JURIDICAL AND FISCAL ASPECTS REGARDING THE RESTRUCTURING OF ECONOMIC ENTITIES IN ROMANIA, IN EUROPEAN CONTEXT

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Summary

The purpose of this paper is the study of the juridical and fiscal aspects regarding the restructuring of the economical entities. Based on analyzing of the different materials on legislative advancements at national level and on European directives, rules and recommendations and other reference works, this study accomplished a synthesis of the main juridical aspects regarding the economical restructuring in Romania and in the European Union. The study emphasizes the importance of the knowledge of the fiscal aspects in order to draft a fiscal strategy, which needs to be developed prior to any formal offers or detailed studying of the target company, and which reveals the characteristics, the stages and the effects of the fusion operation of an economic entity. The results of the study points out the main juridical and fiscal aspects regarding the restructuring of the trading companies, as well as the main components of a fusion operation.

Keywords: juridical regulations, fiscal strategies, fusion

JEL Codes: M41

1. Introduction

A successful implementing of a restructuring operation, here being included those by fusion, implies many juridical aspects, the framework of running it being specified by regulations at national as well as European level.

In order to account the restructuring operations, the establishing of the point in time when the operation takes place is of utmost importance. Thus, a difference needs to be made between the closing date of the financial situations made upon restructuring operation (fusion, demerger, partial contribution of assets) and the date of the actual carrying out of the operation, respectively the date when the general shareholders assemblies of the involved companies have approved the restructuring project of the entities.

In the time lapse between the two points in time, the compiling of the financial situation upon restructuring operations and the date of the actual carrying out of the operation, the contributing company continues its activity, and this may lead to altering the contribution value mentioned in the fusion project. To avoid this, the practice of introducing a retroactivity clause in the fusion project (division or partial contribution of assets) has been established, by which the restructuring operation has effects from the date of closing the financial situation which precedes the restructuring operation. Accordingly the result of the retroactivity period will be distributed to the contribution beneficiary company, regardless of the latter profit or loss.

From an accounting point of view this clause materializes in the accounting, in the contributing company, of the economical-financial operations which take place in this period of retroactivity and the transfer of the result of the contribution beneficiary company, after the restructuring operation is actually carried out.

2. Juridical aspects regarding the restructuring of the economical entities

The accounting treatment of the restructurings is regulated by the legislation in force, both in Romania and in the countries of the European Union through specific norms for these operations.

In Romania, the main juridical act which regulates the fusion operation is the Law of the trading companies no.31/1990, republished, which entails the validity and carrying out conditions, as well as the general conditions, the intervention of the Court, the opposition of the Head office, the financial conditions of the fusion and the form and publicity conditions.

The accountancy aspects regarding the reorganizing and winding up operations are regulated by the Accounting Law no.82/1991, updated, by OMFP no.1376/2004 which approves the methodological norms for reflecting in the accountancy of the main fusion, division, dissolving and winding up operations of the commercial companies, as well as the withdrawal or the exclusion of some associates belonging to the commercial companies and the fiscal treatment...
of these by the OMFP no.3055/2005 for the approval of the accountancy regulations in accordance with the European directives.

The main provisions of the Accounting Law no.82/1991, republished, regarding the fusion relates to the obligations of the economical entities participating to the fusion to:

- to work out the financial situation upon fusion, under the conditions of the Accounting Law no.82/1991, article 28(1), to submit them to auditing if the respective person is under the obligation of auditing the annual financial situation, according to article 34(4) and to submit them at the territorial units of the Ministry of the Public Finances under the accounting regulations in force, according to article 36(4) of the Law of accounting, republished;

- to register in the accounting the operations determined by the fusion, based on adequate documents compiled in such cases, according to article 24 of the Law of accountancy no.82/1991.

The main provisions of OMGP no.1376/2004 which approves the methodological norms for reflecting in the accounting of the companies’ main fusion, division, dissolving and winding up operations, as well as withdrawal and exclusion of some associates within the companies, and the fiscal treatment of these refers to:
- the preliminary operations prior to the fusion which have to be made by the companies involved;
- the stages and the financial operations regarding the fusion;
- the way the fusion operation is reflected in the accounting of the economical entities, offering models depending on the different situations encountered so far;

O.M.G.P no.3055/2009 also regulates some specific aspects of the fusion operations. These refer to:
- acknowledgement and treatment of the commercial fond;
- the evaluations made upon fusion operations;
- the treatment of the own shares acquired as following the fusion with another company.

The Romanian legislation transposes the provisions of the directive 2009/109/CE of unification, of the directive 77/91/CE, 78/855/CE and 82/891/CE regarding the obligation of reporting and drafting of the necessary documentation in the fusion and division cases.

The novelty brought by the directive 2009/109/CE in the juridical aspect of the fusion operations, refer to the diminishing of the reporting obligations imposed to the companies, to simplifying of formalities of informing the shareholders by the leadership of the companies, as well as creating a simplified procedure for fusion through absorption, in which the absorbing company holds the totality or at least 90% of the shares of the absorbed company.  

1. Fiscal aspects regarding the restructuring of the economical entities

Having knowledge of the fiscal aspects of a restructuring operation plays an important role also in implementing it successfully. Even since the beginning phase of the transition operation, these aspects have to be analyzed and a suitable fiscal strategy for the transaction be worked out, this contributing significantly to the estimated result. The fiscal strategy has to be developed prior to the formal offers, the intention notification or to the detailed study of the targeted company. The purpose of the fiscal analysis is not only to identify and manage the fiscal risks, but also that of identifying and exploiting the possible opportunities of fiscal planning.

The detailed evaluation of the company to be purchased has to necessarily include its fiscal evaluation: the fiscal position, the fiscal confiscation, the safe or aggressive approach of the fiscal problem, the risk areas and the planning opportunities. As for the transaction itself, the focus has to be on structuring the acquisition point and on the various clauses in the agreement, which can have fiscal implications. The structuring of the transaction is made according to the concrete objectives of the parts, it is specific to each transaction, it can also be adjusted to maximize the strategies. The focus can be set on attaining of some creative financial structures, on minimizing the taxation at group level, on allocation of the acquisition price, on postponing the taxation of the capital gains or on different exit strategies.

According to international standard provisions, the commercial fond cannot be paid off, however, in some states, the commercial fond can be deducted or fiscally paid off. If this is not possible, the acquirer can formulate the purchase-sale contract so that the equivalent to appear as paid off for the tangible purchased assets, retrieving or removing the component of the price attributed to the intangible assets. This is possible as long as there are no specific fiscal regulations for the price allotment among the different purchased assets.

For the gross asset, entry value of the assets, in the case of a possible future sale, it is recommended a detailed mentioning of the value of every and each acquired asset, the costs of the acquisition being included here.
In our country, the tax code regulates the fiscal aspects of the restructuring operations. Other countries as well have a well structured legislative frame as the fiscal aspects play an important role in carrying out successfully of the restructuring of the economical entities.

The European Union has adopted directives meant to eliminate the taxation of the transfers such as dividends, interests and royalties between companies from different member states. Regarding the distribution of the profit, the regulations in force removes the withholding tax of the dividends and the double taxation of the parent-companies for the profit of their branches.

For fiscal grounds, the European Union prospected also the possibility of creating of a European company. The purpose of the European Union was to create a company type with its own legal framework, to allow the different companies registered in the different member states to fusion, to establish holding companies or common branches, thus avoiding the legal and practical constraints of separate jurisdiction.

This way the adopted fiscal strategy has an important role in accomplishing the objectives of the restructuring operations.

This leads to making use of specialized fiscal consultancy solutions in order to benefit of all fiscal provisions, which offers them a costs-benefits ration.

Without a complete and well-documented analysis of the financial, accountant and fiscal problems, the transition might bring some outcomes contrary to the expected ones, and the involved entities might find themselves in the impossibility of recovering the registered loss.

2. The characteristics and outcomes of a fusion operation of an economical entity

According to the legislation in force, the fusion operation has the following characteristics (Tiron Tudor, Rachisan R. and Cristea St., 2005):

- the fusion is also possible between companies with different legal forms as well;
- irrespective of the form in which the fusion operates, this cannot be carried out before each company has agreed through the general meetings of the shareholders of each company;
- the fusion determines the modifying of the constitutive act and the originally status for each company participating in the fusion, by abiding to the form and publicity conditions;
- the balance sheet drafted upon fusion has to be published by each company participating in the fusion and submitted at the Trade Registry Office together with the application form for the fusion decision;
- within a maximum of three months since the publication of the fusion notice in the Official Gazette, the general meeting of each participating company will decide the upon the fusion;
- the fusion is made by the absorbing of one company by the other, or by merging of two or more companies in order to create a new one;
- in the case of absorption fusion, the absorbing company acquires the rights and is exempted by the obligations of the company to be absorbed, whereas in the case of the merging fusion, the rights and obligations of the company which closes are passed over to the new established company;
- the fusion has as its outcome the dissolving without winding-up of the closing company, and the universal transfer of its patrimony to the beneficiary company, in the stand in which it finds itself at the moment of fusion;
- the closing date of the fusion formalities, the registers and documents which are no longer necessary will be taken over by an associate assigned by the voting majority, and which has the obligation of keeping these documents for 5 years.

The fusion operation process is carried out over many successive stages with patrimony implications on the participating companies. These stages are:

1. Drafting of the fusion projects, which are based on the financial situations made upon fusion, which shall be in accordance with the accounting regulations in force and are subjected to financial auditing. The content of the fusion project is regulated at European level by the directive 2011/35/UE on the fusion of stocks companies. The drafting of the fusion project is a key stage in running of the fusion operations, as this represents the main document on the basis of which further financial and accounting operations are being run. The information contained in this project aim at describing the juridical and economical reality of the operation, and at transposing these into accounting level within the fusing companies.

2. Endorsement and publishing of the fusion project

In order to achieve this, the following operations are run:

- Submitting the fusion project at the Trade Registry Office where each company is registered, together with the declaration of the company which closes its functioning as a result of the fusion;
- The endorsement of the fusion project by the judge assigned by the Trade Registry Office;
- The appointment by the assigned judge of one or more experts which will give their specialized opinions on the fusion;
3. Ensuring opposability against third parties
According to the Romanian legislation, the creditors of the companies participating in the fusion have the right to a proper protection of their interests. Thus, any creditor which holds a debt which is definite, liquid and prior to the publishing date of the fusion project, which is accrued at the time of the publishing and which aims at preventing a prejudice caused by the fusion, can oppose in order to guarantee the fulfillment of its claims.

4. The Romanian legislation in force provides that within three months since the publishing of the fusion project in the Official Gazette of Romania, the 4th part, the general meeting of each participating company will decide on the fusion. This decision is made with a majority of two thirds of the voting rights held by the share holders present, except for the situation in which the fusion leads to increasing of the obligations of one of the participating companies, in which case the decision is taken with a unanimity of votes.

5. Preparing the documents for registering the outcomes of the fusion. In the case of fusion by establishing of a new company, this leads to outcomes since the very date of registering of the new company in the trade register.

6. The accounting registration of the fusion, being the last stage of the fusion process, is represented by the transfer towards the absorbing company or to the newly established company of all the assets, debts and the capitals of the own as well as of the absorbed company, in accordance to the fusion’s established rules. Together with the registering of the transfer, there follows an increase of the social capital generated by emission of new shares to remunerate the shareholders of the absorbed company.

From a juridical point of view, the fusion of the companies has the following outcomes:
- The ending of juridical legal personality of the absorbed companies or of those participating in the merging fusion as a result of their anticipated dissolving, without winding up;
- Their universal transferring of the patrimony to the absorbing or to the newly established company;
- Ascribing of absorbing company’s or newly established company’s shares or social parts to the associates of the disappearing companies;
- The increase of the social capital of the absorbing company, and setting up of the social capital of the future company.

3. Conclusions
The results of the research highlight the main juridical and fiscal aspects concerning the restructuring of the companies, as well as characteristics and components of a fusion operation.

From a juridical point of view, the fusions are characterized by a multitude of accomplishing ways, which can influence the accounting treatment. A successful implementing of a restructuring operation, here included those by fusion, includes plenty of juridical aspects, the guiding lines of their carrying out being formulated by specific national and European regulations.

4. References
The Law of the trading companies no.31/1990, republished with subsequent modifications and amendments

The Law of accounting no.82/1991, republished, with subsequent modifications and amendments

The Law no.571/2003 regarding the Tax Code, republished, with subsequent modifications and amendments

OMFP no.1376/2004 for the approval of the methodology norms regarding the reflecting in the accounting of the main operations of fusion, division and winding up of the trading companies

The accounting regulations in accordance with the European directives, approved by OMFP no.3055/2009, with subsequent modifications and amendments.