CONSIDERATIONS REGARDING THE RIGHT TO WITHDRAW OF THE STAKEHOLDERS IN THE CASE OF FUSION OF SOCIETIES. COMPARATIVE PRESENTATION

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Abstract

The right to withdraw is a measure of protecting the associate/shareholder of the societies, regulated by Law no. 31/1990, which ceases to exist as a result of the fusion. The present article analyses the exertion of the right to withdraw from the Romanian Law, but also in comparative law. Regarding the Romanian regulation of the matter, it presents in parallel the case of capital societies and those of persons, emphasizing the differences between them, from the point of view of the effects of the right to withdraw.

Keywords*: the right to withdraw, fusion, associate/shareholder, exertion of the right to withdraw*.

JEL Classification*:* K22, K30

1. Preliminary considerations

The protection of shareholders, in the vision of the European Union legislation, is oriented around two axes: on one hand, *the informing and participation of the shareholders in taking decisions regarding the fusion*, and on the other hand, *the responsibility of certain factors involved in the process of fusion in the case of production of errors.*

The operation of modifying the social capital subsequent to the fusion can affect the rights of the associates (shareholders) of the participant company, such that the insurance of an adequate protection for these is indispensable[3]. The concern for the protection of the shareholders against the possible negative effects that the merger might have on them has materialized through the Directive 75/855/E.E.C. regarding the merger of joint stock companies, from October 9th 1978, also known as „the third directive", and, afterwards, through the Directive 2011/35/E.U.

The purpose of these directives was to provide a unitary means of monitoring the merger of companies' subject to the law of a Member State and, at the same time, to harmonize the provisions relating to this operation at European level so as to ensure an equivalent level of protection for the shareholders, creditors and employees of the merging companies. The main risk for associates of the companies involved in the merger is the reduction of their patrimonial and non-patrimonial rights as a result of the decrease in their shareholdings in the capital of the company. In order to ensure the protection of these rights, the value of the shares allocated to the company's shareholders in the acquiring company should be equal to that of the shares they held in the dissolved company before the merger took place. The merger will affect the rights of the acquiring company's shareholders if the shares of the absorbed company are over-rated or those of the acquiring company are underestimated.

2. The right to withdraw of the associate/shareholder. General characteristics

When major decisions are taken in the life of the company, the associates or shareholders who have voted against have the right to withdraw from it. And one of the most important decisions is the merger of society. Thus, if the General Meeting decides to merge the company, the main mechanism of protection of the shareholders is to identify the conditions for exercising the right of withdrawal.

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[3] Bejan F., *Fuziunea și divizarea societăților comerciale*, PhD. thesis, Bucharest, 2013, p. 43.

From a terminological perspective, the concept of withdrawal means the voluntary departure[4] of an associate from the company with the consequence of loss of membership of the company concerned.

2.1. Transposition of the Directive

As far as the right of withdrawal is concerned, the third Directive - Directive 75/855 / EEC on the merger of public limited liability companies - has been transposed into the national law of all Member States.

Thus, in Germany, the provisions of the Directive are reflected in the provisions of Articles 2 to 38 and 60 to 77 of the Law on the Reorganization of Societies (UmwG) of 25th October 1982. In French law the harmonization of internal regulations with the provisions of the Directive was made by Law No.88 - 17 of 5th January 1988 and Decree no. 88 - 418 of April 22nd, 1988, with the provisions of art. L.236-1-L.236-24 and R.236-12C.com.fr. Moreover, in the French doctrine[5] it is suggested that associates have the right to maintain this status in their societies, so it is forbidden that they are deprived of the quality of associates against their will. The principle of prohibiting the exclusion of associates from society was also stated in the French case-law by the Court of Cassation in 1996. Thus, the French Supreme Court[6] ruled that no legal provision can justify the obligation of the associate by the judge seised of such an application to give up social titles, or another associate to acquire these titles.

Under Romanian law, the provisions of the above-mentioned Directive are reflected in the provisions of Law 31/1990 on societies.

2.2. The regulation of right to withdraw in Romanian Law

a) In joint-stock companies. In the case of joint stock companies, the right of withdrawal is governed by the provisions of Art. 134 of Law no. 31/1990. Thus, according to article 134, paragraph (1), let. (d), the shareholders who voted against the decision of the General Meeting, through which the merger was decided, have the right to withdraw from the company and to demand the purchase of their shares by the company.

This case of withdrawal was taken up in the company law by the provisions of the Commercial Code of 1887, governing a special form of withdrawal of the shareholders of capital companies.

The provisions of Article 134 of Law no. 31/1990 were the subject of an objection of unconstitutionality[7]. In stating the exception, it was argued that the provisions of Article 134 would violate the provisions of Article 44 paragraph (2) of the Constitution and other international norms, as it protects the interests of society to the detriment of shareholders, especially minority shareholders. The initiator of the exception considered that the provisions of Article 133 of the Companies Act set up draconian conditions for withdrawal, causing an imbalance in the disadvantage of the shareholders. However, the exception of unconstitutionality was rejected, because the Court held that the provisions of Art. 134 of the Companies Act allow shareholders, who voted against a decision of the General Assembly, to withdraw under the terms of the criticized text.

From the analysis of art.134 we can see that although it is about the associate of a joint stock company - where the link and the trust between the associates are not decisive - the manner of regulating the withdrawal conditions is restrictive, specific to the societies of persons. Thus, by examining the content of art.134, we can observe that the right of withdrawal of the shareholder is limited (in order to preserve the social body), but it can not be suppressed, because it represents, as is

[4] Sometimes, however, it is said that the right to withdraw signifies both voluntary withdrawal and forced withdrawal. See Tec L.M., *Withdrawal of the shareholder in the closed-end joint-stock company governed by Law 31/1990*, „Pandectele Române", no. 2/2009.
[5] Cozian M., Viandier A., Deboissy F., *Corporate Law*, Litec, 27th ed., 2014, p. 209.
[6] Cass. com., March 12, 1996, No. 93-17813, Bull. 1996, IV, No. 86, p. 71.
[7] Decision of the Constitutional Court no. 684 of 20 October 2015 published in the Official Gazette no. 950 of December 22, 2015.

claimed in the literature, an individual right of the shareholder[8].

The withdrawal of the shareholder constitutes an exception to the company's operating principles and to the principle of the free transfer of shares[9]. Thus, the withdrawal of the shareholder is contrary to the principle that social will is determined by the will of the majority, and minority shareholders who have abstained or voted against must respect the decision of the majority[10].

In the doctrine, it is sometimes criticized how the legislator named the law regulated by the provisions of Article 134 of the Society Act. Thus, it is reasonably appreciated that the designation of this right as a "right of withdrawal" is inappropriate, since any shareholder has the right to withdraw, and the provisions of Article 134 devolve a particular aspect of this right[11].

b) In partnerships and limited liability companies. Initially, the right of withdrawal was exclusively available to the shareholder in the joint stock company. Subsequently, by introducing li. a1 into the article 226 par. (1)[12], the scope of the subjects of law which may exercise the right of withdrawal[13] has been extended. Thus, at present, "the associate in the collective society, in simple partnership or in the limited liability company can withdraw from society in the cases provided by article 134"[14].

The legal literature states that the right of withdrawal must be considered separately in the relationship of the holder or associate or shareholder because in the case of the shareholder the exercise determines the loss of *affectio societatis* whereas in the case of the associate there will be a damage to the element *intuitu personae*[15].

We consider that the exercise of the shareholder's right of withdrawal results in less damaging consequences for the company, due to the peculiar nature of the joint stock company. While, due to the personality intuition of the human societies, the withdrawal of the associate has far more serious consequences and may even lead to dissolution.

We appreciate that a separate analysis is not warranted, because the legal framework of the right of withdrawal is identical for both the associate and the shareholder. According to the provisions of the law, the effects of withdrawing from the company are similar to the exclusion of the associate for which, 224 of the Law no. 31/1990, it is foreseen to be liable for losses and has the right to benefits until the day of its exclusion, but it will not be able to demand their liquidation until they are distributed according to the articles of association, without being entitled to a proportional part of the social patrimony.

3. The effects of exercising the right of withdrawal

As far as the effects of the exercise of the right of withdrawal are concerned, they are similar,

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[8] Cucu C., Gavriș M.V., Bădoiu C.-G., Haraga C., *Legea societăţior comerciale 31/1990, repere bibliografice, practică judiciară, decizii ale Curţii Constituţionale, adnotări,* Ed. Hamangiu, 2007, p. 448; Demetrescu P, Georgescu I.L, *Commercial Code Carol II*, Bucharest, 1936, p. 170-171.

[9] Cărpenaru St. D., Piperea Gh., David S, , *Legea societăţilor.Comentariu pe articole*, 5th ed., Ed. C.H.. Beck, Bucharest, 2014, p. 448; Demetrescu P., Commercial enterprises, Ed. Legal Research, Bucharest, 1943, p. 297; Mataragiu A.C.., *Fuziunea instrument de restructurare a societăţilor comerciale*, PhD. thesis, Timișoara, 2012, p. 181.

[10] Cărpenaru St. D., Piperea Gh., David S, *op. cit*., p. 448; Mataragiu A.C., *op. cit.*, p. 149. In the sense that the majority shareholder may exercise the right of withdrawal if minority shareholders block his decisions see Duţescu C., *Drepturile acţionarilor*, 3rd ed., Ed. C.H. Beck, 2010, p. 468.

[11] Duţescu C., *op. cit*., p. 609-610.

[12] Intervented by art. unique - point 4 of O.U.G. no. 2/2012.

[13] In the sense that the withdrawal can be challenged if the exercise of the right of withdrawal implies a decision of the General Assembly or the agreement of the associates Voiculescu L.C., *Commercial Dispute Resolution Procedure*, 2nd ed., Ed. CH. Beck, 2009, p. 146- 147.

[14] According to Article 134 paragraph 1, the withdrawal/shareholder is admitted when the decision of the General Meeting has as its object a) the change of the main object of activity b) the relocation of the company's headquarters abroad c) the change of the form of the company d) the merger or division of the company.

[15] See Călin D., *Withdrawal of shareholder from the joint stock company*, „Romanian Business Law Review" no. 3/2011, Bucharest, p.76; paragraph 1a of paragraph (1) of art. 226 was introduced by Government Emergency Ordinance (O.U.G.) no. 2/2002.

unilateral or judicial rescissions of the company contract[16]. The arguments put forward in this sentence are as follows:

- The associate can withdraw from the limited liability companies according to the articles of association, only with the unanimous agreement of the other associates.
- In the event that the articles of association do not provide clauses regarding the withdrawal of associates or the associate does not obtain the unanimous agreement of the other associates it has the possibility to address the court to obtain a court decision, which would allow it to withdraw from the company.

A controversial issue in doctrine is the extent to which the right of withdrawal provided for in Article 134 (1) (d) can be exercised both for open-ended companies quoted on the capital market and for closed.[17]

Analyzing the provisions of Laws no. 31/1990 and no. 297/2004, we can observe that, on the one hand, the Company Law does not distinguish between the two types of companies and, on the other hand, according to the capital market legislation, the withdrawal of the shareholder from the open societies can be done only under certain conditions.

Therefore, according to the provisions of Article 242[18] of the Capital Market Act 297/2004, the shareholder of a listed company may withdraw if he disagrees with the General Assembly decisions on mergers or divisions only if it relates to shares that are not admitted to trading. In the doctrine, although the withdrawal is considered to be inadmissible - arguing this by the fact that with the redemption of shares they must be canceled in accordance with the provisions of the capital market law - it is admitted the possibility of withdrawing the shareholders from a listed company in an indirect manner, of a public purchasing offer regulated by the provisions of the capital market law.[19] Another aspect, which has led to debates in the doctrine, refers to a certain lack of correlation between the provisions of the Companies Act no. 31/1990 and the Capital Market Law no. 297/2004. Thus, it is appreciated that, under the amendment of Article 134 of the Companies Act following the adoption of Law no. 441/2004, an implicit repeal of Article 242 of Law no. 297/2004 was made. Some authors[20] consider that the survival of Article 242 of Law no. 297/2004 would generate a situation deemed absurd, namely that the shareholders of a closed company would enjoy greater protection than the shareholders of a company open in the case of a transaction fusion.

In the specialized literature, there are also opposing opinions, according to the provisions of art. 422 of the Capital Market Law no. 297/2004 not abrogated.[21]

We believe that, whether it is a closed or open company, the shareholder can withdraw. The arguments that we support this statement with are two, namely:

- the first refers to the fact that we join the opinion that promotes the thesis that the text of art. 422 of the Capital Market Law is abrogated, and consequently only the provisions of Art. 134 of the Companies Law are incidental;

- the second argument relates to the fact that the legal status of closed societies may, in my opinion, be assimilated to the legal status of corporations. Given that the withdrawal of the associate is allowed in the case of companies (as demonstrated in section 2.3.lit.b above), the assimilation of the legal regime will also be allowed in closed societies. All the more the shareholder's withdrawal in the case of open companies will be allowed.

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[16] Schiau I., *Mechanisms for the separation of the associates of the companies in Ad Honorem Prof. Univ. dr. Stanciu Carpenaru*, Ed. CH. Beck, 2011, p. 99; Adam I., Savu C. N., *Legea societatilor comerciale. Comentarii si explicatii*, Ed. C.H. Beck, Bucharest, 2010, p. 808.

[17] Bodu S., *Legea societăților-comentată și adnotată*, Ed. Rosetti, Bucharest, 2017, p. 649; in the event of a merger between two companies admitted to trading, the provisions of the Companies Act are applicable and not the provisions of art. 422 of the Capital Markets Act; in the sense that the right of withdrawal cannot be exercised unless the shareholder has been allocated shares in a closed company, see Gheorghe C., *Drept comercial român*, Ed. C.H. Beck, 2013., p. 510.

[18] Prescure T., Călin N., Călin D., *Capital Market Law. Comments and explanations*, Ed. C.H. Beck, Bucharest, 2008, p. 378.

[19] Piperea Gh., *Commercial Law. The Enterprise in the N.C.C. Regulations*, Ed. C.H. Beck, Bucharest, 2010, p. 256.

[20] Cărpenaru St. D., Piperea Gh., David S, *op. cit.*, p.453.

[21] Cucu C., Gavriș M.V., Bădoiu C-G., Haraga C., *op.cit*., p. 289.

4. Instead of conclusions: Informing shareholders

The merger directives place a particular emphasis on the role played by providing appropriate information to shareholders about the merger process and the share exchange rate. This information requirement is not an end in itself but must allow the shareholders to express an informed vote within the General Assembly convened to approve the merger in accordance with Article 6 of Directive 2011/35/EU. This obligation is in line with the implementation of two principles, namely *the information and participation of shareholders in the decision on the merger*.[22]

The duty to provide information is indissolubly linked to the informed exercise of the consent, it follows that non-compliance with this obligation must be sanctioned by the annulment of the decision adopted.[23]

In particular, the draft terms of merger must provide for the rate of exchange of shares, the distribution of the shares of the acquiring company or of the newly created company, as well as the rights granted by these companies to the shareholders holding special rights (Article 5 of Directive 2011/35/EU).

The draft terms of merger shall be published in the form provided for by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC for each of the merging companies at least one month before the date of the general meeting which is to decide on the merger project.

Concerning the publicity of the merger project, although Article 3 of Directive 68/151/EEC mentioned that this will be done according to the internal law of each Member State, Directive 2009/109/EC of 16 September 2009 exempts companies which publish on their website the draft terms of merger for a certain period of time. The content required by the European merger provisions is only a minimum; therefore, the legislative bodies in the Member States may impose additional information.

The Administrators' report should indicate the evaluation difficulties encountered during the preparation of the draft terms of merger, as required by Article 9 of Directive 2011/35/EC.[24]

Regarding the reporting and documentation requirements in the case of mergers and divisions, a file shall be opened in each Member State, the central register, the trade register or the company register for each of the companies registered in the register concerned, according to the Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Council Directive 2005/56/EC.

The draft terms of merger shall be published in the form provided for by the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC for each of the merging companies at least one month before the date of the general meeting which is to take a decision on the merger project.

The obligation to inform shareholders/associates is maintained even if the report drawn up by the directors is waived[25]. The information contained in the merger project is not sufficient to adequately inform its shareholders.

For the harmonization of the national and the union legislation, according to article 2432, paragraph (1), the administrative bodies of each of the entities shall be required to draw up a detailed, detailed report explaining and justifying, legally and economically, the proposed merger and, in particular, the exchange rate of the shares.[26]

The report is not carried out to the extent that all associates/shareholders and all holders of other securities conferring voting rights in each merging company decide in this respect.

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[22] T. G. I. Strasbourg, 26 sept.1969: R.T.D.com.1970, p. 150.

[23] Catana R. N., *Company Law*, Sfera Juridica Publishing House, Cluj Napoca, 2007, p. 82.

[24] According to him: "The management or management bodies of each of the merging companies draw up a detailed written report explaining the draft terms of merger and specifying the legal and economic basis of the project, in particular as regards the share exchange ratio. The report also describes any special assessment difficulties encountered."

[25] In this regard, see Mataragiu A.C., *op.cit.*, p. 138.

[26] Tuleașcă L., *Drept comercial-Comercianții*, Ed. Universul Juridic, Bucharest, 2018, p. 341; Schiau I., Prescure T., *op. cit.*, p. 702.

As we consider that the provisions of Article 242 (1)[27] are of general applicability, *de lege ferenda*, we consider it useful to complete it by adding the term "shares" along with "share exchange rate". Therefore, the text of art.2432 paragraph (1) would read as follows: "The managers of the merging or splitting companies must prepare a detailed written report explaining the draft terms of merger or division and specifying their legal and economic basis, in particular on the exchange rate of shares, *and shares respectively* ".

It should be noted that the right to information regulated by the provisions of Article 242 (2) also subsists and where the provisions of Article 241 of the Companies Law no. 31/1990.[28]

According to article 243 of the Companies Act, the merger of companies must be subject to an objective assessment by one or more independent experts preparing a written report for the shareholders as mentioned above. All this information is intended to enable shareholders to exercise the right to vote in an informed manner when the General Assembly is convened to vote for the merger. If, after analyzing this information, the shareholder decides that he does not agree with the merger, he may vote against. According to the provisions of Article 134 paragraph (2) of the Law no. 31/1990, the shareholder who voted against the merger may exercise its right of withdrawal within a term of 30 days by the date of the adoption or publication of the judgment in the case of the merger. Regarding the content of the draft merger, the Romanian courts had the opportunity to make their pronouncements. Thus, as stated[29], the project will include certain mandatory information, which contains essential information on the extent of shareholders' rights resulting from the merger.

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[27] Please note that art. 243² was introduced by Law no. 441/2006.
[28] In this regard, see Mataragiu A.C., *op. cit.*, p. 171.
[29] C.A. Timisoara, Civil Decision no. 830 of 25 June 2010, „Curierul Judiciar", no. 3/2011, p. 135-136.