

FUSION OF THE ASSOCIATIONS AND FOUNDATIONS SET UP ON THE BASIS OF OG 26/2000

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Abstract: *Fusion of associations and foundations is an institution scarcely ruled by the Romanian legislation, compelling the most of cases the practice to fall back on to legal dispositions regarding the commercial companies, mainly due to the lack of legislation or a clear practice that does not allow ambiguity. In fact, the only regulations regarding these institutions are provided by the art. 33 – 34 index 1 from OG 26/2000 and art. 234 – 239 from the Civil Code, settlements that do not answer to the dynamics of the non-governmental organizations, that weight more and more in the Romanian society. Thereby, it is difficult for us to answer how to transfer the assets and liabilities (on the fusion and split up date or thereafter), at the possibility as that an association fuses with a foundation or that a foundation splits up in many associations, even that by clearance the patrimony of an association may be transferred to a foundation or that of a foundation to an non-profit association. Therefore we consider that a practical approach is compulsory for this subject with regard the completion of legislative lacks in this field, by reporting to juridical norms and the principles of the civil law as well in order to identify the optimal solutions in these cases.*

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The fusion of an association with another association can be done according to article 34 index 1 from Governmental Ordinance 26/2001 by absorption of an association by another association or by merging two or more associations in order to set up a new association.

Procedurally, in the case of fusion by absorption it is necessary to adopt decisions of the general assembly through which the absorbed association approves ceasing of its activity and absorption of the association by the association that will continue the activity and also the decision through which the association that continues its activity absorbs the association that cease its activity or, in case of a fusion by merging the decisions of the general assemblies with regard the ceasing of

activity and absorption in a new association.

According to article 34 index 2 these decisions must be taken by the majority of at least two thirds of the members of the leading authority, of the General Assembly, respectively.

The Article 34 index 1 and 34 index 2 from the Governmental Ordinance 26/2001 are the only articles regarding the fusion of associations and foundations.

The special law does not refer to the situation of rights and obligations, proceeding from the relations with the thirds of the two associations, to capitals and patrimonies, assets and liabilities of the association members.

To clarify these issues, the special law specifies at article 80 the fact that the provisions of Ordinance 26/2000 are

supplemented with the Civil Code provisions.

In the case of the fusion of associations these dispositions are provided by Book I Title IV Chapter V – The Reorganization of Legal Entities – article 232 and the subsequent ones from Civil Code.

So, article 233 paragraph 2 from the Civil Code shows us that the fusion is done observing the conditions provided for obtaining of juridical entity, except the case when, by law, the constitutive act or the articles of association are disposed otherwise.

Also, the Article 235 from the Civil Code disposes that, in case of absorption, the rights and duties of the legal entity absorbed are transferred into the patrimony of the legal entity that absorbs it and in the case of merging of legal entities their rights and duties and obligations are transferred into the patrimony of the new set up legal entity.

In order to avoid litigations subsequent to fusion with regard the assets and the liabilities of the absorbed association or of the associations that fuses by merging, depending on the case, the legal practice considered that it is necessary that the content of the decision of fusion specifies the patrimony that is to be absorbed or comes into the new association patrimony [1].

Usually, the courts require that a copy of the balance and of the last balance sheet submitted to the National Agency of Fiscal Administration is attached to the request regarding the associations or foundations fusion.

The complexity of the operations regarding the taking over of the patrimony, assets and liabilities within the fusion of associations and foundations, made that the practice ‘borrows’ the legal dispositions established in case of fusion provided for commercial companies. In practice, it is difficult that the date on which the court makes the decision with regard the fusion of

associations is the effective date on which the assets and liabilities are taken over, due to the huge volume of inventory of the association assets, activity that, generally, needs many days [2]

So, the article 241 from Law 31/1990 it is shown that the fusion project must contain the date of the financial status of the companies taking part, that have been used to set the fusion conditions and the date on which the transactions of the absorbed company are considered from accounting point of view as belonging to the absorbing company or to one or another of the beneficiary companies, through the decision of fusion by absorption or merging a date subsequent to the date when the delivery and taking over of assets and liabilities and archive of the association is to be set.

We are in the situation in which the taking over of the association patrimony takes place in fact to a date subsequent to the court decision of fusion.

With regard the associated members, the situation is different, depending on the fusion manner.

In the situation of fusion by merging, because a new association is set up, this one must observe the dispositions regarding the associations set up – respectively the nomination of the associated members and the structure of the Executive Board.

In the case of the fusion by absorption, we consider that the associations may decide on a new structure of the General Assembly, if the members of the absorbed association become or do not become members of the association which absorbs.

When the members of the absorbed association do not want to continue their activity with the new association, and the intention of fusion is only to continue the activity of the absorbed association, taking into account the fact that the absorbed association ceases its activity, the parts may not stipulate inside the decision of fusion

the status of the members of the absorbed association.

Article 34 index 3 from the Governmental Ordinance 26/2000 shows that the fusion in case of foundations is done in the same way as the associations fusion. The only difference in the case of foundations fusion refers to the quorum needed to approve the fusion decision. If the associations needs a quorum of two thirds from the number of the members of association General Assembly, within the fusion we have the application the dispositions of article 29 paragraph 5 from Governmental Ordinance 26/2000, respectively the possibility that the fusion to be approved either by the founder or by the majority of the alive founders, or, if none of the founders is alive, the fusion decision may be taken by the vote of a four fifths of the Executive Board members.

So far we have presented the situation in which two or more associations decide to fuse or to or more foundations decide to fuse.

What happens if a foundation decides to fuse with an association either by absorption or by merging?

A first opinion is that the fusion is allowed by the ruler only between legal entities without patrimonial purpose and having the same legal form, which means exclusively between associations, respectively foundations, such a fusion between an association and a foundation being not allowable. The argument of this opinion is given by the provision of article 34 indexes 1 from Governmental Ordinance 26/2000, which emphasizes only the fusion between associations, and the second thesis of the article emphasizes that the dispositions referring to the associations are applied in the case of fusion of foundations, too. So it is considered that the ruler excluded the participation at a fusion of some legal entities having different forms of organization [3].

But this interpretation violates the principle according to which where the law

makes no difference, we do not make the difference either (*ubi lex non distinguit, nec nos distinguere debemus*).

Also, this opinion is contrary, in our opinion, to the right of free association provided by article 40 from Constitution and by article 2 from Governmental Ordinance 26/2000.

It is true that the special civil law makes no express reference regarding the fusion between associations and foundations but neither forbids it, the special law, respectively Governmental Ordinance 26/2000, referring only to the fusion between associations and the fusion between foundations.

The fact that the ruler did not take precedence the fusion between associations and foundations does not mean he excluded this possibility or forbade it.

As we have previously highlighted, according to article 80 from Governmental Ordinance 26/2000, the dispositions of Governmental Ordinance 26/2000 are completed by the provisions of the Civil Code.

The Civil Code is shown that ‘The fusion is made through the absorption of a legal entity by another legal entity or by merging of more legal entities in order to become a new legal entity’ (article 234 Civil Code)

Given the fact that the ruler did not forbid the fusion between associations and foundations, nor we should consider an omission from the special law as being an interdiction of fusion between associations and foundations.

Logically, subsequent to this idea, it should be emphasized that both foundation and the association are subjects of law with similar purposes, respectively the achievement of some purposes of general or community interest, their patrimony being irrevocably earmarked to these purposes (article 1, article 4, article 15 Governmental Ordinance 26/2000), there being no technical, functional, or logical impediment leading to the idea that such a fusion could

not be done.

Besides, the ruler provided the possibility that in case of dissolution (article 60 paragraph 2 from Governmental Ordinance 26/2000) of the association or foundation, the assets remaining after liquidation are transferred to legal entities of private or public law with identical or similar purpose, through a procedure established in the association or foundation statute.

Article 60 paragraph 3 from Governmental Ordinance 26/2000 establishes that, when the liquidators did not manage that within six months after liquidation termination, the liquidators did not manage to transfer the assets in the conditions mentioned above, and also when the association or foundation statute does not provide a procedure for assets transmission or if the provision is contrary to the law or public order, the assets remained after liquidation shall be assigned by the competent court, to a legal entity with an identical or similar purpose.

These dispositions show that, when an association is dissolved, it can transfer its remained patrimony after the liquidation only to an association or a foundation as a result of the statute provisions or of the liquidator's report, the situation being similar in the case of a foundation which can transfer its patrimony to an association or to a foundation.

So, an association or foundation, which would intend to act for a common purpose of general or community interest earmarking the patrimony which they possess for this purpose, would have no other possibility according to the reason that an association cannot fusion with a foundation only if one of them is dissolved and the other one takes over its patrimony as a result of liquidation and the members of the foundation join the association and not in the least to fusion and carry out the activity according to the proposed purposes.

As long as the civil law assures the possibility that this kind of taking over,

which would be the logical-legal reason supporting in sustaining the hypothesis that an association and a foundation with identical or similar purposes cannot fusion?

We consider that such an argument does not exist. The simple omission of the ruler regarding the fusion of associations and foundations does not mean the interdiction of this legal operation, as long as there is a general legal frame – articles 234 and 235 from Civil Code – regarding the fusion of legal entities.

Another argument in favour of the opinion regarding the possibility of fusion between associations and foundations, starting from the argument that the law does not stipulate the possibility of fusion between associations and foundations only, is that, until the modification of Governmental Ordinance 26/2000 by Law no. 246/2005 for the approval of the Governmental Ordinance 26/2000, it was not expressly stipulated by the Governmental Ordinance 26/2000 the possibility of fusion nor for associations nor for foundations, without this situation is interpreted as the fusion of associations or foundations would be forbidden by law. So, fusions between associations or between foundations had been conducted before and after Law 246/2005 appeared.

These fusions were a result of interpretation of legal norms of civil law, in the sense of their application not their violation (*actus interpretandus est potius ut valeat quam ut pereat*)

The *a fortiori rationae* argument justifies the extension of the norm application regarding the fusion between associations or between foundations to a case expressly unforeseen by law, that of the fusion between an association and a foundation. The reasons taken into account when establishing the norm regarding the fusion between associations or foundations are found in the situation of the fusion between an association and a foundation, there being no logical reason to interpret the law as forbidding such fusions.

Also, in the case of fusion by merging, the legal entities of private law set up according to Governmental Ordinance 26/2001 associations or foundations they cease their activity, and the activities of general or community interest are to be accomplished by the new foundation or association where the other non-governmental organizations merged.

The argument with regard the impossibility of fusion of an association with a foundation due to the lack of this provision, expressly from legislation, is contradicted by the legal possibility not stipulated by the special law, except the transformation of a testamentary foundation that constitutes the will of the testator founder [5].

The way of reorganization of a legal entity through transformation of the legal entity has been introduced into the Civil Code by articles 241 Civil Code.

Lack of provision regarding the transformation of associations and

foundations by the special law does not mean rejection by the court of an inquiry made by an association or foundation willing to re-organize its activity under another form provided by OG 26/2000.

Consequently, we consider as allowable the hypothesis of fusion between associations and foundations as legal entities with the purpose of accomplishment of some general and community purpose.

In order to avoid non-unitary legal practices with regard the allowance of fusion between an association and a foundation and of transformation of an association into a foundation and a foundation into an association (except the testamentary foundation), we consider that the ruler should expressly provide these possibilities, both from principle of freedom of association and of observance of the re-organization ways provided by the Civil Code.

References

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