, legal or natural person, materialized in accumulation of shares or assets in several companies maintaining their initial status.<sup>52</sup>

### 3. Conclusion

The merger represents one of the companies' reorganization methods allowing them to adapt to new economic substantiality, either at national level (domestic mergers), or outside the national borders (cross-border mergers). The definition of domestic merger, respectively cross-border merger depends on the legal perspective involved in the conceptual delimitation, as well as on the national applicable law perspective, namely the law areas concerned. The merger may be considered (a) as a reorganization method of legal entities, (b) as a complex reorganization operation with specific features deriving from the structure of the legal entities involved *i.e.*, companies<sup>53</sup> (c) a form or freedom of establishment and a method of changing the company's nationality (in case of the cross border mergers) and (d) an economic concentration under the Competition Law no 21/1996.

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<sup>52</sup> O. Căpățână, same as above, pg. 5.

<sup>53</sup> St. D. Cârpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea Societăților Comerciale, Comentariu pe articole*, 4th edition, C.H. Beck Publishing House, Bucharest, 2009, pg. 920;

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