SCIENTIFIC REVIEW

CHANGE OF THE BUSINESS COMPANIES MERGER STATUS IN THE LIGHT OF COMPLIANCE OF LAW REGULATIONS IN THE REPUBLIC OF SRPSKA WITH REGULATIONS OF THE EUROPEAN UNION

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ABSTRACT

In the paper, the author analyzes the change of the business companies in the Republic of Srpska merger status, that is, the possibilities and ways through which one or more companies can change their structure in order to adapt to market conditions as easily as possible. First of all, the aim of the paper is to display the state of legislative regulations on status changes in the Republic of Srpska and the degree of compliance of this area of commercial law with EU regulations. The author started from the fact that the Law on business companies of the Republic of Srpska from 2008 and subsequent amendments to that Law harmonized this area with community law. In terms of methodology, the paper used the method of analysis, and the comparative method, which achieved a concise observation of the distinctions between the described and analyzed legal regulations. On the basis of the performed analysis, it is concluded that with the adoption of the Law on business companies of the Republic of Srpska, the matter of the status change of the merger has been significantly harmonized with the regulations of the European Union by introducing novelties regarding the modification of the founder's rights of the company that is being terminated, the introduction of auditors and reporting by an independent expert during the merger of companies.

***Keywords**: business companies, status changes, merger, EU directives.*

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INTRODUCTION

Business companies are established for the purpose of carrying out a certain economic activity during the time of their existence. However, it often happens that it is necessary to take certain actions within a certain company in order to make adjustments, i.e., adjustments to business conditions. Therefore, the most common reasons that impose the need for certain changes are market requirements, but very often these changes are also imposed by legal solutions. Actions taken in such and similar cases are different and depend on the goal that needs to be achieved. In any case, there would be a reorganization of the company. Reorganization of a company has its different meanings depending on the legal system, i.e., legal solutions. Consequently, a business company can be reorganized by making certain status changes or by making a change in form, i.e. legal form [1]. In some other cases, the reorganization may lead to the termination of the business entity, and an increase or decrease in the founding capital of the business entity [2]. As can be observed, also, in the Republic of Srpska, the legislator gave similar meanings to the reorganization of the company. In contrast to changes in status, a change in legal form does not necessarily lead to the termination of a company, but to the termination of its existence in a certain form. A change of legal form is a transition from one form to another[3], and it can be very easy a transition from a limited liability company to a joint stock company or vice versa.

[3] Article 417. Law on business companies

Bearing in mind that the reorganization of business companies implies a very wide range of possibilities, under which, in addition to those mentioned, bankruptcy and liquidation, in this paper the emphasis will be placed on status changes, the status change of mergers, viewed from the aspect of existing legal solutions and solutions that are regulated by the regulations of the European Union, and in order to determine the degree of compliance of the existing legal regulations with the regulations of the European Union, in this matter. When talking about the status changes of companies, one should start from the fact that it is a special form of reorganization, i.e., on structural connections of business companies. Merger of companies refers to all forms of companies regulated by the Law on Companies of the Republic of Srpska. However, by taking a deeper look at the institute of status changes of mergers, we notice that this status change, as well as other status changes, are also used outside of companies. More precisely, they are very often used for reorganizations within institutions, as well as other legal entities, but they also refer to institutions. Thus, the Law on higher education of the Republic of Srpska gives the possibility that status changes can be implemented between higher education institutions [3].

THE CONCEPT OF STATUS CHANGE

Under the status change of a company is meant a wide range of changes in the legal position of the company, after which the company, in relation to its previous legal position, can no longer be considered the same. In practice, we encounter several types of status changes, which in principle can be subsumed under three basic types, namely: merger, division and separation. Which of the aforementioned status changes a society will opt for depends on the goals it wants to achieve, and they are most often of an economic nature. Certain forms of status changes can occur between companies that are independent and not connected by capital to a group, between subsidiaries in one group of companies or subsidiaries in different groups of companies, and between parent and subsidiary companies [2]

The society changes its legal position and freely decides about it, which means that it cannot be forced to change its status, but it can be forbidden to them [4]. Preventing the change of status of a business company can happen when it tries to avoid criminal responsibility. However, such prohibitions are prescribed by the criminal legislation. It is officially taken care of by the acting state body, which decides on the status change.

In addition, companies are prohibited from making status changes if they violate regulations on competition protection.

The nature of the status change of the merger is such that it always leads to essential changes, which, first of all, relate to the termination or the creation of a new company. However, in the case of termination of the company by status change of merger, the consequences that occur in the case of regular termination, i.e., by shutting down the company. This is reflected both in the assets of the company that are taken over by another or new company, and in the employees, because they remain employed in that other or new company.

The national legislations of European countries also know, that is, they regulate the institute of status changes, which have harmonized their regulations in more or less detail with the directives of the European Union[5]

MERGER OF A BUSINESS COMPANY

Merger of business companies is defined as merger with merging and merger with establishment[4].

Merger by merging is a change in status by which one company ceases to exist without liquidation, transferring all its assets and liabilities to another existing company, in exchange for the issuance of shares or shares to shareholders or members of companies terminated by the merger from the acquiring company, and if necessary, a monetary supplement that does not exceed 10% of the nominal value of such issued shares[5]. This legal provision is much more precise in relation to the merger with merging regulated by earlier legal regulations [6], both in terms of the status of the merged company after the status change, and in terms of the modalities of the rights of the founders, that is, the shareholders of the company being merged. Merger with separation is a status change by which two or more business companies cease to exist

[4] Article 372 of the ZPD
[5] Ibid

without liquidation, transferring all their assets and liabilities in exchange for the issuance of shares or shares from the new company to the shareholders or members of the defunct company and, if necessary, a cash payment that does not exceed 10% of the nominal the value of shares thus issued[6]. Both in the case of a merger by merger and in the case of a merger through the establishment of a new company, there are a number of inaccuracies in relation to the existing Law[7]. In relation to mergers and acquisitions where one company ceases to exist but continues in another company, in the case of mergers with the establishment of two or more companies, which participate in the status change, cease to exist and continue to exist in the newly established business company. Similar to the aforementioned decision on the status change of a merger, which is defined by the Law on Business Companies, a similar position has been taken in the European Union, according to which a clear division of mergers is made, as "merger by purchase" and "merger by founding a new company"[7]. Merger by purchase means a procedure in which one or more companies, after the company goes bankrupt without liquidation, transfers to another company all its assets and liabilities in exchange for issuing to the shareholders of the company or companies being bought, shares in the company it is buying, and cash payment, if has, which does not exceed 10% of the nominal value of such issued shares, or where they do not have a nominal value, their accounting parity value[8].

The company that ceases to exist transfers all its assets, rights and obligations to the company that is being merged, while the acquiring company is responsible for the obligations of the merged company to creditors, so the agreement of the companies participating in this status change cannot provide for the exclusion of liability. By taking over goods from a merged company, that is, a company that ceases to be merged, very often certain abuses can occur on the market. These abuses are possible by creating concentrations [11]. However, not every form of concentration is prohibited. Only those concentrations that result in a significant disruption of effective market competition on the entire market of Bosnia and Herzegovina or on a significant part of it, and especially those that create a new or strengthen an existing dominant position, are prohibited[9].

In addition to the aforementioned abuse, a change of status can be resorted to if the goal is the cessation of existence, that is, the termination of one or more companies, avoiding the payment of certain obligations that entail the termination of companies, in a regular procedure. From the meaning of the introduction of the merger institute, however, it follows that the ultimate goal of the merger is not the termination of the company or companies that end due to a change in status. The main goal is the further development of their business activities, that is, the activities they performed. Thus, in Italian literature, merger is understood as a specific way of modifying the constitutive acts, that is, a specific procedure for the transformation of society [8].

The merger process takes place in several stages. In the first phase, the companies participating in the merger and acquisition prepare a draft of the merger agreement, and the management boards of each of the participating companies prepare a detailed written report explaining the agreement and stating the reasons for the status change as well as the consequences that will arise from it. Then, the draft contract is published in the Official Gazette of Republic of Srpska and subjected to an audit by one or more independent auditors of the companies participating in the status change, with the fact that the audit can be omitted if the shareholders or owners of shares with voting rights agree to it[10]. An identical position regarding the absence of revision of the draft contract is taken in the law of the European Union [9]. Independent auditors are appointed by the court in non-litigation proceedings. The last, third, stage refers to making a decision on status change, which is the responsibility of the assembly, that is, the founder of the company.

In practice, the draft contract must be certified by a notary, and then submitted to the court registry and published in the Official Gazette no later than 30 days before the meeting of shareholders[11]. Opting for this kind of legal provision, the Law on Securities Companies of the Republic of Srpska retained the traditional way of publishing data[12], which, by the way, was amended by the Directive on amendments to the Second, Third, Sixth and Cross-Border Mergers Directives [10]. This conclusion also stems from the

[6] 372.2. ZPD

[7] Article 407, paragraph 2 of the ZP.

[8] Article 3 of the Third EU Directive.

[9] Article 13 of the BiH Competition Law.

[10] Article 379 of the ZPD.

[11] Article 380 of the Law on Business Companies.

[12] Article 6 of the Third Directive 78/855/EEC

fact that after the adoption of the Directive on Amendments in 2009, amendments were made to the Law on Business Companies from 2008, however, the method of publishing data in the process of status changes did not change[13], while, for example, this alignment was carried out in the Republic of Serbia by the new Law on Business Companies [12].

Creditors of companies participating in the merger process have the right to demand security or settlement of their claims, both due and unpaid. Creditors of the companies participating in the merger have priority in settling claims from the assets of the company that was their debtor. In addition to securing and settling claims, the law also paid special attention to the protection of bond holders, as well as the protection of holders of securities with special rights[14], in a similar way as provided by EU directives.

CONCLUSION

On the basis of the presented material on the status change of the merger, it is evident that the Law on Business Companies of the Republic of Srpska provided a clearer and more precise definition of both the status change of merger with merger and the status change of merger with establishment. Those clarifications primarily refer to the very name of the status change. Namely, while the earlier regulation used the term takeover, the new Law uses the term merger with merger. The essential novelty, both in the case of merger and in the establishment of a new company, refers to the determination of the status of the company that is being merged in terms of its termination, as well as in terms of the modification of the founder's rights of the company that ends, after the implementation of this status change. Also, important novelties refer to property valuation, because the new regulations give an important role in that matter to the independent auditor, unlike the previous regulation, which gave an important role to the company's supervisory board and the appraiser. In this part, it is particularly emphasized that the Law on Business Companies has also implemented Directive 2007/63/EC of the European Parliament and the Council, and the emphasis is placed on reporting by an independent expert when merging companies. In addition to the above, clarifications were made with regard to the publication of the draft merger agreement, and thus alignment with Directive 2009/109/EC of the European Parliament and the Council was carried out. From the above, it can be concluded that the Law on Business Companies of Republic of Srpska significantly harmonized the status change of the merger with the regulations of the European Union.

[13] Article 379 of the ZPD.
[14] Articles 386-388, ZPD

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[9] Article 2 of Directive 2007/63/EC of the European Parliament and of the Council of November 13, 2007 amending Council Directives 78/855/EEC and 82/891/EEC regarding the requirement for an independent expert's report during the merger or division of public companies with limited liability - No examination of the draft terms of the merger or an expert report is required if all shareholders and owners of other securities giving the right to vote of each of the companies involved in the merger have so agreed.
[10] Directive 2009/109/EC of the European Parliament and the Council of September 16, 2009 amending Council Directives 77/91 EEC, 78/855 and 82/891/EEC and Directive 2005/56/EC - this Directive stipulates that publication made if, for a continuous period of at least one month before the date on which the assembly deciding on the merger is scheduled to be held and until the assembly has not been adjourned, it makes the draft of the merger agreement available to the public free of charge on its website.
[11] Article 12 of the BiH Competition Law, Official Gazette of Bosnia and Herzegovina, No. 48/2005, 76/2007, 80/2009. According to the aforementioned legal provision, one of the ways of concentration is the merger or merger of independent economic entities or groups of economic entities.
[12] Article 495. Law on Business Companies, Official Gazette of the Republic of Serbia no. 36/11, 83/2014, 5/2015, 44/2018, 91/2019, 109/2021.

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