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CORPORATE MERGERS: A COMPARATIVE ANALYSIS OF THE ITALIAN AND AMERICAN LEGAL SYSTEMS

Chiar.mo Prof. Antonio Nuzzo

RELATORE

Chiar.mo Prof. Andrea Palazzolo

CORRELATORE

Ludovica Carboni
Matr. 160483

CANDIDATA

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INTRODUCTION

Corporate mergers are a cornerstone of modern business strategy, profoundly impacting the global economic landscape by enabling companies to expand, innovate, and enhance their competitive edge.

The importance of mergers is particularly prominent in Italy, where mergers have been the subject of extensive scholarly debate, especially regarding whether the companies involved in a merger are extinguished and cease to exist or whether they continue in a different form. Understanding the legal nature of mergers is not merely a theoretical exercise but a practical necessity. It affects how companies strategize, how stakeholders are protected, and how the broader economic landscape evolves.

Italian scholars have long debated the legal effects of mergers, inspired by the literal text of art. 2504-bis c.c.

The most recent jurisprudential and doctrinal stance, articulated by the Court of Cassation in its landmark ruling no. 21970/2021, marked a decisive return to the *extinguishing-successory theory* of mergers. This theory asserts that, following a merger, the incorporated companies cease to exist, with their rights and obligations transferred to the surviving or newly-formed entity.

This traditional approach has deep historical roots. Under the 1942 Civil Code, art. 2504-bis c.c. explicitly provided that “upon completion of a merger, the incorporating or resulting company assumes all the rights and obligations of the extinct companies”, reinforcing the concept that a merger led to the dissolution of the merging companies, resulting in a

phenomenon of universal succession in many aspect similar to the one that occurs in the case of universal succession *mortis causa*.
However, this perspective shifted with the company law reform introduced by Legislative Decree no. 6 of 2003, which fundamentally changed the traditional view. The reform removed the term "extinction" from the updated art. 2504-bis c.c., leading many scholars to interpret the change as an attempt to frame mergers as a restructuring or reorganization of the companies involved, rather than their dissolution. According to this interpretation, known as the *evolutionary-modifying theory*, companies involved in a merger would survive the process in a new form, retaining their identity within a reorganized structure.
The *evolutionary-modifying theory* was widely accepted and confirmed by the United Sections of the Supreme Court in ruling no. 2637/2006, which concluded that mergers do not lead to the extinction of companies but rather an evolutionary modification, where the company persists in a new organizational structure[1].
Fifteen years after the 2006 intervention, the debate became prominent again, with the United Sections revisiting the issue of the legal nature of mergers with ruling no. 21970 of 2021, completely overturning their previous conclusions and reaffirming the *extinguishing-successory theory.* The Court clarified that merger "is not merely a modifying

[1] Cass. Civ., SS.UU., February 8, 2006, no. 2637, in Società, 2006, p.459, with a commentary by F. Dimundo, "Effetti processuali della fusione: le Sezioni unite pongono fine all'interruzione dei processi civili"; in Riv. not., 2006, 1136 ff., with a commentary by F. Scalabrini - G.A.M. Trimarchi, "Le Sezioni Unite sulla natura giuridica della fusione: un punto d'arrivo nel dibattito tra teoria e pratica?"; in Corr. giur., 2006, p.795, with a commentary by F. Meloncelli, "Fusione di società e interruzione del processo civile"; in Vita not., 2006, p.125, with a commentary by A. Pellizzeri Macrì, "Sulla natura della fusione per incorporazione."

event, but rather a true and proper legal dissolution or extinction, concurrent with a successory phenomenon."

Moreover, the Court highlighted that the evolutionary-modifying thesis could be considered in contrast with the literal text of the new provision of art. 2504-bis c.c., affirming that "while it is true that the word *extinguished* has been eliminated, the provision has also established, in a much less ambiguous way, that all relationships, both substantive and procedural, continue to be held by the incorporating or resulting company[2]."

This interpretation aligns Italy more closely with the United States, where the extinction of merged companies has never been debated and is specifically stated in the Model Business Corporation Act (MBCA) Section 11.07 (a)(2).

Motivated by this ongoing debate and the importance of mergers in the modern legal landscape, I aimed to focus this dissertation on a comparative analysis of corporate mergers in Italy and the United

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[2] In addition to G.F. Campobasso. (2015). Diritto commerciale.Vol. 2: Diritto delle società. Utet, p.658, in the sense of emphasizing (also) the aspect of universal succession, C. Santagata - R. Santagata, "Le fusioni.(2005) Giuffrè, p. 64. G. Ferri. (2016) Manuale di diritto commerciale, edited by Angelici - Ferri, 15th ed., Turin, Giappichelli, p. 481 ff.; G. Presti.- M. Rescigno. (2021). 'Corso di diritto commerciale', Bologna, 10th ed.,p. 707; G.B. Portale. (2005) 'La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato', in 'Europa e diritto privato', p. 116; G.A. Rescio. (2015). 'La fusione e la scissione', in 'Trattato delle società a responsabilità limitata', edited by Ibba-Marasà, vol. 7, Milan - Padua, p. 151 ff., (who reaffirms their position in G.A. Rescio, 'Fusione e scissione', in 'Le società a responsabilità limitata', edited by Marasà – Ibba. (2020) vol. 3, Milan,p. 2490 ff.), correctly noting that 'the dispute, once heated between decidedly polarized positions, seems today to tend towards quiet recognition of the inherent limitations of both views, if taken 'in purity,' and their ability to provide more conceptual frameworks to support arguments rather than adequate answers for the solution of concrete problems: hence a substantial indifference to the starting conception, often inclined to converge with the opposing theory in hybrid formulations.' On this point, see also S. Patriarca - P. Benazzo. (2022). 'Diritto delle società', Bologna, 3rd ed., p.263, according to whom, 'despite, especially with regard to the merger proper, the law itself (...) hints favorably towards the occurrence of a phenomenon of extinction/creation of legal entities, the legislator's choice is oriented towards describing the phenomenon in terms of universal succession'; as well as N. de Luca, 'Morte apparente o risurrezione di società?', cited, according to whom 'the merger is not only a modificative-evolutionary phenomenon, but also a translative-successory one.' For further references, see A. Genovese, 'Art. 2504 bis', in 'Le società per azioni', edited by Abbadessa – Portale. (2016) vol. 2, Milan,p. 3352 ff.

States. This decision was also influenced by my period of study at *Temple Beasley School of Law* in Philadelphia, where I was able to deepen my understanding of American corporate law while also reflecting on the Italian system.

The work is structured into four chapters, each aimed at providing a comprehensive analysis of how mergers are regulated in both Italy and the United States. I will examine the distinct legal frameworks governing these processes, highlighting the characteristics and principles that define each system.

This work analyzes the strengths and drawbacks of both legal frameworks, seeking to determine whether each system could benefit from mutual alignment and to what extent harmonization between them is achievable.

While ruling no. 21970/2021 has brought the two systems closer, substantial differences remain deeply embedded within their respective legal cultures. These differences are rooted not only in the different legal systems - civil law in Italy and common law in the United States - but also in the historical and economic contexts that have shaped each country's approach to corporate law.

Italy’s civil law system is characterized by a high degree of codification, resulting in a more structured and predictable merger process, albeit one that can be slower and more complex. In contrast, the U.S. common law system emphasizes flexibility, allowing for quicker responses to changing market conditions, but it also introduces a degree of uncertainty.

Moreover, the historical contexts, particularly in the aftermath of World War II, have influenced each country's approach to mergers. In Italy, strong state involvement led to a stakeholder-centric model that prioritizes the interests of not only shareholders but also other parties, such as employees and creditors. Conversely, the U.S. has favored a market-driven efficiency model that emphasizes shareholder primacy, focusing on maximizing shareholder value.

Therefore, as global markets continue to integrate, some convergence between these systems may emerge; however, the fundamental differences in their legal frameworks and constitutional principles are likely to preserve distinct approaches to merger regulation in Italy and the United States for the foreseeable future.

CHAPTER I

MERGERS IN THE ITALIAN AND EUROPEAN LEGAL SYSTEM

1. The Italian legal landscape for mergers

The term *merger* refers to the unification of two or more companies into a single one, including both their respective assets and pre-existing corporate structures.

According to art. 2501 c.c., merger occurs either through the formation of a new company or through the incorporation into a company of one or more other companies.

A merger can be carried out in two different forms. The first one is the so called *merger in the strict sense* (also referred to as “proper merger”) which involves the establishment of a new company and the extinction of the pre-existing companies that participated in the merger; the second one is called *merger by incorporation* (also known as “improper merger”) whereby one or more of the pre-existing companies participating in the merger are incorporated into another company participating in the merger, so that the latter continues to survive, albeit characterized by a changed organizational and capital structure[3].

The merger can take place either between companies of the same type (*homogeneous or horizontal merger*), or between companies of a

[3] This is the most widespread form of merger in practice. In turn, the merger by incorporation is said to be "direct" when the parent company incorporates the subsidiary company, and "reverse" when the subsidiary incorporates the parent company. On the methods of carrying out reverse mergers and the legal problems they raise, see A. GIANNELLI, in Riv. soc., 2008, 1155 ff.

different type (*heterogeneous or vertical merger*)[4], or even between companies and entities of a different type within the limits permitted by the discipline of heterogeneous transformation. The merger between heterogeneous companies (for example, the incorporation of a general partnership or a limited liability company into a joint-stock company)[5] also involves the transformation of one or more of the merging companies. The same limits established for transformation therefore apply to heterogeneous mergers[6]. Furthermore, for companies or entities of a different type from the one resulting from the merger, the rules on transformation must also be respected when implementing the operation.

Participation in the merger is not permitted to companies that are in a state of liquidation and have already begun the distribution of assets (art. 2501, paragraph 2, c.c.), unless only companies with capital not represented by shares participate in the merger (art. 2505-quarter c.c.). The previously debated problem of the compatibility between merger and liquidation was thus resolved with an intermediate solution[7].

[4] However, it was and remains controversial whether irregular companies can also participate in the merger, considering the fact that the publicity requirements required for the merger procedure are not possible for them and in a negative sense, lastly, Cass, 11-1- 1989 no. 58, in Giur, comm., 1991, II, 268, with a critical note by STORCHI. Resolving previous doubts, the current regulation expressly allows simple companies to participate in the merger (art. 2502-bis c.c.), also because they are now subject to the obligation to register in the company register.

[5] A general partnership is a business arrangement where two or more people jointly own and manage a business. On the other hand, a limited liability company is a business structure where the owners (called members) enjoy limited liability. The incorporation of a general partnership into a joint-stock company determines that partners in a GP, who previously had unlimited liability, become shareholders with limited liability, holding shares that represent their ownership. The incorporation of a LLC into a joint-stock company entails that LLC members convert their ownership into shares, while retaining limited liability.

[6] *See* Cons. note. Milan, Maximum no. 52/2004 (albeit starting from a broader interpretation of the limits of admissibility of heterogeneous transformation). It follows that the incorporation of an individual company into a company is not a merger, but rather a business transfer (*see* Cass., 25-10-1976, n. 3844, in Giur. comm., 1977, 11, 9).

[7] The incorporating company may therefore also be in a state of liquidation. And in the sense that the incorporation does not in itself imply the revocation of the liquidation status of the incorporating company,

Furthermore, with the Legislative Decree No. 6 of 17 January 2003 (Corporate Law Reform) the ban on companies undergoing insolvency proceedings was lifted.

There are various reasons why companies choose to pursue mergers. First of all, the merger is a tool for concentrating corporate businesses that allows them to expand their size and competitiveness on the market. The merger is also an institution that gives rise to a legal and not just an economic concentration (as, for example, happens in groups of companies). Indeed, as we stated above, in a merger a plurality of companies is replaced by a single entity: the incorporating company or the new company resulting from the merger.

The merger therefore results the reduction of the assets of the individual companies to unity and the merging of the respective shareholders into a single organizational structure which continues the activity of all the pre-existing companies, while the latter - except one in the merger by incorporation - become extinct.

However, they expire - and this is the peculiarity of the merger - without giving rise to any definition of the relationships with third parties and between the shareholders. In fact, the incorporating company or company resulting from the merger "assumes the rights and obligations of the companies participating in the merger, continuing in all their

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correctly, *MARCHETTI, in Riv. Not.,1991,19; (SERRA-) SPOLIDORO, Fusioni e Scissioni,17; Comm. Gabrielli/Perrino, III, 1488*. But, differently, *C. and R. SANTAGATA, Le Fusioni, 31 s*., according to which it would not be admissible for, following the merger, the incorporating company to continue in the state of liquidation.

And for the admissibility of the merger even when the state of liquidation of the merged company is due to loss of the former share capital. art 2447, provided that the net assets of the incorporating company are sufficient to absorb the losses, Milan Trib. 28-9-1995, in Società, 1996,803 with note by *C. SANTAGATA*; Court of Milan, 27-3-1996, in Not.,1997,191.

relationships, including procedural ones, prior to the merger" (art. 2504-bis, paragraph 1, c.c.)[8].

The creditors of the extinct companies will therefore be able to assert their rights on the unitary assets of the company resulting from the merger. In turn, the shareholders of the companies that become extinct become shareholders of the incorporating company or of the new company and receive shares or shares of the latter in exchange for their original participation, based on a predetermined exchange ratio.

Therefore, from a substantial point of view, for the members there is a continuation and not extinction of the social contract, even if its implementation continues for everyone in a single company and through a renewed and unitary organizational structure.

2. Applicable regulations

2.1 National legislation

In Italy, the merger is mainly governed by the rules contained in Section II of Chapter X of Title V of Book V c.c. (arts. 2501-2505-quater). There are, however, other provisions scattered throughout the Civil Code which regulate the institution of the merger.

Thus, merger deals with art. 42-bis c.c., relating to the merger of associations, recognized and unrecognized, and of foundations[9]; art. 1902, paragraph 1, c.c. that rule the effects of the merger between

[8] Tamini Trasformatori. Organizational, Management and Control Model Pursuant to Legislative Decree no. 231 of 08 June 2001; General Section.

[9] Art.42-bis c.c. relates to mergers of associations and foundations, extending merger regulations beyond traditional corporate entities.

several insurance companies on ongoing insurance contracts[10]; art. 2112, paragraph 5, c.c. relating to the effects of the merger towards the workers employed by the subjects participating in the operation[11]; art. 2357-bis, c.c. ruling on the regulation of the purchase of own shares following a merger[12]; art. 2365, paragraph 2, c.c. regarding matters reserved to the competence of the extraordinary assembly of joint-stock companies[13]; art. 2381, paragraph 4, c.c. on matters that cannot be delegated within the administrative body of the joint stock company[14]; art. 2473, paragraph 1, c.c. on the causes of withdrawal from limited liability companies[15]; art. 2475, paragraph 5, c.c. regarding the body's responsibilities administrative in limited liability companies[16]; the art. 2545-novies, paragraph 2, c.c. relating to the merger of cooperative societies[17].

To these provisions are added those contained in the special laws for the merger of certain categories of companies, such as those banking (arts. 31, 36, 57, paragraph 4; 96-quater paragraph 3, and 150-bis, paragraph

[10]Art.1902, paragraph 1, c.c. addresses the effects of mergers between insurance companies on existing insurance contracts, ensuring continuity of coverage.

[11]Art. 2112, paragraph 5, c.c. deals more broadly with the protection of workers' rights in the event of a transfer of undertaking, which includes, but is not limited to, mergers. In the context of mergers, this article ensures that: (i) employees of the merged companies automatically become employees of the resulting company; (ii) the merger cannot be used as a pretext for dismissing employees or altering their contractual rights.

[12]Art. 2357-bis, c.c. regulates the purchase of own shares in merger contexts, allowing exceptions to normal restrictions.

[13]Art. 2365, paragraph 2, c.c. specifies that merger decisions fall under the extraordinary assembly's competence in joint-stock companies.

[14]Art. 2381, paragraph 4, c.c. prohibits delegation of merger-related decisions within the administrative body of joint-stock companies.

[15]Art. 2473, paragraph 1, c.c. includes mergers as a potential cause for withdrawal from limited liability companies.

[16]Art. 2475, paragraph 5, c.c. outlines administrative body responsibilities in limited liability companies during mergers.

[17]Art. 2545-novies, paragraph 2, c.c. addresses specific aspects of cooperative society mergers.

5, TUB[18]), those insurance (arts. 168, 201 and 202 of Legislative Decree no. 209/2005[19]), "social" ones (art. 12, legislative decree no. 112/2017[20]); the rules relating to cross-border mergers, currently contained in Legislative Decree no. 108/2008[21]; those that regulate the "distribution" of administrative liability for crime, in the event of a merger of the entity to which it belongs criminal conduct is attributable (arts. 29, 31, 32, 42 and 70 of Legislative Decree no. 231/2001[22]); those that deal with the merger as a modality through which it can be achieved the "concentration"[23] between companies, to be evaluated for the purposes of compatibility with the competitive structure of the internal market [art. 5, paragraph 1, letter. to the. n. 287/1990] or of the single European market in which they operate [arts. 3, first section, letter. a), 4, § 2 and 8, § 4 Regulation (EC) n. 139/2004][24].

Lastly, the merger is regulated, on a tax level, by art. 172 TUIR, which applies the tax neutrality regime to the same (similarly to what happens for transformation and demerger)[25].

[18] Arts.31, 36, 57 (paragraph 4), 96-quater (paragraph 3), and 150-bis (paragraph 5) of the Consolidated Banking Law (TUB) provide specific regulations for mergers involving banks. These rules address issues like authorization procedures, creditor protection, and special considerations for cooperative banks.

[19] Arts. 168, 201, and 202 of Legislative Decree no. 209/2005 (Insurance Code) regulate mergers in the insurance sector. These provisions ensure policyholder protection, maintain solvency requirements, and outline specific procedures for insurance company mergers.

[20] Art. 12 of Legislative Decree no. 112/2017 governs mergers involving social enterprises. It ensures that the social purpose and non-profit nature of these entities are preserved in merger transactions.

[21] Legislative Decree no. 108/2008 implements EU directives on cross-border mergers, providing a framework for Italian companies merging with entities from other EU member states.

[22] Arts. 29, 31, 32, 42, and 70 of Legislative Decree no. 231/2001 address how administrative liability for crimes is handled when companies involved in a merger have pending criminal proceedings. These provisions ensure that liability is appropriately transferred or maintained in the merged entity.

[23] In both Italian and EU law, mergers are viewed as a mechanism through which companies can achieve "concentration", which refers to the consolidation of economic power or market share.

For the Italian internal market concentration are assessed under art. 5, paragraph 1, letter a) of Law no. 287/1990 (Italian Antitrust Law). While for the EU single market they are valuated under Regulation (EC) No. 139/2004, specifically arts. 3, 4, and 8.

[24]The antitrust articles aim to ensure mergers comply with competition laws in Italian and EU markets.

[25] By virtue of this regime, the merger is a fiscally neutral operation for income tax purposes; furthermore, it is excluded from the scope of VAT. The merger operation, precisely because it was facilitated by the tax

2.2 European Legislation

Mergers are also subject to specific European regulations, which represents the common matrix of the rules found in the laws of the member states.

Directive no. 78/855/EEC, the III Directive on corporate matters, provided the fundamental framework that laid the groundwork for further law. Following that, Directive no. 2011/35 was enacted, which revoked the 1978 Directive and implemented procedural streamlining while maintaining the fundamental features of mergers. Directive no. 2017/1132 consolidated several elements of company law into a unified document, giving particular attention to domestic mergers in Chapter I of Title II (arts. s 87-117).

As regard to cross-border mergers, their regulation was initially established by Directive no. 2005/56, which provided the foundation for cross-border operations. Subsequently, Directive no. 2017/1132 (Chapter II, arts. 118-134) was included, and further changes were made by Directive no. 2019/2121. Furthermore, Regulations No. 2157/2001 and No. 1435/2003 detail the particular rules that enable the creation of European organizations, such as the European Company and European Cooperative Society.

Taken together, these rules establish a well-organized legal framework for mergers, guaranteeing openness, safeguarding the rights of

legislator through the application of the principle of fiscal neutrality, can if necessary concrete be used to achieve undue savings
tax. To avoid such an eventuality helps the discipline in the matter of abuse of the right and tax avoidance pursuant art. 10-bis of l. n. 212/2000 (c.d. «Statute of the taxpayer»), introduced by d.lgs. no. 128/2015.

stakeholders, and encouraging international business operations inside the European Union.

3. Stages of the merger process

Scholars often divide the merger process into three essential phases[26]:

1) the merger plan.
2) the merger resolution.
3) the merger deed.

However, it is important to recognize that, despite this theoretical division, merger must be considered as a single and cohesive operation. In the case where a merger & acquisitions (M&A) operation is involved, before these three formal phases commence, there is a crucial pre-project phase known as *due diligence*[27].

The due diligence process plays a vital role in the Buyer's decision to invest or acquire the Target, on what terms, and at what price[28].

In particular, the due diligence is a comprehensive investigation and evaluation of three different aspects related to the operation[29]:

1) legal aspect.
2) financial aspect.
3) organizational aspect.

[26] See G.F. Campobasso, Commercial Law. 2, Company Law, edited by M. Campobasso, Turin, 10th ed., 2020, p. 658.

[27] The phrase 'due diligence' was originally used in connection with public underwritings. Section 11 of the Securities Act establishes a defense in securities lawsuits for misleading prospectuses for certain persons, such as underwriters, if they exercise due diligence in investigating the company before selling its securities. The term is now more broadly utilized to describe the investigation that an investor or buyer conducts on a prospective investor or target. *See* Miller, E. L. Jr., Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide, 2nd ed., Hoboken, New Jersey: Wiley, 2011, p. 49.

[28] *Ibid.*

[29] Lessambo, Felix. *US Merger and Acquisition*. Palgrave Macmillan, 2021, p. 9.

Legal due diligence refers to the systematic examination and evaluation of all the legal risks involved in a merger and acquisition (M&A) process. The idea behind this investigation is to understand if there will be any future legal problems due to the acquisition[30].

Financial due diligence consists in the examination and assessment of the financial elements of a target firm in the context of a merger, acquisition, or any other commercial transaction. Financial due diligence is typically conducted by specialized accountants as well as investment bankers and management consultants[31].

Lastly, organizational due diligence (aka Management due diligence) aims to assess and understand the organizational structure, culture, human resources, and operational aspects of a target company during a M&A operation[32].

4. The first phase: the merger plan

The merger plan represents the most important innovation introduced by Legislative Decree no. 22/1991, implementing directives no. 78/855/EEC and no. 82/891/EEC regarding corporate mergers and splits.

The draft of the merger plan is a document that defines the salient characteristics of the operation, crystallizing the outcome of the agreements reached between the participating companies.

The art. 2501-ter c.c. establishes that “the administrative body of the companies participating in the merger draws up a merger plan”. In joint-

[30] *Ivi*, p. 31.
[31] *Ivi*, p. 33.
[32] *Ivi*, p. 35.

stock companies, the art. 2381, paragraph 4, c.c. includes this competence among those that cannot be delegated to a managing director or an executive committee. The merger plan must therefore always be approved by a resolution of the board of directors. Instead, for limited liability companies, art. 2475, paragraph 5, c.c. states that the preparation of the merger plan is "in any case within the competence of the administrative body" and the doctrine believes that the phrase *in any case* means only that the merger plan must be approved by all the directors, even if the company adopts the disjunctive administration model[33]. In partnerships a similar rule is missing, and the general rules allow, where provided for in the statute, that the merger plan may be drawn up by the directors separately and by majority vote.

Usually, all companies participating in a merger approve an identical document as the merger plan, but it is possible for each company to submit a merger plan with partially different content to its corporate bodies for examination. This can happen, for example, when the discrepancies consist in the illustration of the specific consequences of the operation for its shareholders or creditors.

However, approving merger plans that are markedly different from each other is inadvisable. Priority should therefore be given to the drafting of merger plans that are as identical as possible for all the companies involved, and this preference is confirmed in the possibility- admitted

[33] See G.F. Campobasso, Diritto Commerciale, Vol. II, 2020,,p.364 and M. Notari, La fusione e la scissione delle società, 2020, p127. This interpretation is further supported by judicial decisions such as Cass. civ., 26 March 2010, n. 7300 and Cass. civ., 13 December 1990, n. 11828, which highlight the administrative body's exclusive competence in preparing the merger plan.

by notarial doctrine - to draw up a single merger plan even if the operation involves several mergers[34].

4.1 The content of the merger plan

The numbers from 1) to 8) of the art. 2501-ter, paragraph 1, c.c. detail the content of the merger plan and all the information provided therein must be indicated in a complete and exhaustive manner, as it is not possible to provide a reference to other documents, unless they constitute mere annexes to the project itself.

Art. 2501-ter prescribes that the merger plan must mention:

1. the type, name or company name and headquarters of the companies participating in the merger.
2. the deed of incorporation of the new company resulting from the merger or of the incorporating company, with any amendments deriving from the merger[35].
3. the exchange ratio of the shares or quotas[36], as well as any adjustment in money to be paid to the members to compensate for

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[34] In doctrinal terms, the possibility of drafting a single merger plan, even when the merger involves multiple companies, has been widely discussed and accepted. M. Notari, in his work "The Merger and Demerger of Companies" within the Treatise on Commercial Law, edited by G. F. Campobasso, Vol. III (2020), argues that a single plan can simplify the process and ensure greater consistency among the various corporate operations involved. This approach is particularly beneficial in chain mergers or multiple mergers. Furthermore, the National Council of Notaries, in study no. 187-2012/I, "The Corporate Merger: Operational Aspects and Applicative Problems", supports the practice of preparing a single merger plan even for complex operations, highlighting the operational and practical advantages of such a choice.

[35] Ministry of Enterprises and Made in Italy. Mergers of Companies or Selling a Business.

[36] In a merger by incorporation, this will normally occur through an increase in the share capital of the incorporating company, but nothing prevents this from being done in another way (for example, through the assignment of own shares in the portfolio or shares of the incorporating company's shareholders). And see, *PORTALE*, in Giur.Comm,1984,I,1031 ff; *DI SABATO*, in Società, 1986,p.952 ff; (*SERRA-)SPOLIDORO*, Fusioni,p.33.

any remainder resulting from the application of the exchange ratio[37].

4. the methods for assigning the shares or quotas of the company resulting from the merger or of the incorporating company[38].
5. the date from which such shares or quotas participate in the profits.
6. the date from which the operations of the companies participating in the merger are charged to the financial statements of the company resulting from the merger or of the incorporating company[39].
7. the treatment possibly reserved for particular categories of members and for holders of securities other than shares.
8. the particular advantages, where appropriate, for the persons responsible for the administration of the merging companies.

However, what has just been outlined is only the minimum content of the merger plan. Indeed, art. 2501-ter c.c. specifies that the aforementioned information “must in any case result" and, therefore, there are no preclusions against the possibility of the project having content beyond that required by law. In fact, since its function is to allow the understanding of the substantial physiognomy of the operation, it is necessary that it also contains any additional information useful for the best achievement of this purpose.

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[37] However, this adjustment cannot exceed ten percent of the nominal value of the shares or quotas assigned (art. 2501-ter, paragraph 2, c.c.), unless only companies with capital not represented by shares participate in the merger (art. 2505-quater). This is to prevent holders of minimal shareholdings from being completely ousted from the company resulting from the merger. And cf. Trib. Benevento, 3-11-1992, in Società, 1993, p.218, with note from CABRAS.

[38] Ministry of Enterprises and Made in Italy. Mergers of Companies or Selling a Business.

[39] *Ibid.*

4.2 The filing of the merger plan

The merger plan, in order to fulfill the information and transparency function mentioned above, must be brought to the attention of the shareholders (and, more generally, to the interested third parties) by suitable means. Pursuant to art. 2501-ter, paragraph 3, c.c. "the merger plan is filed for registration in the company register of the place where the companies participating in the merger are based. As an alternative to filing with the company register, the merger plan is published on the company's website, with methods designed to guarantee the security of the site itself, the authenticity of the documents and the certainty of the publication date".

Art. 2501-ter, paragraph 4, c.c. establishes that "at least thirty days (fifteen, in mergers in which companies with capital represented by shares do not participate) must elapse between the registration or publication of the plan on the website and the date set for the decision on the merger, unless the members waive the deadline by unanimous consent"[40].

4.3 The documents accompanying the merger plan

The information provided to third parties and above all to the shareholders of the companies involved is not limited to the merger plan. The law indeed provides for a series of documents - financial situation, report of the administrative body and report of the experts -

[40] According to G.F. Campobasso in Diritto Commerciale, Vol. II, 2020, p.367 the requirement for registration or publication ensures that shareholders and interested third parties are adequately informed and can exercise their rights effectively. Also, M. Notari, in La fusione e la scissione delle società, 2020, elaborates on the importance of these procedural steps for maintaining transparency and trust in corporate operations. These requirements are also discussed in detail by P. Benazzo and S. Patriarca in their book Diritto delle società, 2022, where they highlight the critical role of these provisions in safeguarding the interests of all parties involved.

which accompany the merger plan and which, like this one, carry out the function of allowing members to consciously express their own vote regarding whether or not to approve the operation.

These documents are not mandatory. The members - and, where present, the holders of other financial instruments that grant the right to vote on the merger - of each of the companies participating in the operation can unanimously renounce it[41].

4.3.1 The financial situation

The purpose of the financial situation ex 2501-quater c.c. is to provide shareholders and corporate creditors with the purely accounting information necessary to be able to evaluate both the existence of advantages or any prejudices that could derive from the operation (and thereafter evaluate whether or not to allow it) and the opportunity to exercise the right of opposition enshrined in art. 2503 c.c.

The directors of each company involved in the merger must prepare an updated financial situation of their company, complying with the rules established for the financial statements. This means respecting not only the structure of the financial statements, which includes the balance sheet, income statement and explanatory notes, but also the prudential evaluation criteria established for the financial statements themselves.[42]

[41] The non-essential nature of the documentation accompanying the merger project (so-called «documentary simplification») is the result of transposition in Italy, with the legislative decree no. 123/2012, of Directive 2009/109/EC.

[42] Therefore, companies that prepare financial statements according to international accounting standards must also prepare the merger balance sheet based on these principles, observing in particular IIAS 34 on interim financial statements (G.F.Campobasso)

If unforeseen events impact the financial situation of the merger, there are those[43] who believe that it is not necessary to proceed with an update of the situation itself, given that is, in the hands of the administrative bodies of the companies involved, the obligation, pursuant to art. 2501-quinquies c.c., to inform the shareholders of any significant changes in assets and liabilities that may have occurred between the date on which the merger plan is filed at the registered office (or published on the company's website) and the date of approval of the merger plan by the shareholders' meeting.

The merger balance sheet, as prepared, provides shareholders with little information about the fairness of the exchange ratio since it does not reveal the actual value of the company's assets. The law, as in the past, does not set guiding criteria for determining the exchange ratio, leaving such evaluation to the technical discretion (but not the arbitrary decision) of the directors[44]. However, unlike in the past, the law now aims to prevent possible abuses against minority shareholders by requiring adequate information for shareholders and an impartial preliminary review of the fairness of the exchange ratio.

Art. 2501-quater c.c. provides for cases in which the financial situation may be omitted[45]; in particular, as anticipated, in unlisted companies, if

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[43] National Council of Notaries, Business Question no. 142-2013/I, Merger and significant changes in assets compared to the reference statement of assets and liabilities, in CNN Notizie of 15.6.

[44] From this correct perspective (Ferri, Di Sabato, Tantini, Scardulla), which is no longer debatable (Bianchi, Cerrai, C. Santagata, Spolidoro), it is rightly held that the shareholders' resolution can only be challenged when the exchange ratio is determined arbitrarily or based on incomplete or untruthful data. Specifically, see G. FERRI, Le società,p. 927 ff.; TANTINI, Trasformazione, p.315 ff.; and in case law, among others, Cass., 2-3-1976, no. 693, in Giur. comm., 1976, II, 289; Cass., 21-7-2016, no. 15025; Cass., 20-4-2020, no. 7920 (legitimate differentiation for savings shares).

[45] The Notary Council of Milan (maximum n. 180), specified that the exemption ex lege from the preparation of the financial situation referred to in the art. 2501-quater c.c., expressly provided for in the case of "incorporation of one or more companies into another, which owns at least ninety percent of their shares or quotas" in accordance with the provisions of art. 2505- bis, paragraph 1, c.c., also applies to the

the filing of the merger plan at the registered office (or on the company's website) takes place within six months from the closing date of the last financial statement, the financial situation may not be prepared and may be replaced by the financial statement itself. Therefore, if the administrative body of a company with financial year coinciding with the calendar year deposits at the registered office (or publishes on the company's website) the merger plan by 30 June, it may not update the financial situation referred to in the art. 2501-quater c.c. and may replace it with the budget of the previous financial year, which must in any case be approved by the members.
Pursuant to art. 2501-quater c.c., the financial situation is not required, furthermore, if the shareholders and holders of other financial instruments who attribute the right to vote of each of the companies participating in the merger unanimously renounce it.

4.3.2 The report of the administrative body

Art. 2501-quinquies c.c. establishes that the administrative body of the companies participating in the merger is required to draw up a report accompanying the project to be submitted to the shareholders' meeting called to decide on the merger.[46] The report is aimed at illustrating and justifying, from a legal and economic point of view, the merger project and, in particular, the exchange ratio of shares or units. The administrative body must, therefore, provide considerations regarding

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case of incorporation of 100% owned companies cent and other types of mergers and splits attributable to art. 2505 Civil Code, even in its absence of an express provision in this sense.

[46] M. Notari, La fusione e la scissione delle società, 2020, p.136 emphasizes the importance of the administrative report in ensuring that shareholders are fully informed about the legal and economic rationale behind the merger, including the exchange ratio of shares or units.

the evaluation methods followed in determining the economic value of the companies participating in the merger, highlighting how these methods have influenced the determination of the exchange ratio, as well as reporting any difficulties encountered in its determination[47].

In the event of critical issues, the administrative body reports to the shareholders in the meeting and to the administrative body of the other companies participating in the merger any significant changes to the assets and liabilities that may have occurred between the date on which the merger plan is filed with the headquarters of the company or published on its website and the date of the decision on the merger.[48]

The report in question is not required in case of unanimous renunciation by the members and holders of other financial instruments that attribute the right to vote to each of the companies participating in the merger.[49]

4.3.3 The experts' report

The experts' report is a reasoned opinion on the adequacy of the exchange ratio and must indicate:

• the method or methods followed and the values resulting from the application of each of them.

• any evaluation difficulties.

[47] Guichet.lu. (n.d.). Cross-border merger of businesses. Retrieved October 7, 2024, from Guichet.public.lu.
[48] A. Presti and M. Rescigno, Corso di diritto commerciale, Bologna, 2021, p. 412, further elaborate on the methods of evaluation and the communication of significant changes in assets and liabilities during the merger process.
[49] P. Benazzo and S. Patriarca, Diritto delle società, 2022, p.248, discuss the procedural steps involved in drafting the administrative report and the scenarios under which the requirement for the report can be waived.

• An assessment of the appropriateness of the methods used to determine the exchange ratio and their relative importance in determining the value adopted.

According to art. 2501 sexies c.c. if the acquiring company (or the company resulting from the merger) is a joint-stock company [50] or in limited partnership by shares, the experts must be designated by the Court or among the auditing companies registered in the appropriate register. If the company is listed on regulated markets, the expert must be chosen from among the auditing firms. In all other cases the expert can be chosen by the same companies participating in the merger always between the same subjects (accounting auditors or auditing companies)[51]. In any case, the companies involved in the merger may request the Court, in the jurisdiction where the resulting or acquiring company is located, to appoint one or more joint experts (art. 2501-sexies, paragraph 4, c.c.). However, according to some scholars[52], separate reports must be prepared for each company.

Each expert has the right to obtain all useful information and documents from the companies participating in the merger and to carry out any necessary verification[53]. The expert is liable for damages caused to the

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[50]*Maximum no.28/2004 Consiglio Notarile di Milano*: According to the approach expressed by the Notary Council of Milan, if the incorporating company or the one resulting from the merger is not a joint-stock company, it cannot be exclude that some or all of the companies participating in the merger choose a common expert; in this case, however, the administrators are required to make this type of choice in such a way as not to compromise the requirements of impartiality and independence of the expert or joint experts.

[51]Ferrara, F. (2013). *Le operazioni straordinarie delle società*. Utet, p. 309.

[52] G.F.Campobasso. However, Ferrara-Corsi (Gli imprenditori, 987 ff.) and (Serra-)Spolidoro (Fusioni, 69) believe that in such cases there would be a single joint report.

[53] Tamini Trasformatori. Organizational, Management and Control Model Pursuant to Legislative Decree no. 231 of 08 June 2001; General Section.

companies participating in the mergers, their shareholders and third parties[54].

Pursuant to of art. 501-sexies, paragraph 6, c.c., in the case of mergers of partnerships with joint-stock companies, the experts responsible for drawing up the report on the adequacy of the exchange ratio of the shares or quotas are also entrusted with the task of drawing up the asset appraisal report partnership pursuant to art. 2343 c.c.[55].

Art. 2501-sexies, paragraph 7, c.c. establishes that experts' report is not required if the shareholders and holders of other financial instruments which attribute the right to vote of each company participating in the merger unanimously renounce it[56].

4.3.4 Filing of the documents

Art. 2501-septies c.c. provides, during the thirty days preceding the decision regarding the merger and until the merger is approved, the obligation to file at the headquarters of the individual companies participating in the merger (i.e., to publish on their website), of the copies relating to the following documents: the merger plan (with the report from the administrative body and that of the experts) and the financial statements of the last three financial years and the financial situation of the participating companies. The rule requires compliance

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[54] Montalenti, P. (2011). La responsabilità degli esperti nella fusione. Il Mulino.

[55] Stella Richter, M. (2008). *La fusione tra società di persone e società di capitali*. Giuffrè. Moreover, according to the Notary Council of Milan *Maximum n.28/2004* , the provision in question presupposes that:

(a) at least one of the companies participating in the merger is a partnership; (b) the company resulting from the merger, if newly established, is a joint stock company or, in the case of a pre-existing company, is a joint stock company that decides on an increase in share capital following the merger itself.

Also, see Cerved. (n.d.). Storico quotazione. From https://www.cerved.com/storico-quotazione/.

[56]Ferrara, F. (2013). *Le operazioni straordinarie delle società*. Utet, p. 311.

with the deadline of the 30 days, except in the case in which the shareholders waive the deadline by unanimous consent[57].

Pursuant to art. 2501-septies, paragraph 2, c.c. shareholders have the right to view these documents and obtain a copy of them free of charge. At the request of the member, the copies are sent to him electronically[58]. Also, the company is not required to provide copies of the documents if they have been published on the company's website from which it is possible to freely copy or print them[59].

5. The second phase: the merger resolution

Once the preparatory phase described so far is concluded, the merger is decided. Art. 2502 c.c. establishes that the merger must be approved by each of the companies involved approving the relevant project. The current regulations, however, allow the merger decision to introduce modifications to the project that do not affect the rights of shareholders or third parties (art. 2502, paragraph 2, c.c.)[60]. Naturally, it is necessary for the modifications to the merger project to be approved by all the companies participating in the merger.

It is also envisaged that, if the deed of incorporation or the statute do not provide otherwise, the deliberative quorums to be taken must be as follows:

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[57]Perrone, A. (2011). *Le operazioni di fusione e scissione*. Zanichelli, p. 112.

[58]Campobasso, G. F. (2015). *Diritto commerciale. Vol. 2: Diritto delle società*. Utet, p. 368.

[59] Ferrara, F. (2013). *Le operazioni straordinarie delle società*. Utet, p. 111.

[60] The modifiability of the exchange ratio remains particularly controversial. Before the reform, it was allowed by G. Ferri Jr., *Modificabilità e modificazioni del progetto di fusione*, Milan, 1988, p. 101 ff., and now by C. and R. Santagata, *Le fusioni*, p. 418 ff., but it is still excluded by the prevailing opinion: among many, Guerrera, in *Manuale breve*, p. 441; Comm. Gabriell/Perrino, III, p. 1537; Spolidoro, in *Studi Colombo*, p. 338 ff., except with the unanimous consent of the shareholders (also in this sense, Lucarelli, in *Riv. soc.*, 2004, p. 1365).

- in partnerships, with the consent of the majority of the partners determined according to the share attributed to each in the profits, without prejudice to the right of withdrawal for the partner who has not consented to the merger.
- in joint-stock companies, the merger must be approved by the extraordinary shareholders' meeting with the usual majorities[61]. However, if the resulting company from the merger is of a different type (heterogeneous merger), unlisted companies must also observe the supermajorities required for transformation.

Furthermore, in the case of a heterogeneous merger, shareholders who did not vote in favor of the resolution will have the right to withdraw (art. 2437)[62]; this right, however, is recognized in the case of a homogeneous merger only for limited liability companies (art. 2473).

The merger resolutions of the individual companies, along with the documents required by art. 2501-septies, must be registered in the Companies Register, subject to a legality check by the notary recording the minutes if the resulting company from the merger is a joint-stock company[63].

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[61] On first call, the extraordinary meeting of a joint-stock company decides by vote; in second call, the extraordinary meeting of a joint-stock company is duly incorporated with the participation of more than one third of the capital company and decides with the favourable vote of at least two thirds of the capital represented at the meeting (*see* art. 2369 c.c.).

[62] The rule can be generalized to cases where the merger also involves other statutory changes for which the right of withdrawal is provided in joint-stock companies, such as a change in the corporate purpose that entails a significant change in activity, the revocation of the liquidation status, amendments to the articles of association concerning voting or participation rights, etc. However, in the opposite sense, G. Ferri, *Le società*, p. 931, on the assumption that these are indirect consequences of the merger. For a convincing rebuttal, see Serra, *La trasformazione*, p. 351 ff.; Marchetti, in *Riv. not.*, 1991, p. 46; and now, C. and R. Santagata, *Le Fusioni*, p. 464 ff.; as well as Trib. Venezia, 18-3-1966, in *Riv. dir. comm.*, 1967, II, p. 358, with a note by De Cocci; Com. not. Triveneto, Orientamento L.A.9/2005.

[63] Notarial scrutiny and potential court approval are therefore necessary even for the merger resolutions of partnerships (although other statutory amendments of such partnerships are not subject to this form of scrutiny), but only if the resulting entity from the merger is a joint-stock company. This resolves a previously contentious issue with an intermediate solution. See also MORERA, *L'omologazione*, p. 87 ff.

6. The third phase: the merger deed

The merger process ends with the signing of the merger deed (art. 2504 c.c. by the legal representatives of the companies involved. It acts as a deed constitutive of the new company, must always be drawn up in the form of a public deed, even if the acquiring company or the new company resulting from the merger is a partnership. The merger deed therefore represents a real contract between the companies. It is drawn up by public deed and its content follows that determined in the resolutions of the shareholders' meetings, therefore by the merger plan[64].

The merger deed is subject to legal publicity and must be filed for registration, by the notary or by the persons responsible for the administration of the company resulting from the merger or of the incorporating company, within thirty days, in the Companies Register office of the places where the headquarters of the companies participating in the merger, of the resulting company or of the incorporating company are located[65].

The final registration in the Companies Register, which must be that of the incorporating company or the new company resulting from the merger, is recognized as having constitutive effect of the merger. The resulting company assumes all rights and obligations of the participating companies, which are dissolved. The shareholders of these companies have the right to receive, in exchange for their shares or

[64] Ministerio de Justicia. (2009). Act 3-2009, of April 3, on structural changes in corporations.

[65] According to *G.F. Campobasso*, this latter registration cannot precede the others (art. 2504, paragraph 3, c.c.), as the effects of the merger commence from the date of the last registration (art. 2504-bis, paragraph 2, c.c.).

See also Ministry of Enterprises and Made in Italy. Starting, running, and closing a business.

quotas, shares or quotas in the continuing company, according to the predetermined exchange ratio.[66]

In the merger by incorporation (but not in the merger in the strict sense), it is allowed to set a later effective date for all purposes than the one indicated above (art. 2504-bis, paragraph 2, c.c.).[67]

Regarding the possibility of backdating the effects of the merger, the law appropriately distinguishes (art. 2504-bis, paragraph 3, c.c.).

Real effects (unification of the companies and their assets) cannot be conventionally backdated, as the interests of the company's creditors, which cannot be altered by private autonomy, are also at stake.

However, the following are permitted:

a) Accounting backdating, which involves attributing the transactions of the merging companies that occurred before the merger's completion to the financial statements of the resulting company.

b) Backdating the date from which the shares or quotas received by the shareholders of the dissolving companies participate in the profits. These effects are usually backdated to the beginning of the current fiscal year, and, as noted, the effective date must be specified in the merger plan.

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[66] However, the right of exchange does not apply to shares or quotas owned, even through a fiduciary company or intermediary, by the companies that are dissolved in the merger or by the incorporating company (art. 2504-ter c.c.). These shares must be canceled without exchange to prevent the incorporating or new company from becoming the holder of its own corresponding shares. On this topic, see De Petri, in Riv. dir. comm., 1992, I, p. 207 ff.

[67] According to G.F. Campobasso, this can occur as long as it is provided for in the merger plan. Similarly, C. and R. Santagata in Le fusioni, p.242. Differently, Marchetti in Riv. not., 1991, 46; (Serra-)Spolidoro in Fusioni, p.142, argue that the later effective date could also be decided by the administrators at the time of the merger act. Contradicting the regulatory data is the opinion (C. Santagata, Genovese) that the later effective date for all effects would also be possible for a merger in the strict sense. See also Abbadessa-Portale/Genovese, p.3355 ff.

Moreover, The Notary Council of Milan with the Maximum No.56/2004 has recognized the possibility that, in the event of a merger by incorporation of two or more companies, the merger deed may provide for the operation to take effect from several dates following registration in the company register.

The current regulation also governs the preparation of the first financial statement following the merger and establishes that, in principle, the values of assets and liabilities as recorded in the accounting books of the merging companies as of the effective date of the merger must be reflected. However, a deviation from these values is allowed when a merger deficit arises (art. 2504-bis, paragraph 4, c.c.).[68]

7.The protection of creditors

The merger may impact the position of creditors of the participating companies because, following the merger, all creditors will have claims against the consolidated assets of the combined entity. This situation could disadvantage creditors of the more financially stable companies. To address this, it is mandated that the merger can proceed only after sixty days (thirty days if no joint-stock companies are involved) from the registration of the last resolution of the participating companies in the Companies Register (art. 2503, partially amended under current regulations)[69]. During this period, any creditor who existed before the

[68] A merger deficit occurs in two cases: first, when the incorporating company, as a result of the merger, allocates shares to the shareholders of the merged company that have a total value exceeding the net asset value of the merged company at the time of the merger (exchange deficit). Second, when the incorporating company has purchased and recorded in its own financial statements, prior to the merger, a stake in the merged company for an amount exceeding the net asset value of the merged company at the time of the merger (cancellation deficit).
The merger deficit must be allocated, where possible, to the individual undervalued assets or overvalued liabilities and, for the remaining difference, to goodwill (with the consent of the board of statutory auditors, if present). On this point, see CARATOZZOLO, In Società, 2004, p.1463; as well as BIANCHI, in Liber amicorum G.F. Campobasso, IV, p.331 ff; Vicari, in Riv soc, 2008, p.521 ff. If the merger deficit cannot be covered through the aforementioned revaluations or cannot be attributed to goodwill, it should be treated as a loss, resulting in the reduction of reserves or the entry of an adjusting item called "merger deficit."
In cases of an exchange deficit, it is required that the assets of the incorporating company undergo evaluation under art. 2343 to certify that the new capital is covered, Cons. not. Milano, Maxim n. 72/2005.
[69] The deadline is reduced to fifteen days for mergers involving banks (art. 57, paragraph 3, TUB). It is also reduced to one month for mergers and demergers carried out by companies controlled by the State resulting in companies similarly controlled by the State (art. 1 of Law Decree 350/1993, converted into Law 42/1993), and for those carried out within the framework of the disposal procedures of controlling

publication of the merger plan has the right to raise objections to the merger[70].

However, this timeframe requirement can be waived if consent is obtained from all respective creditors who existed before the publication of the merger plan, or if payments are made to non-consenting creditors, or if equivalent amounts are deposited with a financial institution.[71] Moreover, the deadline for opposition may be waived if the expert report, prepared for all participating companies in the merger by a single auditing firm, asserts under its own responsibility that the financial position of these companies does not require safeguards for creditors' protection[72].

Opposition suspends the implementation of the merger until the outcome of the related judgment. However, the Court may still allow the merger to proceed if the company provides adequate security specifically for the opposing creditors[73].

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shareholdings of the State and public entities (art. 10, letter d, Law Decree 332/1994, converted into Law 474/1994).

[70] Since the regulatory provision does not specify whether opposition must occur through judicial means, especially considering that art.33 of Legislative Decree 5/2003 was repealed (by Law 69/2009), whose literal text suggested filing a petition with the court at the debtor company's registered office, correct doctrine (including Ferri, Ferrara, Simonetto, Cabras, Serra, and extensively revisited by Oriani in *L'opposizione dei creditori della società alla fusione nel quadro dei mezzi di conservazione della garanzia patrimoniale*, Milan, 2011) deems a simple declaration addressed to the company as sufficient. Consequently, it falls upon the company itself to act in court to remove the impediment to the merger. As a result, there is no suspension of procedural deadlines during legal holidays (Notary Council of Milan, Maximum no. 62/2005; differently, Rome Tribunal, 12-6-2017, in *DeJure*).

Regarding case law, which supports the necessity of judicial opposition, among others: Milan Tribunal, 27-10-1997, in *Società*, 1998, p. 433, noted by Fimmano; Milan Tribunal, 14-11-2011, in *Giur. it*, 2012, p. 1351, noted by Cagnasso; Milan Tribunal, 20-12-2018, in *Società*, 2019, p. 956, noted by Zam-Miti, but see also Milan Tribunal, 10-3-2005, in *Foro it*, 2005, I, p. 2593, which allows for the possibility of opposition even through extrajudicial means.

[71] Ferrara, F. (2013). *Le operazioni straordinarie delle società*. Utet, p. 311.

[72] Ghezzi, F. (2013). *Le fusioni e le scissioni delle società*. Giuffrè, p. 186.

[73]Perrone, A. (2011). *Le operazioni di fusione e scissione*. Zanichelli, p. 112.

It is explicitly stated that individual bondholders lose the right to oppose if the merger is approved by their assembly (art. 2503-bis, paragraph 1, c.c.), presumably under normal voting majorities rather than those required for loan condition modifications[74]. Furthermore, holders of convertible bonds receive special treatment: early conversion options and equivalent rights recognition in the resulting merged entity for those who do not exercise conversion[75].

A merger executed in violation of art. 2503 is legally valid but ineffective against third parties[76], and penalties are provided for administrators (art. 2629).

In cases where unlimited liability companies participate in the merger and the resulting entity is a joint-stock company, the personal liability of the former partners for obligations predating the merger remains intact. Their release requires consent from creditors (art. 2504-bis, paragraph 5, c.c.).

8. The invalidity of the merger

The complex procedure leading to a merger may encounter more or less serious defects or anomalies, which can affect one or more of the phases outlined so far. This issue was not explicitly regulated by the 1942

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[74] Campobasso, G. F. (2015). *Diritto commerciale. Vol. 2: Diritto delle società*. Utet, p. 368.

[75] Guatri, L., & Bini, M. (2005). *La valutazione delle aziende*. Egea, p. 75.

[76] Thus, among others, Cass., 5-3-1976, no. 726, in Giur. it., 1976, I, 1, 909; Cass., 16-3-1993, no. 3121; Trib. Velletri, 10-8-1994, in Giur. comm., 1995, II, 527, with a note by Vicari. It has been inferred that the stipulation of a conditional merger agreement is valid; that is, a merger agreement whose effects are suspended until the expiration of the period granted to creditors for opposition (thus, among others, Tantini, *Trasformazione*, p. 347 ff.; App. Milan, 8-6-1984, in *Vita not.*, 1985, p. 1147, with a note by Minniti). This solution deserves to be upheld even in light of the subsequent regulation on the effective date of the merger, also because I do not agree with the thesis that a violation of art. 2503 would only result in not precluding opposition after the registration of the merger agreement (Genovese, *L'invalidità dell'atto di fusione*, p. 204 ff.), or the obligation to compensate the damaged creditors (Rescio, C. and R. Santagata, *Le fusioni*, p. 608; Abbadessa-Portale/Vicari, p. 3330; G. Scognamiglio, *Le scissioni*, p. 391 ff.).

Code, and in the rare cases where it arose, serious disadvantages became evident if the merger were declared invalid and subjected to common law principles. Retroactively invalidating the merger and reverting to the pre-merger state would potentially dismantle the productive entity formed by the merger and its now unified assets. These assets would need to be judicially redistributed, in whole or in part, among the previously dissolved companies, posing significant challenges in determining the division of assets and liabilities[77].

Today, this problem is specifically addressed by art. 2504-quater, which limits the time frame within which the invalidity of a merger can be declared. It maximally prioritizes the preservation of the merged entity and the certainty of legal transactions. According to the article, once the legally prescribed registrations of the merger have been completed and their effects produced, the merger cannot be declared invalid anymore, without any exceptions. From that moment onward, returning to the past is no longer possible, and the only recourse left is the right to seek damages, potentially owed to shareholders or third parties harmed by the merger[78] (art. 2504-quater, paragraph 2, c.c.). They may pursue action against the administrators of the participating companies in the merger and/or the resulting entity[79].

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[77] This was the solution hypothesized, but not implemented due to the exclusion of the nullity of the merger deed, as ruled by the Tribunal of Genoa on November 3, 1988, in Società, 1989, 481, with a critical commentary by C. Santagata.

[78] And in the sense that the compensation action also belongs to creditors who did not exercise or could not exercise (creditors subsequent to the publication of the merger plan) opposition under art. 2503, cf. BELTRAMI, in Riv. soc., 2002, 1242 et seq.; and essentially C. and R. SANTAGATA, Le Fusioni, 667 (except where failure to oppose is presumed to imply tacit consent to the merger).

[79] On this point, BELTRAMI, La responsabilità, 144 et seq.; C. and R. SANTAGATA, Le Fusioni, 044 et seq.; and also see ANGELICI, in Riv. dir. comm., 1992, 1, 272 et seq.; as well as G. FERRI jr., Modificabilita, 128 et seq., who also hypothesizes a specific compensation action (transfer of part of shares or quotas) for minority shareholders against majority shareholders, when the former are damaged by the exchange ratio. In the same vein, Tribunal of Rome, August 1, 1994, in Riv. dir. comm., 1996, 11, 89, with

Therefore, shareholders have only a limited period, from the merger resolution to the final registration of the merger[80], to challenge it before the judicial authority and attempt to suspend the execution of the merger agreement[81]. After this point, the merger is unassailable, and if the stay of execution has not been granted, the challenge to the merger resolution can only proceed to determine compensable damages.

There is a tendency to distinguish between mere invalidity of the merger deed and its "non-existence," which arises from the radical omission of one or more essential phases, with identical legal consequences to those for shareholders' resolutions. Art. 2504-quater would not preclude the possibility of subsequently asserting the non-existence of the merger deed[82].

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a note by MAINETTI; conversely, Tribunal of Catania, June 18, 1994, in Banca e borsa, 1996, 11, 109, with a note by C. SANTAGATA. The liability of the controlling shareholder who exercises their vote in conflict with principles of fairness and good faith is also affirmed by GUERRERA, Responsabilità deliberativa, 302 et seq., supported by GENOVESE, in Riv. soc., 2007, 84 et seq., and VICARI, Gli azionisti nella fusione di società, Milan, 2004, 365 et seq.

[80] The legislative provision is clear in identifying the final registration as the deadline for declaring the invalidity of the merger deed, assuming this is the moment when the effects of the merger take place. Therefore, I believe that when and if all effects of the merger are postponed, the ultimate deadline for declaring the invalidity should be identified as the date when these effects actually begin, not the date of the final registration (similarly argued by DE Acutis, in Giur. comm., 1991, 1, 138 S,; GENOVESE, L'invalidità, 147).

[81] Contrary to what has been asserted by certain jurisprudence (Tribunal of Milan, 2-4-1995, in Giur. it., 1996, 1,2, 78; Tribunal of Milan, 28-9-1995, in Società, 1996, 803, with critical commentary by C. SANTAGATA), it does not appear that this remedy is precluded by the specific regulations concerning the nullity of the merger (see also Tribunal of Milan, 27-10-1997, in Giur. it., 1998, 1443).

[82] According to this viewpoint (C. Scognamiglio, De Acutis, Farenga, Cerrai), which is supported in jurisprudence, notably by the Tribunal of Velletri, July 23, 1994, in Giur. comm., 1995, II, 527, with commentary by VICARI, see especially G. Scognamiglio, in Riv. dir. comm., 1992, I, 1027 et seq., which defines the non-existence of a merger when the merger plan, resolution, or deed are missing or legally non-existent, and when the exchange ratio is not determined. This argument has been reaffirmed after the 2003 reform with formally modified terms, suggesting that these identified defects result in the radical ineffectiveness of the merger deed, with the declaration of nullity not being precluded by art. 2504-quater (G. Scognamiglio, Le scissioni, 384 et seq.). It has also been argued that art. 2504-quater does not prevent recourse to the court of registry to obtain the cancellation of the registration of the merger deed (C. and R. Santagata, Le fusioni, 626).

Regarding the exchange ratio, in particular, it has been hypothesized that art. 2504-quater does not preclude subsequent challenge of only the merger balance sheet for the purpose of revising an inaccurate or improper exchange ratio. This view is supported by FARENGA, in Riv. dir. comm., 1991, 1, 470 et seq.; however, in contrast, AnGELICI, in Riv. dir. comm., 1992, 1, 274 et seq., and GENOVESE, L'invalidità, 223 et seq., correctly argue that only actions of partial nullity are possible, which do not affect the merger itself.

However, scholars tend not to support attempts at a restrictive interpretation of the law[83], partly because it fits into a framework of coordinated and consistent legislative choices: modern legislative design in corporate matters aims to replace traditional real remedies (invalidity of the deed) with obligational remedies (simple compensation for damages) when stability and certainty in legal transactions are at stake.

It should be pointed out, however, that art. 2504-quater grants immunity to defects and anomalies in the merger deed and process, but not to those of the company resulting from the merger, whether pre-existing or caused by the merger itself (for example, unlawfulness of the object of the new company). Therefore, even after the merger has been completed, it is still possible to declare the company null and void. This means that the consequences will in any case be the liquidation of the company resulting from the merger; never a return to the previous situation[84].

9. The Fiat-Chrysler merger

To better illustrate the practical application of merger regulations as outlined in the Italian Civil Code, this thesis will examine the merger

[83] See G.F.Campobasso. In the same line of thought, (SERRA-)SPOLIDORO, Fusioni, 161 et seq.; LUCARELLI, La SCIS-sione, 421 et seq.; BELTRAMI, La responsabilità, 8 et seq.; Cass., June 1, 2012, no. 8864, in Foro it., 2012, 11, 3107; Cass., February 28, 2020, no. 5602; Tribunal of Milan, May 13, 1999, in Società, 2000, 75, with commentary by Spolidoro; Tribunal of Milan, March 11, 2019, in Società, 2019, 909; and substantially, GENOVESE, L'invalidità, 145 et seq., which, while starting from the premise that art. 2504-quater is not applicable in cases of non-existence of the merger deed, correctly argues that non-existence can only be discussed in cases of material forgery of the merger deed.

[84] Thus, correctly, GUERRERA, in Manuale breve, 456; G. SCOGNAMIGLIO, in Riv not., 1990, 904 et seq.; GENOVESE, L'invalidità, 234 et seq. In the sense, however, that there would be a restoration of the previous situation rather than dissolution of the company, Oppo, in Riv. dir. civ., 1991, 11, 514 et seq.

between Fiat S.p.A. and Chrysler Group LLC, which culminated in the formation of Fiat Chrysler Automobiles N.V. in 2014.

9.1 The case

The merger lasted several years, beginning with Chrysler's financial difficulties and ending with the establishment of a dominant worldwide automotive group.

I. 2009: Fiat acquires 20 % stake in Chrysler

With the 2008 financial crisis, Chrysler encountered significant financial challenges and subsequently filed for Chapter 11 bankruptcy protection in April 2009[85].

In order to save the company, the governments of the United States and Canada, also with the retiree health fund (VEBA) of the United Auto Workers (UAW) union, acquired equity interests in Chrysler. Fiat joined Chrysler as a strategic partner, providing technology and management knowledge in return for an initial 20% ownership interest, which could be raised over time depending on Chrysler's success.

On June 10th, 2009, Fiat officially acquired a 20% stake in Chrysler and assumed management control[86]. Led by CEO Sergio Marchionne, Fiat began working on Chrysler's operational turnaround.

II. 2011: Fiat increases its stake in Chrysler

By 2011, Fiat had raised its ownership stake to 53.5%, therefore becoming the majority shareholder. This was accomplished by

[85] Chrysler files for Chapter 11 bankruptcy protection. U.S. Bankruptcy Court, Southern District of New York. Case No. 09-50002.

[86] Fiat Group Automobiles. (2009, June 10). Fiat acquires 20% stake in Chrysler LLC and assumes management control. Press release. Available at: Fiat Chrysler Archives

achieving and surpassing performance objectives and acquiring shares from the U.S. government (in particular from the U.S. Treasury and the United Auto Workers' healthcare trust (VEBA)[87].

III. 2013: Fiat acquires additional shares

In 2013, Fiat pursued an acquisition of the remaining shares owned by the U.S. and Canadian governments, increasing its stake to 58.5%.

IV. 2014: Full ownership of Chrysler

Fiat's last obstacle in its quest for complete ownership was obtaining the 41.5% ownership interest carried by the UAW's VEBA health care fund. Following protracted talks, Fiat reached a settlement of $3.65 billion in January 2014 to acquire VEBA's ownership interest, therefore ensuring complete control over Chrysler[88]. Through this transaction, Fiat successfully gained complete control of Chrysler, therefore establishing the conditions for a formal merger.

V. 2014: Fiat and Chrysler Merge to Form FCA

In October 2014, Fiat and Chrysler merged to form Fiat Chrysler Automobiles (FCA), a new entity registered in the Netherlands with headquarters in London. FCA was listed on the New York Stock Exchange (NYSE) and the Borsa Italiana in Milan, reflecting its dual-national identity. This merger allowed the two companies to combine their strengths, with Chrysler's strong presence in the North American market and Fiat's expertise in Europe and Latin America[89].

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[87] United States Department of Treasury. (2011, July 21). Sale of U.S. Government's remaining shares in Chrysler to Fiat. Available at: Treasury.gov.

[88] Fiat Chrysler Automobiles. (2014, January 21). Fiat finalizes acquisition of remaining Chrysler shares from VEBA Trust. Press release. Available at: FCA Archives.

[89] Building on the success of the Fiat-Chrysler merger, FCA began exploring further expansion through mergers. In 2019, FCA and French automotive group PSA Peugeot Citroën announced their intention to merge. The deal was completed in January 2021, creating Stellantis, one of the largest automotive groups

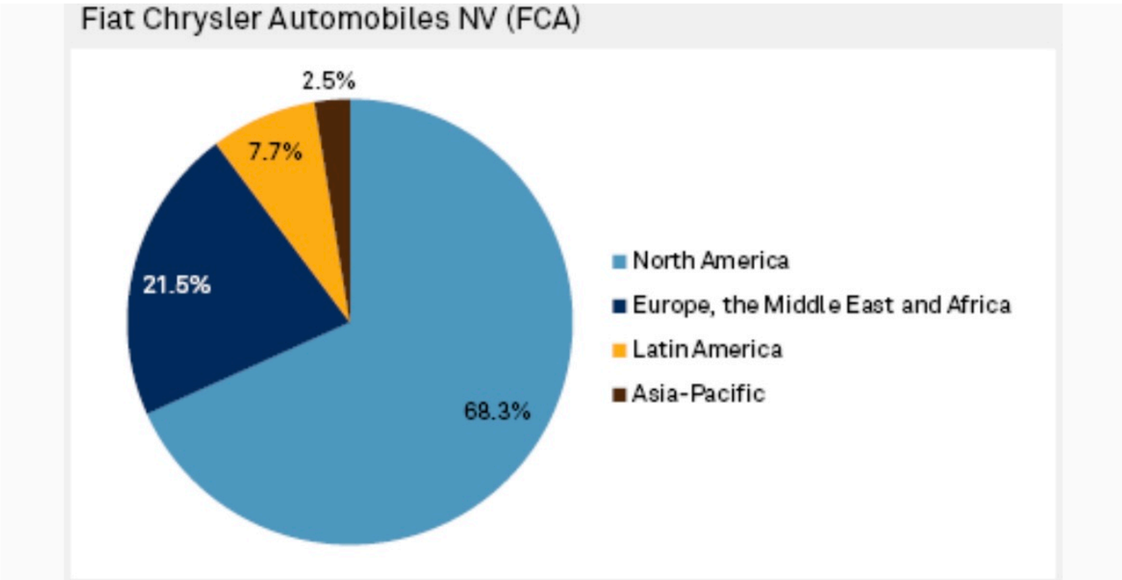

Table 1: FCA global sales 2014.

9.2 How the Fiat-Chrysler merger reflects mergers according to the Italian Civil Code

The Fiat-Chrysler merger reflects several key aspects of mergers as outlined in the Italian Civil Code, particularly in arts. 2501 to 2504.

1)The merger plan

The Italian Civil Code mandates that companies involved in a merger must create a comprehensive merger plan that specifies the conditions of the merger, such as the share exchange ratio and the valuation of the merging companies' assets. Regarding the Fiat-Chrysler merger, both

in the world. This new merger built on the foundations laid by the Fiat-Chrysler merger, positioning Stellantis as a dominant force in the global automotive market.

companies produced and endorsed a merger plan that outlined the legal and financial details of the merger. In particular:

- The common merger plan was approved by the Board of Directors of Fiat on June 15, 2014, and by the Board of Directors of FCA on May 27, 2014;

-The Common Merger Plan (together with the documentation attached to it) was filed for the purposes of Italian law with the Turin Companies Register on June 23, 2014, and registered on June 26, 2014;

-The Common Merger Plan (together with the documentation attached to it) was filed for the purposes of Dutch law with the Amsterdam Chamber of Commerce on June 20, 2014, and communicated to the public in the Netherlands through a notice in the newspaper *Het Financieele Dagblad* and in the Dutch Official Gazette on July 11, 2014[90]; the one-month period established for possible opposition by FCA creditors pursuant to Section 2:316 of the Dutch Code began to run from the publication of the aforementioned notices.

2)Exchange ratio

In mergers involving corporations with shareholders, the Italian Civil Code mandates the establishment of an exchange ratio to determine the proportion of shares in the merging companies that will be exchanged for shares in the newly created organization. Within the Fiat-Chrysler case, a pre-established exchange ratio was implemented, resulting in Fiat stockholders being granted shares in the newly formed firm, Fiat Chrysler Automobiles (FCA). In order to guarantee fairness for both

[90] Stellantis. (n.d.). Board report of Fiat S.p.A

groups of shareholders, the exchange ratio was determined based on a valuation of the two companies. In particular:

In assessing the assets and liabilities of Fiat and FCA based on their net book value and other valuation methodologies applied to them, respectively, in Fiat's 2013 financial statements and FCA's interim balance sheet attached to the Common Merger Plan, Fiat and FCA were valued at Euro 8,693,456,028 as of December 31, 2013 and Euro 200,000.00 as of April 1, 2014, respectively. However, since the value of each ordinary share of FCA immediately after the merger will be equal to the value of each ordinary share of Fiat immediately before the merger, an exchange ratio of 1:1 was applied. Therefore, Fiat shareholders, as the sole shareholder of the incorporating company FCA, received one ordinary share of FCA for each ordinary share of Fiat they hold.

3)Experts reports

The Italian Civil Code mandates that a merger must include expert evaluations from independent auditors or assessors to guarantee a fair exchange ratio and suitable merger conditions. Due to the multinational nature of the Fiat-Chrysler deal, expert valuations were performed to confirm the fairness of the transaction and the general conditions of the merger. In particular, Reconta Ernst & Young S.p.A. ("E&Y") was appointed as the independent expert at the request of Fiat, and KPMG Accountants was appointed at the request of Chrysler Group LLC.

However, neither the board of directors of Fiat nor the board of directors of Chrysler Group LLC relied on the reports on the exchange ratio in recommending the merger to their respective shareholders. Indeed, the exchange ratio was determined by mutual agreement between Fiat and Chrysler and the reports were prepared solely to comply with the provisions of Italian and Dutch law.

Nevertheless, the report on the exchange ratio is available to the public at Fiat's headquarters, on Fiat's website, and at the Turin Companies Register. Similarly, on June 15, 2014, KPMG issued the auditor's reports to the board of directors of FCA regarding the reasonableness of the proposed exchange ratio, as required by Dutch law.

4)Registration and protection of creditors

Italian legislation mandates that mergers must be authorized by the extraordinary general meetings of the shareholders of the firms concerned. Both Fiat and Chrysler convened shareholder meetings to solicit votes on the planned merger in the Fiat-Chrysler deal. Moreover, the Fiat-Chrysler merger ensured the preservation of the interests of both creditors and stockholders. After the approval of the merger in the extraordinary shareholder's meeting and the registration with the Turin Companies Register, a 60-day period from the date of such registration must be observed before proceeding with the closing of the merger. During this period, creditors whose rights arose prior to the registration of the merger plan with the Turin Companies Register (Italy) had the possibility to oppose the merger before a competent Court in Italy. Also, during the one-month period following the announcement of the filing of the merger plan with the Dutch Chamber of Commerce, creditors whose claims arose prior to the registration of the merger plan with the Dutch Chamber of Commerce may oppose the merger before the Amsterdam Court.

CHAPTER II

EVOLUTION OF THE LEGAL NATURE OF MERGERS IN THE ITALIAN LEGAL SYSTEM: LEGISLATIVE AND JURISPRUDENTIAL PERSPECTIVES

1. The extinguishing-successory orientation

It is crucial to examine the legality of mergers because they are a complex act that not only alters the corporate structure but also has significant impacts on stakeholders, such as shareholders, creditors, and employees.

The issue of framing the legal nature of the merger has given rise to numerous conflicts in jurisprudence. The different interpretations were all inspired by the literal text - before and after the company law reform, introduced by Legislative Decree no. 6 of 2003 - of art. 2504-bis c.c.

The prevailing traditional orientation[91], shared by most of the jurisprudence before the company law reform, framed the merger as a phenomenon of universal succession in many aspects similar to that which occurs in the case of universal succession *mortis causa*. Based on this approach, a merger would result in the extinguishment of the merged company, in the case of merger by incorporation, or the extinguishment of all merging companies, in the case of proper merger, followed necessarily by the succession of either the incorporating

[91]Santagata (2005). "Le fusioni". Giuffrè, p. 41, note 104.

company or the new company resulting from the merger in all the legal relationships previously belonging to the extinct companies [92].

Historically, this theory reflects the legacy of the anthropomorphic conception of the legal entity and the outcome of the regulatory framework existing under the repealed Commercial Code, where mergers were expressly listed among the causes for dissolution of companies (art. 189, no. 7, Commercial Code). In the Commercial Code of 1882, the merger between commercial companies was governed by arts. 192-195, to which several other provisions were added to regulate specific aspects of the operation. In regard to the effects determined by

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[92] Visentini, La fusione fra società, Rome, 1942, p.37; A. Graziani, Company Law, Naples, 1963, 521; G.G. Pettarin, Acquisition, Merger, and Splitting of Companies, Milan, 1992, p.73 ff.; V. Salafia, Unlimited Liability of Partners in Heterogeneous Mergers, in Società, 1993, p.1033; B. Quatraro, The Merger: Profiles and Legal Nature, in Bankruptcy Law, 1994, 376. After the reform, the Disiano Preite Association seems to adhere to this orientation in The New Company Law, (edited by G. Olivieri - G. Presti - F. Vella), Bologna, 2003, p.350, while emphasizing that it is a "phenomenon akin - but not identical - to that characteristic of universal succession." This opinion has long been shared by consistent case law (among others see Cass. Civ. 28 May 1980, no. 3496, in Bankruptcy Law, 1980, II, p.396; Cass. Civ. 8 November 1983, no. 6612, in Civil Justice, 1984, I, 1171, with a note by G. Guarnieri, Company Merger and Incorporating Liability for the Debts of the Incorporated Company; in Italian Law Review, 1984, I, 1, 1466; in Italian Forum, 1985, I, 106; Cass. Civ. 6 December 1984, no. 6404, in Legal Construction Journal, 1985, I, 1, 250; Cass. Civ. 5 July 1993, no. 7321, in Banking, Stock Exchange, and Credit Titles, 1994, II, 503; Cass. Civ. 27 January 1994, no. 833, in Commercial Law Review, 1996, II, p.470; Cass. Civ. 24 February 1995, no. 2115; Cass. Civ. 27 August 1997, no. 8100; Cass. Civ. 22 September 1997, no. 9349, in Legal Studies, 1998, 191; Cass. Civ. 3 November 2000, no. 14383, in Civil Justice, 2000, I, 2811; Cass. Civ. 11 April 2003, no. 5716; Cass. Civ. 7 January 2004, no. 50; Cass. Civ. 16 January 2004, no. 554; but see also Trib. Napoli 5 December 1989, in Società, 1990, 939).

A distinctive view is held by F. Santoro-Passarelli, General Doctrines of Civil Law, Naples, 1986, 95, according to whom mergers would have a particular successory nature, as only inheritance would be a universal succession under our law, while every other succession, both inter vivos and mortis causa, would be a particular succession.

the merger on the incorporated or merged companies, the following articles assumed particular importance: art. 188, co. 1, no. 7, which included the merger among the causes of dissolution of commercial companies; the art. 193, co. 1, second period, pursuant to which, the companies «that as a result of the merger cease to exist, they must also publish the declaration of the established manner for the extinction of their liabilities » and art. 195, for which, once performed the merger, «the company that remains in existence, or that results from the merger, assumes the rights and obligations of extinct societies »[93].

Subsequently, with the entry into force of the 1942 Civil Code, the legislator's approach did not change. Indeed, art. 2504-bis, paragraph 1, c.c. established that upon completion of the operation, "the incorporating company or the one resulting from the merger assumes the rights and obligations of the extinct companies". It was therefore asserted without hesitation that a corporate merger realizes a phenomenon of universal succession, by virtue of which the extinction of the merged company (in the case of a merger by incorporation) or of all the merged companies (in the case of a proper merger) occurs, and

[93]Regarding the extinction-successory construction, albeit with differences concerning the sequence of the two events (whether extinction is the cause or effect of the succession of the company resulting from the merger), see, for example, in the first sense, E. Vidari, Corso di diritto commerciale, II, Milan, 1894, especially p.290; and, in the second sense, C. Vivante, Trattato di diritto commerciale, Vol. II, Le società commerciali, Milan, 1923, p.479; U. Navarrini, in Delle società e delle associazioni, in Commento al Codice di Commercio, Milan, 1924, p.832 et seq.; A. Scialoja, note on Court of Appeal of Naples, in Foro It., 1911, I, p.1417 et seq.; G. De Semo, Sulla fusione di società commerciali, in Foro It., 1933, I, 1223 et seq.; A. Candian, Fusione di società commerciali, in Studi di diritto commerciale in onore di Cesare Vivante, I, Rome, 1931, p.250 et seq.

the succession, respectively, of the merging company or of the new company resulting from the merger, in all legal relationships, active and passive, of the extinguished or merged companies. The same can be said following the entry into force of the art. 13 Legislative Decree 16 January 1991, no. 22 («Implementation of directives no. 78/855/EEC and no. 82/891/EEC in matter of corporate mergers and splits»), which introduced art. 2504-bis, paragraph 1, c.c. of which established, with reference to the effects produced from the merger, that the "company resulting from the merger or the incorporating one assume the rights and obligations of extinct societies"[94]. Nevertheless, it was asserted that extinction should not be considered the cause of the new company resulting from the merger stepping into the legal relationships formerly held by the extinguished companies, as traditional doctrine held. Instead, extinction was seen as the consequence of this new entity stepping into such relationships, thus resulting from the direct modification aimed at unifying corporate structures[95].

2. The evolutionary – modifying orientation

Other authors[96], however, observed that once the merger is correctly identified as a modification of the corporate structures involved in the

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[94] Moreover, on this occasion, the legislator considered that it was not its task to take a position on the legal nature of the merger. Indeed, the Report of the Minister of Justice, concerning Legislative Decree No. 22 of 16 January 1991, states that a more analytical description of the effects of the merger "seemed superfluous on the one hand, and inappropriate on the other, based on the assumption that the task of the legislator is to regulate the merger procedure, rather than to define the legal nature of the institute, taking a position on the debate between those who see the merger as a phenomenon of succession in universum ius and those who instead consider it to be a peculiar modification of the articles of association" (art. 13).

[95] G. Tantini, Transformation and merger of companies, in Tratt. of commercial law and public economic law, edited by F. Galgano, VIII, Padova, 1985, p.282; G. Cottino, Commercial law, I, 2, Padova, 1987, p.641; G.F. Campobasso, Commercial law, 2, Company law, Torino, 2002, p. 612 ss.

[96] G. Ferri, The merger of commercial companies, Rome, 1936, p.61; C. Santagata, The merger between companies, Naples, 1964, 63; D. Corapi, The statutes of joint-stock companies, Milan, 1971, p.306; E. Simonetto, On the transformation and merger of companies, in Commentary on the Civil Code directed by

operation, it appeared contradictory and above all pointless to resort to the concept of the extinction of the incorporated company or the merged companies. Indeed, due to the merger process, the participating companies would modify their structure completely to conform either to the model represented by the incorporating company, in the case of merger by incorporation, or to the model represented by a new company, in the case of merger by formation of a new entity.

As a result, and without needing to resort to the concept of extinction, there would be an overlap of structures that are entirely identical; these would effectively coincide perfectly, thereby undermining the autonomous identity of all participating companies or the incorporated company. Therefore, what the traditional position mistakes for the extinction of companies and the recreation of another society, different from the previous ones, is instead a single change, namely the loss of the individuality of the individual companies, a loss of individuality that is a necessary and intentional consequence of the merger.

It was the company law reform brought by Legislative Decree no. 6/2003 that led to the disappearance, in the text of the art. 2504-bis, paragraph 1, c.c. of the reference to «extinction» of the incorporated or merged companies. The current provision states on the *Effects of the*

Scialoja and Branca, arts. 2498-2510, Bologna-Rome, 1976, p.208; A. Serra, The transformation and merger of companies, in Treatise on private law directed by P. Rescigno, 17, Turin, 1985, p.336; F. Salerno Cardillo, Merger of companies: universal succession or statutory modification?, in Vita not., 1987, p.472; F. Di Sabato, Manual of companies, Turin, 1996, p.758; *Ibid,* Company law, Milan, 2003, p.456 s. Trib. Naples, 5 December 1989, cited.

merger: "The company resulting from the merger or the incorporating company shall assume the rights and obligations of the companies participating in the merger, continuing in all their relationships, including procedural ones, prior to the merger[97]". Therefore, with a lexical interpretation of the new text of the art. 2504 bis c.c, the prevailing doctrine developed the so-called *evolutionary-modifying theory*[98]. According to supporters of such orientation, the terminological change that occurred with reference to the art. 2504-bis,

[97] It should be noted, moreover, that this expression almost verbatim reproduces that dictated by art. 2498 c.c. concerning transformation, where it states that following the transformation, the transformed entity retains the rights and obligations and "continues in all relationships, including legal proceedings, of the entity that carried out the transformation. According to F.Magliulo, 'Fusione Societaria',Notariato 5/2021, 527, It reinforces the theory of the modifying nature of the merger.See also Tamini Trasformatori. (n.d.). Organizational, Management and Control Model Pursuant to Legislative Decree no. 231 of 08 June 2001; General Section.

[98] A central role in developing the concept of merger as a mere modification-evolution of the participating companies is played by the thought of two authors, who both reject the then-majority view of merger as an extinction-successory event. At the same time, they differ in their assessment of the occurrence of an extinction phenomenon of the involved companies (a contrast between those who entirely deny the configurability of an extinction event and those who admit the extinction of the merged companies, but without recognizing it as central to defining the characteristics of the institution, which is still found among proponents of the modification-evolution theories). The reference is to C. Santagata and E. Simonetto. According to C. Santagata (see La fusione tra società, Naples, 1964, and Le fusioni, in Fusione e Scissione, VII, I, in Trattato delle società per azioni directed by G.E. Colombo-G.B. Portale, Turin, 2004), the merger results in the statutory modification of the involved companies, determining the objective coincidence of the statutes, implemented through the merger resolution. This reciprocal modification does not result in any successory phenomenon but does indeed determine the extinction of the merged companies, to be understood, however, only as "formal" extinction: "By opening the corporate statute (or contract) to govern (besides its own) the relationships of the other companies participating in the merger, a phenomenon of reciprocal 'appropriation' is realized that affects the organization, and only consequently and reflectively, the relationships. This event does not correspond to any 'alienation' because even the merging company, in deciding (and then implementing) the merger, does not intend to transfer (i.e., alienate) anything, but merely modifies its statute (or contract) to govern a variation in its organization with the aim of unifying, in a functional unitary regulation, its relationships in an integrated combination with the relationships of the merging company" (C. Santagata, Le fusioni, cit., especially p.83). Following the merger, the pre-existing plurality of legal entities, centers of attribution, becomes unnecessary due to the completion of the merger. The object of this purely formal extinction will thus be "all [but only] those subjective qualifications strictly functional to the operation of the statute (organs, capacity, nationality, etc.) and linked – for the need of its implementation – to that center of attribution that has now become unnecessary" (C. Santagata, La fusione tra società, cit., especially 181; the uselessness of the different center of attribution derives from the fact that "once the adjustment of the statutes is achieved, the entities are found to be governed by objectively coinciding statutes": p. 153). According to E. Simonetto (Delle Società (artt. 2498-2510), cit.), the merger would constitute a mere change in the constitutive act, followed by no type of extinction, not even "formal" in the above terms, but only the "loss of individuality of the participating companies," which would result in the survival of the merged company in the company resulting from the merger ("the companies, in short, do not extinguish but merge, unify and the corporate participations remain perfectly recognizable in their elements when the contracts unify": p. 231).

co. 1 c.c. would highlight the legislator's desire to place the merger in an exclusively reorganization framework of the business activity first exercised by the companies involved, which, although incorporated or merged, would survive the operation, by virtue of the principle of continuity obtainable from art 2504-bis c.c[99].

This thesis gradually became dominant[100], shared by much of the doctrine[101] and, until very recently, by the majority of jurisprudence[102],

[99] This is the thesis initially proposed by C. SANTAGATA in 'La Fusione tra società', 93 ff., which defines universal succession as the effect of mutual statutory modifications of the companies participating in the merger; a thesis later taken up by other authors (Simonetto, Silvetti, Ferrara, Galgano, Serra, Tantini), with an approach that, however, tends to completely abandon the concept of universal succession.

[100] See, for this observation, R. Rordorf, commentary on Art. 2501, in "Nuova Rassegna di giurisprudenza sul Codice civile" directed by C. Ruperto, V. Sgroi, Book V, Vol. IV, Arts. 2380-2554, edited by A. Ceccherini-R. Rordorf, Milan, 1994: "the prevailing doctrine now seems indeed inclined to reject the configuration of the phenomenon in terms of extinction and establishment of entities, because such an explanation would not be suitable to account for the persistence of previous social relationships (albeit modified and inserted into a different organizational context) and the essentially dynamic nature of an entrepreneurial tool that the parties use not to extinguish, but to concentrate and increase the operational potential of their respective enterprises.

[101] E. Simonetto, 'Trasformazione e fusione', cited, see F. Di Sabato, 'Diritto delle società', Milan, 3rd ed., 2011, p.456; A. Serra, 'La trasformazione e la fusione delle società', in 'Trattato di diritto privato', directed by Rescigno, 17, Turin, 1985, 340 ff.; F. Magliulo, 'La fusione delle società', 5, Milan, 2nd ed., 2009, p.49 ff.; as well as F. Guerrera, 'Trasformazione, fusione e scissione', in 'Diritto delle società (Manuale Breve)', directed by various authors, Milan, 2012, p.441 ff.; A. Vicari, 'Art. 2501', in 'Le società per azioni', directed by Abbadessa - Portale, II, Milan, 2016, p.3285.

[102] See Cass. Civ. 18 November 2014, no. 24498; Cass. Civ. 16 September 2016, no. 18188; Cass. Civ. 16 May 2017, no. 12119; Cass. Civ. 12 February 2019, no. 4042; Cass. Civ. 10 December 2019, no. 32208, all referenced in the reasoning.

See, for example, App. Torino 28 February 2018, according to which the principle that a merger between companies results in a purely evolutionary - modificative event of the same legal entity, which retains its identity, does not apply to mergers prior to the entry into force of the corporate reform; App. Sassari 7 January 2019, confirming the extinction of the incorporated companies but in the case of mergers predating the entry into force of the corporate reform. In the same vein, App. Roma 4 May 2012 had already expressed a similar view. According to Trib. Milano 18 April 2019, in this Rivista, 2019, p.1037, with a merger 'a formal change of an existing corporate organization is implemented, but not the creation of a new entity that distinguishes itself from the old, hence the incorporated company survives in all its relationships to the modifying event in the incorporating company, with the consequence that a judgment issued against a party who has been incorporated into another entity during the trial remains valid.' In accordance with Trib. Catania 25 January 2018, 'in terms of companies, a merger entails a formal change of an existing corporate organization, but not the creation of a new entity that distinguishes itself from the old, therefore the incorporated company survives in all its relationships to the modifying event in the incorporating company.' And further, Trib. Milano 8 January 2019, which refers to the evolutionary - modificative event of the same subject, preserving its identity with regard to mergers. According to Trib. Roma 15 November 2019, the merger does not result in the extinction of the incorporated company, nor does it create a new legal entity in the case of a proper merger. In line with Trib. Perugia 7 January 2021, the merger does not result in the extinction of the incorporated company nor the creation of a new entity but achieves unification through the reciprocal integration of the participating companies.

albeit with a few sporadic exceptions[103]. It received endorsement in 2006 from the United Sections of the Supreme Court, which, in revising its previous consolidated position, with judgment no.2637 ruled that "based on art. 2504-bis, paragraph 1, c.c. , as amended by Legislative Decree no. 6/2003, the merger between companies does not entail the extinction of one entity and the corresponding creation of a different entity, but rather results in a purely evolutionary-modificative event of the same entity, which retains its own identity, albeit in a new organizational structure”[104].

3. Court of Cassation ruling no. 2637 of 2006

3.1 Facts

With appeal notified on 8 June 2004, the company Amit s.r.l. took the company Lottomatica s.p.a. to Court before the Regional Administrative Court of Lazio. Given that Amit s.r.l. was the holder of a contract for the ticketing and advertising distribution services expiring on 30 June 2004, relating to the events promoted by the Accademia di Santa Cecilia Foundation, it requested the annulment of the provision

[103] They continue to hold that the merger constitutes a universal succession corresponding to "mortis causa" and results in the extinction of the incorporated company: see Cass. Civ. 19 May 2011, no. 11059, and Cass. Civ. 12 November 2019, no. 29256. Other rulings (Cass. Civ. 15 February 2013, no. 3820; Cass. Civ. 10 December 2019, no. 32208) take an eclectic stance, asserting on the one hand that the merger constitutes "an evolutionary-modifying event of the same legal entity, which, despite a new organizational structure, retains its identity"; on the other hand, "if the incorporated company has been removed from the business register after the entry into force of art. 4 of Legislative Decree no. 6 of 2003, the immediate extinction of the company occurs, given the constitutive effect of the removal order, and it can no longer maintain its individuality nor assert the persistence of its own autonomous standing.

[104] Cass. Civ., SS.UU., February 8, 2006, no. 2637, in Società, 2006, p. 459, with a commentary by F. Dimundo, "Effetti processuali della fusione: le Sezioni unite pongono fine all’interruzione dei processi civili"; in Riv. not., 2006, 1136 ff., with a commentary by F. Scalabrini - G.A.M. Trimarchi, "Le Sezioni Unite sulla natura giuridica della fusione: un punto d’arrivo nel dibattito tra teoria e pratica?"; in Corr. giur., 2006, 795, with a commentary by F. Meloncelli, "Fusione di società e interruzione del processo civile"; in Vita not., 2006, p. 125, with a commentary by A. Pellizzeri Macrì, "Sulla natura della fusione per incorporazione."

with which the Foundation had directly entrusted Lottomatica with the contract for those services, without going through, despite its status as a public law body, the public tender procedure referred to in Legislative Decree no. 157 of 1995. The Foundation and Lottomatica formed themselves, resisting the request.

During the proceedings, Lottomatica s.p.a., with a document notified on 30 July 2004, proposed a regulation of jurisdiction, requesting that the jurisdiction of the ordinary judge be affirmed in relation to the case brought by Amit. Amit resisted with a counter-appeal. Accademia di Santa Cecilia Foundation also proposed an independent request for regulation of jurisdiction, requesting, with a deed notified on 29 and 30 September, that the jurisdiction of the ordinary judge be declared. Amit resisted with a counter-appeal.

The Attorney General, to whom the documents were transmitted pursuant to art. 375 c.p.c., concluded his indictment, requesting that the jurisdiction of the administrative judge be affirmed. The parties responded to these conclusions with briefs and, having heard them in chambers, Lottomatica requested that it be declared, pursuant to art. 300 c.p.c., the interruption of the process as a consequence of the merger by incorporation of the company itself, together with the company FinEuroCames s.p.a., into the company NewGames s.p.a., with notarial deed dated 14 December 2005.

3.2 The ruling

First of all, the Court established that the two appeals must be joined as they both aim to resolve the same question of jurisdiction, in relation to the request proposed by Amit against the current appellants before the administrative judge[105].

Secondly, the Court decided that Lottomatica's request, demanding to declare the interruption of the process by virtue of the merger by incorporation of the company itself, together with the company FinEuroGames s.p.a., into the company NewGames s.p.a. cannot be accepted.

The Court reiterated that the extinction of the appellant does not affect the conduct of the cassation proceedings, because this is dominated by the impulse of office.[106] Moreover, the Court also denied the minor premise, adding that the incorporation had not resulted in the extinction of the incorporated company, with consequent radical disapplication of the institution of the interruption of the process.

In its reasoning, the Court underlined that art. 2505-bis c.c., established, in the first paragraph, that the company resulting from the merger or the incorporating one assumes the rights and obligations of the companies participating in the merger, continuing in all their relationships, including procedural ones, prior to the merger[107]. Therefore, according to the Court, the legislator had clarified that the merger between companies, provided for by the arts. 2501 et seq. c.c. does not

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[105] *See* Cass. 17 October 1992, n. 11436 and Cass. 22 December 2003, n.19667.

[106] Cass. December 14, 2004; Cass. October 15, 2004; Cass.18 August 2004, no. 16138; 27 June 2000.

[107] Tamini Trasformatori. (n.d.). Organizational, Management and Control Model Pursuant to Legislative Decree no. 231 of 08 June 2001; General Section.

determine, in the case of merger by incorporation, the extinction of the incorporated company, nor does it create a new legal entity in the case of an equal merger; but implements unification through the mutual integration of the companies participating in the merger. The phenomenon does not, therefore, entail the extinction of a subject and (correlatively) the creation of a different subject but it resolves in a merely evolutionary-modifying event of the same subject, which retains its own identity, albeit in a new organizational structure.

3.3 Debate following sentence no. 2637 of 2006

Following the intervention of the Supreme Court's United Sections in 2006, there has been a lively debate regarding the procedural effects of mergers, with interpreters divided into three well-defined camps.

According to the first perspective, contrary to what was established in the 2006 ordinance no. 2637 by the United Sections, mergers remain an event of extinction for the merged companies and succession for the resulting/incorporating company, even after the 2003 company law reform. Therefore, procedurally, mergers continue to cause the interruption of pending proceedings and the succession of the resulting or incorporating company to the merged companies according to Art. 110 c.p.c[108].

Others argue that while mergers have an extinction-succession nature, they do not cause the interruption of pending proceedings[109]. Two

[108] See V. Colesanti, Notes on the subject of company mergers and interruption of the process, in Banca e borsa e titoli di credito, 2006, 491 et seq., and *Ibid.*, Further on the subject of company mergers and interruption of the process, in Riv. Dir. Proc., 2007, p.374 et seq.

[109] This is the position of D. Dalfino, La successione tra enti nel processo, Turin, 2002, p. 230 et seq.; *Ibid.*, Fusione societaria e successione nel processo senza pause, in Corriere Giur., 2006, p. 1086 et seq.; *Ibid.*, Sulla inidoneità interruttiva della fusione societaria (e sull'effetto successorio che ad essa si accompagna),

arguments are presented to deny the applicability of Arts. 299 and following of the c.p.c. Firstly, the literal interpretation: the rules on the interruption of proceedings – unlike Art. 110 c.p.c. – do not consider the cessation of the party *for other reasons* (a phrase commonly referring to cases of termination of the legal entity) among the causes of interruption. More importantly, it is claimed that the rationale behind the rules on the interruption of proceedings (which impose significant burdens on the parties interested in continuing the proceedings: resumption or continuation within a peremptory period of three months from the interruption) does not apply in cases where the event affecting the party is voluntarily caused by the party itself, rather than involuntary.[110] Regarding the procedural discipline of succession, some believe Art. 110 c.p.c. should apply here: if the merger is not recorded in the proceedings, the merged company could remain a party; if the merger is notified (it is unclear whether in the specific ways provided by Arts. 299 and following, even though they are not applicable, or in any other way), the resulting company could appear to continue the proceedings, or be summoned by the opposing party and choose whether to appear or remain absent[111]. Others suggest that the

in Riv. Dir. Proc., 2007, p. 91 et seq., which reprises and develops an idea already present in S. Satta, Commentario al codice di procedura civile, I, Milan, 1959, specifically p. 401. More recently, see O. Desiato, Fusione di società: l'intervento chiarificatore delle Sezioni unite, www.judicium.it; *Ibid*, Fusione di società e processo civile, Naples, 2017, specifically p. 257 et seq.

[110] See D. Dalfino, Fusione e successione nel processo senza pause, op. cit., p. 1090; O. Desiato, Fusione di società e processo civile, op. cit., p. 261; in the sense that the merger, while resulting in the dissolution of the merged companies and the succession (including procedural) of the resulting company, does not cause the interruption of the process, also G. Balena, Istituzioni di diritto processuale civile, II, Bari, 2019, p. 285, note 30. Similarly, and based on the same arguments, the Supreme Court, United Sections, in decisions No. 19509 of September 14, 2010, and No. 19698 of September 17, 2010, stated that even before 2003 (when mergers were still recognized as having a dissolutive-successory nature, as art. 2504-bis of the Civil Code after the reform was considered innovative and not an authentic interpretation), the merger would not have had the effect of interrupting the process.

[111] See O. Desiato, Fusione di società e processo civile, op. cit., p. 281 and following.

procedural discipline should be akin to that of succession by specific title in the disputed right, according to Art. 111 c.p.c. The merged company, although substantively extinguished, would remain procedurally authorized to continue the proceedings until the resulting company from the merger appears in its place[112].

Others still believe that the merger, by explicit legislative choice, finds its complete regulation (not only substantive but also in terms of effects on pending proceedings) in Art. 2504-bis c.c., without the need or possibility to invoke the applicability of the institutions of interruption of proceedings and procedural succession (under Arts. 110 or 111 c.p.c.): Art. 2504-bis c.c. establishes that the proceedings continue regardless of the merger, which may be declared or not, and, if declared, may simply lead to an update of the parties' details, or allow a modification of the company's defense structure.[113]

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[112] See D. Dalfino, La successione tra enti nel processo, op. cit., p. 240 and following. However, refer to the critical observations by E.F. Ricci, Gli effetti della fusione di società sul processo pendente, op. cit., p. 184 and following, who argues that "whoever continues the process cannot avoid appearing in court; whereas under art. 111, the incorporating or resulting company, having to be placed in the position of the successor, would have the different role of a third party with the power to intervene or not intervene at its discretion."

[113]See E.F. Ricci, Gli effetti della fusione di società sul processo pendente, op. cit., p. 179 and following, and C. Consolo, Bram Stoker e la non interruzione per fusione ed “estinzione” societaria (a proposito di gradazioni sull’“immortalità”), op. cit., p. 195 and following, although based on very different substantive premises. According to E.F. Ricci, the merger does indeed cause the extinction of the merged company and the succession of the resulting company on a substantive level, but in the legal process, due to a specific legislative fiction established by art. 2504-bis of the Civil Code, it is "treated as if it were still alive, following its transformation," according to the model of the "unification into a single entity of the companies involved in the merger" (p. 187 and 185). Conversely, and convincingly for us, C. Consolo highlights the coherence of the procedural regulation with the nature of the institution: the merger, as civil doctrine has long clarified, does not cause the extinction of the merged company (except in the limited sense of mere formal extinction, as already clarified in note 10), nor a succession phenomenon, but rather the unification and mutual appropriation of the corporate assets for the continuation of the business: "the very figure of succession (here voluntary, albeit universal) emerges blurred, if we look closely, even and again, once more on the ground of substantive law," "the new formulation [of art. 2504-bis of the Civil Code] reiterates that the procedural relationship continues (and we already knew this), but also suggests that it continues without unnecessary gaps because the 'merely formally' extinct company 'transforms' automatically into the company that survives the merger and this is why the new text avoids alluding to that (ambiguous) extinction" (C. Consolo, Bram Stoker e la non interruzione per fusione ed “estinzione” societaria (a proposito di gradazioni sull’“immortalità”), op. cit., p. 195 and following).

4. Return to the extinguishing-successory orientation: Judgement no. 21970/2021

Fifteen years after the 2006 intervention, the United Sections revisited the issue of the legal nature of mergers with ruling no. 21970 of 2021, completely overturning their previous conclusions and returning to the prevailing jurisprudence before the corporate reform.

In this ruling the Court highlighted that the evolutionary-modifying thesis could be considered in contrast with the literal text of the new provision of art. 2504-bis c.c.: while it is true that the word *extinguished* has been eliminated, the provision has also established, in a much less ambiguous way, that all relationships, both substantive and procedural, continue to be held by the incorporating or resulting company[114].

According to the Court, merger, "is not merely a modifying event, but rather a true and proper legal dissolution or extinction, concurrent with a successory phenomenon. The merger constitutes a universal succession corresponding to *mortis causa* succession and produces the

[114] In addition to G.F. Campobasso, 'Diritto commerciale', cited, p.658, in the sense of emphasizing (also) the aspect of universal succession, see C. Santagata - R. Santagata, 'Le fusioni', cited, 64; G. Ferri, 'Manuale di diritto commerciale', edited by Angelici - Ferri, Turin, 15th ed., 2016, p.481 ff.; G. Presti - M. Rescigno, 'Corso di diritto commerciale', Bologna, 10th ed., 2021, 707; G.B. Portale, 'La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato', in 'Europa e diritto privato', 2005, 116; G.A. Rescio, 'La fusione e la scissione', in 'Trattato delle società a responsabilità limitata', edited by Ibba-Marasà, vol. 7, Milan - Padua, 2015, p.151 ff., (who reaffirms their position in G.A. Rescio, 'Fusione e scissione', in 'Le società a responsabilità limitata', edited by Marasà - Ibba, vol. 3, Milan, 2020, p.2490 ff.), correctly noting that 'the dispute, once heated between decidedly polarized positions, seems today to tend towards quiet recognition of the inherent limitations of both views, if taken 'in purity,' and their ability to provide more conceptual frameworks to support arguments rather than adequate answers for the solution of concrete problems: hence a substantial indifference to the starting conception, often inclined to converge with the opposing theory in hybrid formulations.' On this point, see also S. Patriarca - P. Benazzo, 'Diritto delle società', Bologna, 3rd ed., 2022, p.263, according to whom, 'despite, especially with regard to the merger proper, the law itself (...) hints favorably towards the occurrence of a phenomenon of extinction/creation of legal entities, the legislator's choice is oriented towards describing the phenomenon in terms of universal succession'; as well as N. de Luca, 'Morte apparente o risurrezione di società?', cited, according to whom 'the merger is not only a modificative-evolutionary phenomenon, but also a translative-successory one.' For further references, see A. Genovese, 'Art. 2504 bis', in 'Le società per azioni', edited by Abbadessa - Portale, vol. 2, Milan, 2016, p.3352 ff.

interdependent effects of the extinction of the incorporated company and the simultaneous substitution of the incorporating company as the new holder of the legal relationships, both active and passive, including procedural ones, of the incorporated entities, representing the new center of attribution and legitimacy for the legal relationships previously pertaining to the incorporated entities."

Therefore, with ruling no. 21970 of July 2021, the United Sections revert to their previous position, affirming once again the extinguishing-successory theory of mergers[115].

4.1 Facts of the case

The case at stake dates to 2008 when the Spinone LLC by writ of summons served on 18 March 2008 requested the ascertainment of the simulation or, in the alternative, the revocation under art. 2901 c.c. of two successive contracts of sale concerning the same property. The first contract of sale was stipulated between the sellers Me.Ti. and M.A. and the buyer F.S. and was concluded on 11 April 2005, while the second

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[115] See F. Godio, Fusione ed estinzione di società di capitali e processi pendenti, Padova, 2020, spec. 14 e 107 e segg. Thus, for example, Cass. Civ., 15 February 2013, n. 3829, which emphasizes the extinguishing effect of the merged company and, accordingly, confirms the appellate decision to reject the appeal filed by the formerly incorporated company instead of by the incorporating company. Similarly, Cass. Civ., 10 December 2019, n. 32208, which rejects the respondent's objection of inadmissibility of the appeal due to lack of standing of the appellant formerly incorporated company, but only because the company merged after the appeal was filed. It states that the deletion of the merged company from the business register (which always follows the merger) results in the loss of its standing in court. Similarly, see Cass. Civ. 19 May 2020, n. 9137; Cass. Civ. 2 March 2020, n. 5640; Cass. Civ. 15 February 2013, n. 3820; Cass. Civ. 24 May 2019, n. 14177. See also the case law cited in paragraph 2.2 of the commented decision n. 21970 of 2021.

one was signed between F.S. and B.D.O.J. and concluded on 15 April 2005.

4.2 Procedural history

4.2.1 The decision at first instance

The Tribunal of Tempio Pausania granted the application for absolute simulation of the two contracts of sale.

4.2.2 The decision of the Court of Appeal

By judgement No.2 issued on 7 January 2019 the Court of Appeal of Cagliari, Section of Sassari, seized by the losing parties, rejected the appeal.

On the merits, the local court held that the proceedings brought by the absorbed limited liability company were validly instituted even though the company had been removed from the Register of Enterprises since 23 July 2004.

Two reasons were given by the Court to support its judgement. Firstly, it had been stated that pursuant to art. 2504-bis c.c. the merger involves a mere evolutionary-modifying event of the same entity, which persists and maintains its identity, even though in a different organisational structure. Secondly, the Court pointed out that since the acquiring company had constituted itself at the hearing before the Tribunal on 6 May 2011 in order to ratify the actions of the administrator of the absorbed one, it follows the healing effectiveness of the acts carried out by the *falsus procurator*.

4.3 The decision of the Joint Sections

4.3.1 Question presented

The case came to the examination of the Supreme Court as a result of the appeal (6178-2019) brought by M.A. and ME.TI. against the sentence of the Court of Appeal of Cagliari, Section of Sassari, No. 2/2019. The counterclaimant was represented by Zinconia LLC while the intimated were F.S. and B.D.O.J.

Against the sentence of the Court of Appeal of Cagliari, three grounds of appeal had been submitted:

I. Violation or false application of the arts. 1722.1(4) and 2495.2 c.c. as well as arts. 83, 163.3 (2)(4) and 164 c.p.c.. Hence, the summons and the entire proceedings are non-existent or, in the alternative, vitiated by absolute nullity, since the vocatio in ius comes from a non-existent subject.

II. Subordinately, violation or false application of art. 1413 c.c. and art. 100 c.p.c., in addition to omitting a decisive factual examination, since the judgement under appeal did not consider the circumstance of joint ownership of the property in respect of M., not in common property with the Me., of which the plaintiff company was not a creditor. Therefore, at most it could have been declared the simulation of the contract only for the 50% of shares.

III. Always on a subordinate basis, false application of arts 1414 and 2729 c.c., in addition to omitting a decisive factual examination, regarding the proof of the simulation, which could not have been declared because of insufficient presumptive evidence in the documents.

The Attorney General requested for the acceptance of the first ground with absorption of the other two.

In order to address this issue, it was necessary for the Court to reconstruct the corporate profiles of the so-called extraordinary transactions, and in particular of the merger.

Hence, due to the contrast existing in the case law regarding the effects of the merger by absorption, the case had been assigned to the Joint Sections.

4.3.2 Reasoning

Firstly, the Court has emphasised that the substantial aspects of merger (meaning concentration, extinction, and succession), cannot be separated from the procedural ones.

As regards the first substantial aspect, the concentration, it is undeniable that merger determines a phenomenon of legal and economic concentration[116]. This implies that the active and passive legal relationships, of which the acquired or merged company was the holder, are attributed to a different legal entity (the acquiring company or the company resulting from the merger) and the absorbed company is removed from the Companies Register. Therefore, the merger involves a very large corporate reorganization. Assets, people, and capital are allocated differently, according to the economic program developed in the merger plan, with no formal element remaining the same. Only the

[116] Differently, G. Ferri, in his "Manuale di diritto commerciale," p. 482, observes that "because the merger is carried out through a corporate act, an act concerning social organizations and only indirectly affecting the assets, it differs from concentration, where there is also a phenomenon of unification of the assets of two entities. In concentration, the unification of assets originally belonging to different entities occurs as a result of an act of disposition of one entity's assets in favor of another entity."

shareholders retain this role (except for their right of withdrawal): since they become owners of a share of the capital of the incorporating company or of the company resulting from the merger, according to the exchange ratio, referred to in the art. 2501-ter c.c.

Consequently, that the merger can be classified among the events modifying the statutes of the participating companies is certainly correct, but this is not, however, the only effect of the merger[117]. The fact that the incorporating company or the one resulting from the merger, assumes the rights and obligations of the companies involved indicates that the effects are certainly more significant than those attributable to a simple modification of the statute.

As we mentioned above, the second substantial aspect of merger is the extinction. Indeed, if all the relations pass to another subject, with cancellation from the register of the enterprises, the incorporated company does not preserve them but it extinguishes.

If, as regards legal relationships, art. 2504-bis c.c. makes clear that they all continue with the incorporating company or the one resulting from the merger, as explicitly identified successor by law, we have, at the same time, that natural persons (shareholders, company representatives, employees) lose their original role (deriving their fate from merger plan) and the legal persons - other than the incorporating company or resulting from the merger - become extinct. In fact, for the incorporated

[117] E. Simonetto, Trasformazione e fusione, cited work, 233, according to whom "it is therefore excessively incorrect (...) that clear doctrine (supported before the current code came into force) which holds that companies survive the merger while retaining their individuality. Under this theory lies the intuition of the unacceptable excessiveness of the extinction-creation doctrine, but it does not provide an acceptable explanation of the phenomenon since merging is much less than extinguishing oneself (with the subsequent creation of a new entity) but more than preserving one's individuality unchanged."

company, the registered office, the name, the administrative and control bodies, the nominal capital, the shares, or quotas that represent it, and so on cease; in a word, the original organization dissolves and no residual subjective situation remains.

Now, if no residual subjective legal position remains in the hands of the incorporated company, it has no meaning to affirm the permanence of a subject, devoid of relationships or subjective situations of any kind in its own legal sphere. Because the incorporated company does not hold any subjective legal position anymore, it would be vain to affirm its permanence as it would be an abstract entity[118].

Incorporated or merged companies therefore do not remain market players and are therefore not seen bringing civil suits or being defendants in them. If this were not the case, one could for example come to admit a double defence in court, and also contradictory, in relation to the same subjective positions, on the part of the incorporated company and the incorporating company.

Ultimately, it is necessary to conclude that, from the moment of registration of the cancellation of the incorporated company from the Companies Register, it becomes extinct, as an event equal to and contrary to the registration of the incorporation referred to in the art. 2330 c.c.; the natural persons remain - directors, auditors, employees,

[118] See, among many others, G.A. Rescio, Fusione e scissione, cited work, 2491, who observes that "denying the extinction of the merged or completely demerged entity, with the consequent change in (and thus succession to) the legal ownership of the related assets, forces one to resort to 'metajuridical' concepts: precisely because the entity is a conceptual creation of law, theorizing its survival 'within' the resulting entity or entities from the operation seems unjustified, sometimes contradictory to the positive law, and essentially useless."

partners - who, however, lose this role if they are not reabsorbed into the incorporating company or company resulting from the merger.

For these reasons, here it comes the third substantial element: the succession. Indeed, merger determines a universal succession corresponding to the succession *mortis causa*[119] producing both the effects of the extinction of the incorporated company as well as its replacement by the incorporating one, which now represents the new centre of imputation and legitimation of all the legal relations already concerning the incorporated [120]. The merger is not, in itself, an operation that aims to conclude all corporate relationships (such as liquidation), nor solely to transfer them to another entity while the settlor remains alive (such as the contribution to a company, the transfer of a company,

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[119] In addition to G.F. Campobasso, Diritto commerciale, cited work, 658, emphasizing (also) the aspect of universal succession, see C. Santagata - R. Santagata, Le fusioni, cited work, 64; G. Ferri, Manuale di diritto commerciale, edited by Angelici - Ferri, Turin, XV ed., 2016, 481 ff.; G. Presti - M. Rescigno, Corso di diritto commerciale, Bologna, X ed., 2021, 707; G.B. Portale, La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato, in Europa e dir. priv., 2005, 116; G.A. Rescio, La fusione e la scissione, in Trattato delle società a responsabilità limitata, directed by Ibba-Marasà, 7, Milan-Padua, 2015, 151 ff., (who reiterates his position in G.A. Rescio, Fusione e scissione, in Le società a responsabilità limitata, directed by Marasà - Ibba, III, Milan, 2020, 2490 ff.), who correctly notes that "the dispute, once heated between decidedly polarized positions, today seems to be tending towards a recognition of the inherent limits of both views, if taken 'in purity,' and their susceptibility to provide more conceptual frameworks for argumentation than adequate solutions for practical problems: resulting in a substantial indifference of the initial conception, often inclined to meet the opposing theory in hybrid formulations." On this point, see also S. Patriarca - P. Benazzo, Diritto delle società, Bologna, III ed., 2022, 263, according to whom, "despite the fact that, especially with reference to proper mergers, the law itself (...) sows clues favorable to the recurrence of an extinction/creation phenomenon of legal entities, the legislator's choice is oriented to describe the phenomenon in terms of a universal succession"; and N. de Luca, Morte apparente o risurrezione di società?, cited work, according to whom "merger is a phenomenon not only modifying-evolving but also transferring-successional." For further references see A. Genovese, Art. 2504 bis, in Le società per azioni, directed by Abbadessa - Portale, II, Milan, 2016, 3352 ff.

[120]Conversely, See M. Maltoni, Le Sezioni Unite, cited work, 925, according to whom "claiming that 'merger achieves a universal succession corresponding to succession mortis causa' is conceptually incorrect because it overlooks the systematic framework to which the merger discipline belongs, which is that of organizing assets intended for the exercise of business activity." He then correctly adds that this "is also unnecessary for solving the case brought to the attention of the Supreme Court." See also the considerations of N. de Luca, Morte apparente, cited work, 3495, who, while agreeing with the outcomes of the judgment, notes that "it is nevertheless evident that this situation [the extinction of the dissolved company] cannot entirely overlap with the death of natural persons," an argument stemming from the bankruptcy of the dissolved company.

etc.), but it aims to give it continuation, through the different organizational structure[121]. Reorganization and concentration, on one hand, and extinction and succession, on the other hand, are not incompatible and antithetical concepts. In essence, both effects occur, extinction and succession, without distinction on a chronological level, both deriving from the last of the registrations provided for by the art. 2504 c.c. (without prejudice to the possibility of establishing a different date pursuant to art. 2504-bis, paragraphs 2 and 3, c.c.).

The Court then wanted to definitively clarify who has procedural legitimacy stating that the continuation of the legal relationships establishes the active legitimation of the incorporating company to act and continue to protect the rights and its passive legitimation to suffer and defend itself against the claims of others, with regard to the relationships originally belonging to the incorporated company ; vice versa the latter, not maintaining its subjectivity after the merger and cancellation from the Companies Register, it does not have its own independent legal standing, whether active or passive.

The Court has then specified the results of a merger that takes place in pending lawsuits. Although, in principle, the regime laid down in arts. 110 and 300 c.p.c with the interruption of the process and its continuation by the universal successor would apply, however

[121] C. Santagata and R. Santagata, in "Le fusioni," p. 65, state that "the so-called 'succession' has merely a descriptive value of a profile that, purely logically, can be separated from the result of organizational unification, achieved externally to the relationships: the event is only perceptible by comparing the final situation to the initial one, from the perspective of the company (or, more precisely, the corporate contract). However, there is no corresponding event of 'alienation,' which is characterized by the detachment of the relationship from the legal sphere of an entity: the modification of subjective registration has only a conventional value." M. Maltoni, in "Le Sezioni Unite," p. 924, notes "the inapplicability of any rule devised to regulate the transfer of rights and assets, and in general subjective legal situations, between different centers of attribution, both to mergers and to transformations.

according to art. 2504- bis c.c. the process must not be interrupted. Though this is not because the incorporated company is still existing, but simply because the acquiring company or the company resulting from the merger are the subjects that have become holders of both the substantial and of the procedural relationships of the incorporated.

The ratio of the arts. 299 ff. c.p.c. confirms this reconstruction: given that, if the institution of the interruption of the trial aims to protect both the party affected by the interruptive event and the counterparty, for the purposes of better explication of the right of defense of both (art. 24 of the Constitution), this need is not felt, or in any case it is recessive *ex lege*, in the face of the superior need of continuity in substantive and procedural relationships, for purposes of certainty. In this way, the exclusion of the interruption of the process limits the consequences of the merger on the process, and the incorporating company must then prove only this quality for the purposes of legitimation, where it intends to carry out procedural acts.

As a consequence of the foregoing, the Court affirmed that for a subject extinguished by merger there is no power to undertake a judgement since a company which has become extinct is not subject to rights, nor does it have the capacity and legal standing to enforce them, having been transferred to the incorporating or merged company. It follows that if the incorporated company takes a judgement, the institution of ratification of the acts carried out by the *falsus procurator* will not apply since the right holder is different. However, the latter has the right to intervene in the proceeding once the same has been established by the non-legitimate. In this way, according to art. 105 c.p.c the voluntary intervention of the legitimate takes place.

The Court had already stated that the power granted to any interested party to intervene in a proceeding pending between other parties, in order to assert their own right against all or some of the parties, exists regardless of the actual existence, in the subject who initially brought the legal action, of the conditions necessary for its exercise[122]. This is because the procedural relationship, which is constituted by the intervention of the party entitled to assert the claim brought to Court by a party lacking active legitimacy[123], does not depend on the fate of the original relationship constituted by the plaintiff, since the true party entitled to the object of the dispute, of which the non-entitled party is a party, has an autonomous substantive position.

Hence, an action for the protection of a right already owned by the incorporated company, and then transferred to the incorporating one, may be proposed by the latter in the form of an intervention in Court.

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[122] In this sense, although there is a reference to legitimatio ad causam, both Cass. civ., 26 March 2010, no. 7300 (a case where the condominium resolution concerning the approval of millesimal tables was challenged by the condominium – deemed not to have the relevant power to appeal – but with the intervention of the condominium owners according to Art. 105 of the Italian Code of Civil Procedure); and Cass. civ., 13 December 1990, no. 11828 (a case where the eviction notice for non-payment was filed by the bare owner, but with the intervention of the usufructuaries considered the sole holders of the lease relationship).

[123]However, it is understood not as a mere affirmation of the ownership of the disputed right in the lawsuit – according to the preferable and currently dominant approach (see, for all, C. Consolo, Spiegazioni di diritto processuale civile, I, Turin, 2019, 559 et seq.) – but as the ownership of the right of action, which would belong to the party who files a grounded claim (this seems to be the case in Cass. civ., 24 December 1993, no. 12777, the third precedent of legitimacy cited by the sentence, for which the full text could not be retrieved.

4.3.3 Rule of law

Finally, in the light of the above, the following principle of law has been stated by the Court: “the merger by incorporation extinguishes the acquired company, which cannot therefore initiate proceedings in the person of its former administrator, being the incorporating company entitled to intervene in the pending lawsuits, pursuant to art. 105 c.p.c.”

4.3.4 Decision on the grounds for appeal

On the basis of the principle set out above the first ground of appeal has been considered unfounded and therefore rejected. Specifically, the Court considered that the reasoning of the judgement under appeal should be corrected pursuant to art. 384, paragraph 4, c.p.c.

In this case, Spinone LLC having merged by incorporation into Zinconia LLC on 23 July 2004, with consequent cancellation from the Companies Register, was devoid of legal capacity and standing to sue when it brought this action in March 2008, having already been extinguished and its administrative bodies having ceased to function as legal representatives for a long time.

When doubts arose as to its legitimacy in this respect, the acquiring company was constituted during the first instance, making its own judgment. In the following, the request for a simulation was granted, since the Court of first instance declared the simulation of the contract and the Court of Appeal expressly excluded any nullity of the process, either because of the merely modifying-evolving nature of the merger, whether the acquiring company has been incorporated.

It follows that, having changed the reasoning in the same way as the principle stated, the first ground must be rejected.

As regards the second and third pleas, both have been considered inadmissible.

The Court of the merits has shared the ascertainment operated by the Tribunal of the simulation of the two contracts of sale, given the will of the parties not to transfer the property of the object of the two trades. Still the ratio decidendi expressed by the Court of Appeal was based on a threefold assessment. Firstly, the proposition of the action of simulation with regard to the purchase in its entirety and not pro quota; secondly, the lack of complaint about the conscious participation of the co-owner M. in the simulation; and lastly the irrelevance, in that situation, of the absence of a debtor position of the latter. Assessments which, however, the second ground of appeal did not censor.

As regards the third ground, it did not identify the rule of judgement or rule of law that would have been poorly applied.

Ultimately, given the above, the Court held that appeal must be dismissed.

4.3.5 Further considerations within the National Law

In further support of the extinguishing-successory theory, the Supreme Court cited other rules on the subject of merger proceedings.

The art. 2504, paragraph 3, c.c. establishes that the "deposit relating to the company resulting from the merger or to the incorporating company cannot precede those relating to the other companies participating in the merger". This confirms that the definitive corporate entity - both the pre-existing one reorganized in this way, and the new entity - cannot "coexist" with the continuing legal personality and autonomous subjectivity of the merged or incorporated companies, which must therefore, as a formal structure, become extinct first[124].

Moreover, it is necessary to point out that the question of whether the incorporated or merged company is subject to bankruptcy only partially intersects that of its existence. In this regard, the special provisions of the Bankruptcy Law (L.Fall), art. 10, which establishes the fallibility of entrepreneurs, both individual and collective, under the conditions that it has elapsed no later one year from cancellation from the Companies Register and that the insolvency occurred prior to the cancellation or in the said term[125]. In this way, as far as companies are concerned, an "entity" that is no longer such can fail within one year of the extinction event. Therefore, the company may be subject to bankruptcy after the merger or demerger, even if cancelled by the Companies Register, is not a regulatory element in favour of the thesis of its survival against cancellation. And in this regard, it has been established the principle of law according to which, for the purposes of the correct establishment of the cross-examination pursuant to art.15 L.Fall, the appeal for the declaration of bankruptcy of a company already incorporated by merger and the related convening decree must be notified to the incorporating company, which continues all proceedings prior to the merger, while the aforementioned company retains its identity for any declaration of bankruptcy[126].

[124] It is true that the moment of production of the effects of the merger may not coincide with the publication of the merger plan, given that there may be no coincidence, even by will of the parties, between the moment of completion of the merger advertising referred to in the art. 2504, paragraph 2, c.c., and that of producing the effects of the concentration. This, however, means nothing more than, by will of the parties supported by the regulatory provisions, the extinction of the incorporated company will be postponed to that time.

[125] M. Mozzarelli,Trasformazione e fallimento, cit., 1294 ss.

[126] Cass. 11 August 2016, no. 17050; and Cass., 18 February 2007, no. 2210.

Furthermore, it is worth recalling for our discussion, all those provisions of the legal system that provide for the substitution and continuity of relationships following merger by incorporation. In this regard, art. 1902 c.c., which deals with mergers between insurance companies, can be considered. This article states that the insurance contract "continues with the insurance company resulting from the merger or incorporating the pre-existing companies."
Also, interpreters usually enumerate the Legislative Decree of 8 June 2001, no. 231, art. 29, on the liability of legal persons, according to which, in the case of a merger, "the resulting entity is liable for the crimes for which the entities participating in the merger were responsible"; Exponents also refer to Legislative Decree no. 231 of 2001, art. 32, which, where the company resulting from the merger is responsible for crimes committed by itself, allows the judge to consider the repetition of the crime also in relation to the sentences pronounced against the entities participating in the merger, for the crimes committed prior to it.
For procedural aspects, Legislative Decree no. 231 of 2001, art. 42, in the case of a merger or split of the entity originally responsible, provides that "the proceedings continue against the entities resulting from these modifying events or beneficiaries of the split, who participate in the process." In particular, the Court of Cassation with sentence no. 41768 of 2017 deemed the incorporating body to be the recipient, for the purposes of the correct establishment of the cross-examination, of the summons to trial. Similarly, Legislative Decree no. 231 of 2001, art. 70 expressly intends to clarify that, in the case of a merger or split of the

responsible entity, "the judge acknowledges that the sentence is pronounced against the entities resulting from the transformation or merger or beneficiaries of the split, indicating the originally responsible entity" and that the "sentence pronounced against the originally responsible body still has effect also against of the indicated entities".

In the context of special laws, Legislative Decree 10 September 1993, no. 385, art. 57, paragraph 4, provides that existing privileges and guarantees "in favour of banks incorporated by other banks, of banks participants in mergers with the creation of new banks or demerged banks retain their validity and their degree, without the need for any formality or annotation, in favour of, respectively, the acquiring bank, the bank resulting from the merger or of the bank benefiting from the transfer by demerger". Furthermore, for the figure of the so-called *increase in the vote*, according to Legislative Decree no. 58 of 1998, art. 127-quinquies the increased voting rights are generally retained in the event of succession due to death as well as in the event of a merger and split of the owner of the shares", passing to the incorporating company[127].

In tax matters, the Presidential Decree 22 December 1986, no. 917, art. 172, paragraph 4, consolidated law. on direct taxes, establishes that "from the date on which the merger takes effect, the company resulting from the merger or incorporating company takes over the obligations and the rights of merged or incorporated companies relating to income

[127] Rules inspired by the same concepts are provided for by Legislative Decree no. 58 of 1998, art. 127-sexies, as regards multiple voting shares existing assets of the listed company.

taxes".[128] Similar is the ratio of the Legislative Decree of 18 December 1997, no. 472, art. 15, which dictates provisions regarding administrative sanctions for violations of tax regulations: in the event of a merger or split, the "company or entity resulting from the transformation or from the merger, even by incorporation, takes over the obligations of the transformed or merged companies relating to payment of sanctions".

4.3.6 Further considerations within the European Law

Systematic interpretation according to Community and European law leads to even more unequivocal results in support of the extinction-modifying-devolutionary thesis. For this reason, the Supreme Court cited European Union legislation, where the term 'extinction' is used on various occasions, unlike in national law after the reform[129].

Since this is a harmonized area of corporate law on a European level, the national interpreter must take it into account. The principle of compliant interpretation indeed entails the duty to choose, among the

[128] Note that paragraph 10 of the same art. 172 makes an express reference to "subjects that become extinct as a result of the same operations.

[129] See on this point, with reference to the limits of the reference to the text of the Community directives, O. Cagnasso, 'Le Sezioni Unite', cited, 1208, who observes that 'doubts could arise about the binding nature for the Italian legislator of this aspect of the Community legislation'; F. Magliulo, 'Clamoroso revirement', cited, 531, according to whom 'the Community directives are undoubtedly binding regarding the regulation of the merger institution, but they do not seem to preclude Member States from conceptually constructing it in the way they deem most appropriate, as long as this does not conflict with the aforementioned Community regulation'; as well as previously C. Santagata - R. Santagata, 'Le fusioni', in 'Trattato delle società per azioni', directed by Colombo - Portale, vol. 7**1, Turin, 2004, 3 ff., 6, who note that 'neither the internal legislator nor the interpreter are required to conform to the dogmatic configuration regarding the foundation of the institution' and, therefore, 'the implementation rules of the Community directives, issued by the legislator to regulate the functioning of companies within the individual legal system, cannot help but be influenced by the characteristics and peculiarities of the legal structure in which they are implemented' (p. 10), noting that the presence in the III directive of definitions was due 'to the fact that in Belgium, the Netherlands, and Luxembourg, the merger was not specifically regulated' (note 9 for further references). Moreover, as will be seen, the issue does not seem to be the extinction of the merged company as such, but rather its role in the merger: see par. 7."

different possible interpretations of a statement of domestic law, the one that is most suitable to align it with the dictates of the European law. This is because the phenomenon of the merger is unitary, therefore the final discipline needs to be homogeneous, in its essential and supporting lines.

Starting from the third Council Directive 78/855/EEC of 9 October 1978, relating to mergers between companies for shares, art. 19 provides: "merger produces *ipso iure* and simultaneously the following effects: a) the universal transfer, both between the incorporated company and the incorporating company and towards third parties, of the entire active assets and liabilities of the incorporated company to the incorporating one; b) the shareholders of the absorbed company become shareholders of the incorporating company; c) the incorporated company is extinguished". Therefore, starting from the III Directive, both the succession translation effect and the extinction effect for the incorporated company appear. Directive 78/855/EEC was repealed, with effect from 1 July 2011, by Parliament Directive 2011/35/EU European Council and of the Council, of 5 April 2011, relating to the mergers of joint-stock companies. The art. 19, par. 1 of Directive 2011/35 takes up art. 19, par. 1, of Directive 78/855 in identical terms.

Thus, also the art. 23 of this directive, with reference to the merger through the creation of a new company, states that "the expressions "companies participating in the merger" or "incorporated company" indicate companies that are extinguished".

Even more stringent indications can be drawn from the regulation of cross-border mergers, where the interest in homogeneity of effects in all countries is the prerequisite. The art. 14 of Directive 2005/56/EC, relating to cross-border mergers of joint-stock companies, provides for mergers by incorporation that "the incorporated company expires" and that in mergers through the creation of a new company "the companies participating in the merger become extinct".

Also, the art. 29 of the reg. (EC) no. 2157/2001 of the Council of 8 October 2001, regarding the establishment of a European company by merger, and art. 33 of the reg. (EC) no. 1435/2003 of the Council of 22 July 2003, regarding the constitution of a European cooperative society by merger, expressly provide for the extinction of companies incorporated or merging "*ipso jure* and simultaneously".

Lastly, Directive 2017/1132/EU, published on 30 June 2017 and entered into force on 20 July 2017, as per last amended by Directive 2019/2121/EU of 27 November 2019, offered a codification of European corporate law, through the unification of previous Directives on corporate matters in a single text.

Arts. 105 and 109, and art. 131, respectively on the "Effects of the merger" and on the "Effects of the cross-border merger", continue to provide that "the absorbed company will be extinguished" and "the companies participating in the merger will be extinguished.”

Consequently, if this happens in harmonized systems, the same interpretation in domestic law can only be favored.

5.Debate surrounding Judgement 21970/2021: Criticism and Support

In conclusion, Judgment No. 21970/2021 has caused a tangled and diverse discussion in the Italian legal field.

While critics [130] contend that the ruling ignores the modern realities and complexities of corporate mergers, supporters[131] assert that the ruling offers legal clarity aligning with both Italian and European legal traditions. The debate emphasizes the constant conflict between keeping traditional legal principles and adapting to the changing environment of corporate operations.

5.1 Criticism of the Ruling

Specifically, critics argue that mergers should be seen as internal reorganization processes within the companies involved, rather than as events that result in the extinction and succession of entities[132].

According to many scholars, the 2003 corporate law reform, which was implemented through Legislative Decree no. 6/2003, specifically eliminated the term 'extinction' from art. 2504-bis c.c., thereby promoting a more evolutionary perspective on mergers. Moreover, they contend that the evolutionary-modifying theory better aligns with the operational realities of contemporary businesses and emphasize that viewing mergers as reorganization processes facilitates a smoother and more efficient transfer of rights and obligations, thereby avoiding unnecessary legal and administrative complexities associated with the extinguishing-successory theory[133]. Others criticize the ruling for its

[130] Such as Luigi Ferri, Francesco di Sabato, Carmine Santagata Simone Silvetti, Fabrizio Serra, Vittorio Tantini, Franco Campobasso, and Roberto Sacco.
[131] Such as Giuseppe Rescio, Franco Abbadessa, Luca Benazzo, Paolo Patriarca, Mario Campobasso, Piero Portale, and Francesco Godio.
[132] Luigi Ferri, according to whom the ruling "*ignores the contemporary realities of corporate structures and mergers, sticking to an outdated view of corporate legal principles that no longer align with the globalized economy*". Ferri, Manuale di diritto commerciale, edited by Angelici - Ferri, Turin, XV ed., 2016,p. 481 ff.;
[133] Francesco di Sabato argues that "*the judgment neglects the complexities inherent in cross-border mergers, failing to offer a framework that addresses the specific challenges of international corporate governance.*" DI SABATO, in Società, 1986,p.952 ff;

rigid interpretation, suggesting that it could constrain the flexibility of corporate operations[134].

Overall, critics emphasize the decision's inconsistency with the principle of corporate operational continuity and question the suitability of the Court's approach in navigating the complexities of modern corporate structures.

5.2 Support for the ruling

Supporters argue that the extinguishing-successory theory maintains legal certainty by providing clear legal consequences for mergers. They emphasize that this theory ensures that all rights and obligations of the absorbed company are unambiguously transferred to the absorbing company. This clarity is crucial for protecting the interests of creditors and shareholders by clearly defining responsibility and avoiding potential legal ambiguities during the transition of rights and obligations[135].

Other supporters highlight the ruling's consistency with the Italian legal tradition and the broader European legal framework. They argue that the decision reflects the established legal principle in Italian jurisprudence that sees mergers as events leading to the extinction of the original company and the simultaneous emergence of a new legal entity. This interpretation, they assert, aligns with the prevailing

[134] Carmine Santagata expressed concern that "*this decision reinforces legal rigidity at the expense of innovation, potentially hindering the evolution of corporate operations in an increasingly competitive and interconnected marketplace". C. SANTAGATA, Le Fusioni, p.31.*

[135]Giuseppe Rescio defends the judgment, asserting that "*the ruling brings much-needed legal certainty to corporate mergers in Italy, providing a stable foundation that aligns with European Union regulations".* G Rescio, La fusione e la scissione, in Trattato delle società a responsabilità limitata, directed by Ibba-Marasà, 7, Milan-Padua, 2015, p.151 ff.,,

European jurisprudence, promoting harmonization in corporate law across the European Union. This harmonization is particularly beneficial for facilitating cross-border mergers, which are becoming increasingly common in a globalized economy.

Some supporters view the ruling as a reinforcement of the traditional understanding of mergers within Italian corporate law. They argue that the extinguishing-successory theory offers a clear-cut and unambiguous framework for understanding the legal implications of mergers. By treating mergers as events that terminate the existence of the original entities and create new ones, this approach ensures a straightforward transfer of all rights and obligations, thereby avoiding the complexities and uncertainties associated with the evolutionary-modifying theory[136].

6.Insights and reflections

In the light of the above, it is clear how both approaches present their advantages as well as drawbacks.

The extinguish successor theory presents two main advantages:

1)Legal clarity

2)Consistency with legal tradition

The extinguishing-successory theory provides clear legal consequences for mergers, therefore guaranteeing protections to creditors and shareholders. Indeed, the dissolution of the absorbed company and the establishment of a new legal entity guarantee a clear and unequivocal transfer of rights and responsibilities. At the same time, this orientation

[136] Franco Abbadessa supports the judgment, noting that "*while it is essential to adapt to changing corporate realities, the core legal principles that protect shareholders and ensure transparency must remain intact, as reinforced by this decision.*" Abbadessa - Portale, L fusion societaria, II, Milan, 2016, p.3285.

is in accordance with the Italian legal tradition and European regulation, therefore fostering legal consistency.

However, it also presents drawbacks such as:

1)Rigidity

2) Incompatibility with modern realities

The rigid application of the extinguishing-successory theory may limit the flexibility of corporate operations. This approach may not suit the modern dynamics of mergers, which tend to treat mergers as evolutionary events rather than dissolution events.

On the other hand, also the evolutionary-modifying theory presents advantages and disadvantages. Regarding the advantages, it entails:

1)Flexibility

2)Alignment with modernity

The evolutionary-modifying theory views mergers as internal restructuring processes, allowing greater flexibility in adapting to modern business dynamics and facilitating a smoother transition of rights and obligations.

At the same time, this orientation better reflects contemporary corporate practices, where mergers are seen as evolutionary rather than terminal events.

However, it also presents disadvantages like:

1) Legal Ambiguity

2)Uncertainty in Application

The evolutionary-modifying theory may introduce ambiguity in defining the legal consequences of mergers, making it harder to clearly establish the transfer of rights and obligations, posing risks for creditors and shareholders. Consequently, it might create legal uncertainties and challenges in the practical application of regulations, especially in complex and diverse merger scenarios.

In my view, despite the challenges posed by the extinguishing-successory theory, its merits, particularly in terms of legal clarity, outweigh its drawbacks. Legal certainty should be the cornerstone of corporate mergers, as it provides stability and predictability, which are essential for safeguarding the interests of all parties involved. While flexibility is an important consideration, it cannot come at the cost of introducing legal ambiguity and uncertainty, which could undermine corporate governance and the protection of creditors and shareholders. Therefore, I believe that the extinguishing-successory orientation remains the more prudent and reliable approach, especially in complex mergers, as it ensures the transparency and consistency needed in today's legal landscape.

CHAPTER III

MERGERS IN THE AMERICAN LEGAL SYSTEM

1.The American legal landscape for mergers

Corporate mergers have historically been significant in influencing the structure of American industry, serving as a crucial tactic for companies seeking to broaden their market reach, improve operational effectiveness, and boost shareholder worth.

This chapter examines the intricate legal, financial, and strategic aspects of corporate mergers in the United States, providing a deep understanding of how mergers are carried out and the impact they have on the wider business landscape.

2. The evolution of the U.S. Corporate law of mergers

Due to advancements in technology and the changing nature of markets, U.S. merger regulations have become less strict over time.

The path starts in a world where merges don't happen at all and concludes with a world where mergers can compel stockholders to sell all of their ownership in a firm.

The pivotal moment in this development happened when the law agreed to recognize equity investors as a class of interests that could be sufficiently safeguarded by a majority vote and a right to a statutory appraisal of fair value, with the exception of situations in which fiduciary duties were activated.

To facilitate understanding, we may split the development of merger law into two eras [137].

2.1 The first stage: when mergers were uncommon

The initial period, spanning the history of U.S. corporate law until around 1890, was characterized by a scarcity of mergers.

At the time, legislatures established business corporations through specific acts of incorporation, typically to expedite projects with a public objective, such as building canals or railroads, establishing financial intermediaries (banks and insurance companies), or occasionally setting up manufacturing enterprises.

Shareholders inherently lacked the authority to modify these statutory charters, and as a result, mergers could only take place with the involvement of state legislatures[138].

The situation started to change approximately around 1840 with the introduction of universal incorporation statutes which allowed stockholders to independently incorporate and create their own charter. However, prior to approximately 1870, state incorporation laws consistently prohibited shareholders from making changes to their charters (which would be necessary for a merger) without unanimous agreement[139]. This was done to safeguard the interests of investors who had contributed cash based on the original charter. Therefore, in this aspect, the corporation structure of the mid-nineteenth century resembled the general partnership type.

[137] Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*, p. 456.
[138] *Ivi,,* p. 458.
[139]*Ivi*, p. 460.

2.2 The second stage: the modern era

The efficiency scale of numerous industries was enhanced by technological advancements throughout the final decades of the nineteenth century.

However, mergers were not a cost-effective method for restructuring enterprises into larger entities due to the need for unanimous permission from shareholders[140]. This need led to significant obstacles caused by minority shareholders, resulting in detrimental hold-up issues.

Therefore, in the late 1800s, changes were made to corporation laws to allow mergers and amendments to a company's charter even if not all shareholders agreed. These changes required that the board of directors recommend the mergers or amendments and that a majority (initially a large majority) of the company's shareholders approve them [141].

Currently, Delaware and several other states permit mergers to continue by obtaining the consent of a simple the preponderance of the outstanding shares of each class of stock that has the right to vote on such mergers.

It was at the start of the 21st century that the most significant aspect of modern merger regulations occurred. Indeed, it was recognized the shareholders' entitlement to disagree with a proposed merger and request an "appraisal" - a legal assessment of the monetary worth of their shares - as an alternative to remaining as a shareholder in the newly merged company[142].

[140] *Ivi*, p. 461.
[141] *Ivi,* p. 462.
[142] Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*, p. 465.

Another significant aspect of merger legislation in the contemporary period emerged approximately fifty years later, during the mid-twentieth century, as governments significantly relaxed the allowable types of merger compensation[143].

Indeed, initially shareholders of a merging firm were only eligible to receive ownership in the surviving company as compensation for their former shares. Conversely, from the mid-century, the types of consideration that can be used in the surviving corporation expanded beyond securities to cover all types of property, with cash being the most significant[144].

3. Sources of Corporate Law

3.1 State Corporate Law

Almost every American corporation is established by filing articles of incorporation with the relevant state authority, therefore becoming incorporated under the laws of that state[145]. The jurisdiction in which the articles of incorporation are officially submitted is commonly referred to as the "state of incorporation".

The process of choosing a state of incorporation carries significant implications due to the *internal affairs doctrine*, which is a conflicts of law principle that dictates that corporate governance matters are

[143] Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*, p. 466.

[144] *Ivi*, p. 468.

[145] A very few exceptions are formed under federal law, most of which are actually quasi-governmental entities, such as the Federal Deposit Insurance Corporation, or part of an industry that is heavily regulated by the federal government, such as credit unions and banks.

governed by the laws of the state in which the organization is incorporated[146].

Almost all U.S. jurisdictions adhere to the internal affairs doctrine, regardless of whether the corporation in question has minimal connections to the state of incorporation beyond the act of being incorporated.

Some jurisdictions have a broader exception to the internal affairs doctrine specifically for pseudo-foreign corporations, meaning companies that are incorporated by a state or nation other than the state in question[147]. Therefore, a pseudo-foreign corporation primarily affiliated with the state in question rather than the state of incorporation[148]. For example, a significant number of corporations registered in Delaware are considered pseudo-foreign corporations. The company is registered in Delaware, but most of their activities are conducted in one or more states outside of Delaware.

There is generally no substantial legal distinction between a foreign corporation and a pseudo-foreign corporation in most states and the internal affairs doctrine is used to enforce the laws of the state where the corporation is incorporated for both types[149].

California and New York are the main deviations from this norm. Both states claim to enforce certain aspects of their corporate rules on pseudo-foreign firms that are established in other jurisdictions but have significant connections with California or New York[150]. For these

[146] Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 8.
[147] *Ivi,* p. 11.
[148] *Ibid.*
[149]*Ivi*, p. 8.
[150] See, e.g., Cal. Corp. Code $ 2115, N.Y. Bus. Corp. L. §S 1317-20.

reasons, in 2005 the Delaware Supreme Court ruled that the California statute violated the Due Process and Commerce Clauses of the U.S. Constitution[151].

The internal affairs theory becomes especially important in transactional matters when combined with the constitutional limitations on a state's power to exclude foreign firms[152].

Almost all states have historically let foreign and pseudo-foreign businesses to conduct business within their jurisdictions, with only a few exceptional exclusions[153].

In this regard, there are some decisions worth nothing.

Firstly, in 1839, the U.S. Supreme Court established that federal courts should assume that a state will acknowledge foreign corporations unless the legislature explicitly states otherwise[154].

A later ruling by the Supreme Court suggested that states are not allowed to prohibit foreign businesses from conducting business within their borders, as long as the business falls under interstate commerce as defined by the Commerce Clause of the U.S. Constitution[155]. These decisions successfully established a unified market for corporation charters meaning that if a state like Illinois, for instance, chooses to implement a stringent corporation's legislation, its firms have the freedom to establish themselves as legal entities in a state with less

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151 VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del.2005).
152 Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 15.
153 Committee on Foreign Investment in the United States (CFIUS) can review and block transactions involving foreign entities if they pose a national security risk. This review can affect mergers, acquisitions, and investments in U.S. companies. Foreign Investment Risk Review Modernization Act, 31 U.S.C. § 5301 et seq.
154 Bank of Augusta v. Earle, 38 U.S. 519, 597 (1839).
155 Paul v. Virginia, 75 U.S. 168 (1868).

stringent regulations, such as Delaware, while still being able to operate and do business in Illinois.

Examining Delaware, it is undoubtedly the primary origin of state corporate law. This is because over 50% of the state firms listed for trading on the New York Stock Exchange and close to 60% of the Fortune 500 corporations are incorporated in Delaware.

Delaware's superiority can be attributed to two main factors[156]:

First, the Delaware General Corporation Law (DGCL) has been extensively interpreted by case law, providing a reliable basis for answering legal concerns[157].

Secondly, Delaware possesses a distinct Court known as the Court of Chancery, which primarily handles disputes related to corporate law. The chancellors possess extensive knowledge and experience in topics related to corporate law, which makes their court a highly refined and advanced platform for settling conflicts. Also, the Court of Chancery tends to make decisions expeditiously, which helps to expedite transactions that frequently have time constraints[158].

An essential alternative to Delaware law is the Model Business Corporation Act (MBCA) developed by the American Bar Association. Approximately thirty-five states fully or partially implemented the 1969 MBCA. Twenty-four states have fully accepted the 1984 MBCA, while many others have embraced certain parts of it[159].

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[156] Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 18.
[157] *Ibid.*
[158] *Ibid.*
[159] Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 22.

The most significant exceptions are the states of Delaware, California, and New York, which have not yet complied. Indeed, each corporation has maintained its own distinct corporate statute, incorporating only certain aspects of the Model Business Corporation Act.

It is also relevant to highlight the American Law Institute's Principles of Corporate Governance, which were promulgated in 1992 after more than a decade of work and much controversy and today constitute a significant non-statutory source of corporate law[160]. These principles bear a resemblance to the well-known restatements of the law by the American Law Institute (ALI) and each portion presents a clear and concise rule of law, followed by explanatory comments and annotations. Critics contend that the ALI Principles do not merely reiterate current legal principles, but instead suggest significant modifications to the law[161]. However, Although the original versions of the ALI Principles suggested significant modifications, most parts in the final version of the ALI Principles closely resemble the current legal framework.

3.2 Federal Law

The issuance and trading of stocks and other corporate securities was largely unregulated until the passage of the first state "blue sky law" by Kansas in 1911. These laws were a response to widespread fraud in the sale of securities[162]. Indeed, the name supposedly refers to unscrupulous promoters who would sell building lots in the clear blue sky. State

[160] Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 27.
[161] *Ibid.*
[162] Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 30.

regulation proved largely ineffective, however, because the statutes had a limited jurisdictional reach, many statutes contained numerous special interest exemptions, and states had limited enforcement resources.

In the aftermath of the Great Stock Market Crash of 1929 and the subsequent Great Depression, there was widespread agreement that the time had come for federal regulation of the securities markets. Consequently, between 1933 and 1940 Congress passed seven statutes regulating various aspects of the industry, which have been amended on various subsequent occasions and joined by a few other highly specialized statutes[163].

For our purposes, the most important of these statutes are the Securities Act of 1933 and the Securities Exchange Act of 1934[164] which regulate, respectively, the market sales of securities by issuing corporations and the trading of corporate securities on securities exchanges and other secondary markets[165].

Although the two statutes are concerned with different transactions, they have the same basic purposes. The first aim is to require corporations and other issuers of securities to provide full disclosure in order to ensure that investors have all the information they need to make informed decisions about buying, selling, or voting securities. On the

[163]*Ivi*, p. 29.

[164]*Global Legal Insights* (2021).

[165] Subject to certain exemptions, all corporations that sell securities to the public are subject to the Securities Act. In contrast, the Securities Exchange Act applies to a narrower range of businesses. Although the Act has a complex set of rules for deciding which provisions apply to which corporations, as a general rule of thumb it applies only to publicly held corporations. See also SEC Law.Federal securities law. from https://seclaw.com/federal-securities-law/.

other hand, the second goal is to punish fraud committed in connection with securities transactions[166].

The Securities Act follows a transactional disclosure model, focusing the attention on getting information concerning certain transactions from the issuer to investors. Accordingly, that Act applies only when an issuer is actually selling securities[167]. Therefore, as long as a company can raise funds by other means, the Securities Act does not require it to provide any disclosures whatsoever. Obviously, this leaves a significant gap in the disclosure requirements, and this is why the Securities Exchange Act intervenes to addresses this problem by imposing a periodic disclosure system on certain issuers.

The Securities Exchange Act focuses on regularly and routinely getting information from the issuer to the market[168]. In addition, it includes a hodgepodge of other provisions, concerned with regulating secondary market trading and preventing fraud[169].

The Securities Exchange Act is also notable because it created the Securities and Exchange Commission (SEC), the primary federal agency charged with administering the various securities laws. The agency is headed by five Commissioners, who must be confirmed by the Senate. No more than three can belong to the same political tarty. Most of the agency's work, of course, is done not by the commissioners but by the professional staff comprised mainly of lawyers, although it also includes a number of accountants and economists. The agency staff

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[166] Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 31.
[167] Securities Act of 1933, 15 U.S.C. § 77e.
[168] Securities Exchange Act of 1934, 15 U.S.C. § 78m.
[169] *Ivi,* § 78j et seq.

is organized into Divisions and Offices having various specialized responsibilities, the most important of which include : to provide interpretative guidance to private parties raising questions about the application of the securities laws to a particular transaction; to advise the Commission as to new rules or revisions of existing rules; and to investigate and prosecute violations of the securities laws[170].

Nevertheless, the U.S. Supreme Court has held repeatedly that the federal securities laws do not preempt state corporate law, but instead place only a limited gloss on the broader body of state law.[171] A general guideline established by the Supreme Court is that state law primarily addresses the substantive aspects of corporate governance, whereas federal law focuses on disclosure and specific procedural elements, such as proxy solicitation and the execution of tender offers. However, in some areas, the boundary between federal and state jurisdiction continues to be a subject of debate[172].

4. The merger process

Having explored the general concept of mergers, we now turn to the legal framework.

In our discussion, we will refer to the provisions set in the Model Business Corporation Act since it is the state corporate law accepted by most of the U.S. states and it provides a comprehensive definition of mergers along with detailed procedures.

[170] Stephen M. Bainbridge, *Corporate Law*, 4th ed., 2020, p. 35.

[171] See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); *Burks v. Lasker*, 411 U.S. 471 (1979); Santa Fe Indus. v. Green, 430 U.S. 462 (1977).

[172] *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)

According to chapter 11 of the MBCA, "a merger is the traditional form for combining entities by operation of law"[173], and the range of merger transactions Chapter 11 permits is broad. Indeed, a domestic business corporation may merge with one or more of the following domestic or foreign entities. First, with business corporations; secondly, with unincorporated entities (including limited liability companies, general and limited partnerships, and business trusts); lastly, with nonprofit corporations (which are defined together with unincorporated entities as "eligible entities;" neither is included in the defined term "corporation")[174].

In general, corporate mergers can be classified into five basic categories.

1. *Horizontal mergers* can place when direct competitors, who operate in the same market and provide similar products or services, combine their businesses.
2. *Vertical mergers*, in contrast, entail the consolidation of organizations that operate within the same supply chain, such as a manufacturer combining with a distributor.
3. *Market-extension mergers* occur when companies with similar products or services merge, but they operate in distinct markets [175].
4. *Product-extension mergers* involve organizations in the same market that offer complementary products or services.

[173] MBCA § 11, Introductory comment.
[174] *Ibid.*
[175] Donnelly, S. (2024, June 20). *10 risks of mergers and acquisitions & how to mitigate them*. Finance Alliance.

5. *Conglomerate mergers* occur when corporations consolidate despite having no connection between their products or services, typically resulting in a broader range of operations[176].

Although much planning and preparatory work must take place beforehand, a merger actually occurs when a document called the articles of merger is filed with the appropriate state officials.[177] The two businesses typically merge, with one being referred to as the "surviving corporation" [178]. The entity resulting from the merger may be one of the parties to the merger, or a new corporation or eligible entity created by the merger. Therefore, section 11of the MBCA may apply to a merger in which none of the parties is a domestic corporation, as long as the resulting entity is a new domestic corporation. In the case of any merger involving a corporation or eligible entity organized under the laws of a foreign jurisdiction, the Act recognizes that whether and how those foreign entities may merge are matters governed by the law of the foreign jurisdiction[179]. After the merger, this surviving company becomes the sole owner of all the assets and takes on all of the liabilities of the two parties[180].

Section 11 also permits share exchanges in which either (i) a domestic corporation acquires all of the shares or eligible interests of one or more

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[176] Donnelly, S. (2024, June 20). *10 risks of mergers and acquisitions & how to mitigate them*. Finance Alliance.

[177] Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*, p. 471.

[178] A merger in which both parties disappear and are survived by a new third corporation is technically called a consolidation. See, e.g., DGCL§ 251(a). A merger is technically defined as the unification of two or more corporations in which at least one of the constituent parties survives. In a consolidation, two or more corporations combine to form a new corporation. Because the articles of consolidation serve as the new entity's articles of incorporation, the distinction is mostly semantic from a corporate law perspective. See also American Bar Association. (2016). Model Business Corporation Act.

[179] MBCA § 11.01.

[180] Miller, E. L., & Segall, L. N. (2017). *Mergers and Acquisitions*, p. 212.

classes or series of another domestic or foreign corporation or eligible entity, or (ii) all of the shares of one of more classes or series of a domestic corporation are acquired by another domestic or foreign corporation or eligible entity[181]. As a result, in a share exchange, the existence of the acquired entity continues. If enough shares or eligible interests are acquired, the acquired entity may become a subsidiary of the acquiring entity. Each of these transactions is a share exchange, even if it involves no shares and only "eligible interests". Also, a foreign corporation or eligible entity may only be the acquired entity in a share exchange if it is permitted by the law governing the foreign corporation or eligible entity[182].

5.Economic motives for mergers

Mergers and acquisitions (M&As) are now widely used by organizations as a significant strategy to improve their competitive position, enter new markets, and boost shareholder value[183]. Corporations are primarily motivated to undertake M&A activities for five reasons.

The primary motivation is to generate value, in particular to enhance shareholder value. This is frequently accomplished through synergies, wherein the collective worth of the amalgamated firm surpasses the total of the separate companies[184]. In turn, synergies can be classified into two main categories:

[181] American Bar Association. (2016). Model Business Corporation Act.
[182] MBCA § 11, Introductory comment.
[183] Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*, p. 463.
[184]Weston, J. P., and Kenneth M. Weaver (2004). *Mergers and Acquisitions*, p.115.

(i)*revenue synergies* refer to the benefits that result from expanding market presence, diversifying products, or capitalizing on cross-selling prospects. For instance, a merger of two companies that operate in geographically similar regions can enhance their customer base and increase their revenue[185].

(ii)*cost synergies* arise from the advantages of scale, decreased administrative costs, or the removal of duplicative processes. Companies can typically gain cost savings by integrating activities, which allows for shared resources, improved processes, and decreased duplication of efforts[186].

The second reason is that mergers are an effective means of achieving diversification, which helps mitigate risk and improve long-term financial stability[187]. Diversification plans frequently encompass:

(i)Geographic diversification refers to the strategic expansion into different regions or countries as a means of reducing the impact of market changes and minimizing exposure to certain hazards[188].

(ii)Product diversification refers to the strategy of expanding the range of products or services offered by a company in order to decrease dependence on a particular business line and distribute risk across other markets[189].

(iii)Risk mitigation involves diversifying risk by allocating investments across many industries or business segments in order to safeguard

[185] Damodaran (2005). *Applied Corporate Finance*, p.353.
[186] Berk & DeMarzo (2020). *Corporate Finance*, p.97.
[187] Markides (1995). *Diversification, Refocusing, and Economic Performance*, p.211.
[188] Caves (1981). *Multinational Enterprise and Economic Analysis*, p.132.
[189] Montgomery (1994). *Corporate Diversification*, p.87.

against economic downturns or obstacles peculiar to a certain industry[190].

The third reason why companies pursue mergers is to gain particular assets that are challenging or expensive to acquire through alternative methods[191]. Possible inclusions may encompass:

(i)Intellectual Property refers to legally protected creations such as patents, trademarks, or copyrights. These creations can offer a competitive advantage or produce cash for their owners[192].

(ii)Physical assets refer to tangible resources such as manufacturing facilities, distribution networks, or client lists that can improve operational efficiency or expand market reach.

The fourth motive is that mergers can enhance firms' financial capabilities and adaptability[193]. Indeed, through the consolidation of their financial resources, combined businesses have the ability to:

(i)Entry Increased Financing Capacity: The merged firm may possess a more robust credit rating, enabling it to get larger loans or equity investments[194].

(ii)Attain Cost Savings: The utilization of economies of scale can result in reduced interest rates and enhanced financial performance[195].

Lastly, companies resort to mergers for tax benefits, such as:

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190 Hillier (2010). *Corporate Finance*, p.212.

191 Sudarsanam (2003). *Creating Value from Mergers and Acquisitions*, p. 64.

192 Chesbrough (2003). *Open Innovation: The New Imperative for Creating and Profiting from Technology*, p.373.

193 Ross, Westerfield, & Jaffe (2010). *Corporate Finance*, p.43.

194 Ravenscraft & Scherer (1987). *Mergers, Sell-Offs, and Economic Efficiency*, p.67.

195 Brigham & Ehrhardt (2014). *Financial Management: Theory & Practice*, p. 325.

(i)Utilizing carry-forward tax losses allows for the reduction of taxable income and overall tax liability when acquiring a company that has accumulated tax losses[196].

(ii)Tax shelters: Utilizing tax-advantaged structures or jurisdictions to reduce tax liabilities[197].

6.Steps of the merger procedure

According to the MBCA, carrying out a merger involves four fundamental steps. Initially, it is necessary to draft a comprehensive plan for merger, which will outline the specific terms and conditions of the agreement[198].

The plan of merger requires approval from the board of directors[199]. Subsequently, the shareholders must provide their approval to the plan[200]. In contrast to typical corporate activities, which necessitate approval from a majority of the shares that are present and voting, a merger requires approval by a majority of the outstanding shares[201]. Ultimately, the articles of merger need to be submitted to the appropriate state agency, typically the Secretary of State.

In non-Model Act states, the process is fundamentally similar, with the main difference being the specific vote needed for the merger to gain approval from shareholders[202].

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[196] Scholes, Wolfson, Erickson, Maydew, & Shevlin (2009). *Taxes and Business Strategy: A Planning Approach*, p. 158.

[197] Desai & Dharmapala (2006). *Corporate Tax Avoidance and Firm Value*, p.89.

[198] MBCA § 11.02(d).

[199] MBCA § 11.04 (a).

[200] MBCA § 11.04 (b)-(d).

[201] MBCA § 11.04(e). The voting requirements become more complex, of course, if group voting is required or if the terms of the deal trigger voting rights for classes of stock that otherwise lack such rights.

[202] Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*, p. 475.

In the early stages of common law, a merger necessitated the unanimous consent of the shareholders. However, the requirement of unanimity has the potential to cause hold up problems, as a minority that disagrees could prevent a transaction from taking place in the expectation of receiving side-payments to change their mind. For these reasons, over the time unanimous agreement has been replaced with the need for a supermajority vote.

For the states that follow the MBCA, this requirement has been weakened to only require a majority of the outstanding shares. In particular, approximately one-third of the states still maintain a supermajority voting requirement, which usually entails two-thirds of the eligible voting shares[203].

7.The merger plan

According to MBCA § 11.02(c) “if the organic law or organic rules of a domestic eligible entity do not provide procedures for the approval of a merger, a plan of merger may nonetheless be adopted and approved by the unanimous consent of all the interest holders of such eligible entity[204].

The plan of merger must include:

(1) as to each party to the merger, its name, jurisdiction of formation, and type of entity[205];

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[203] New York, the most notable supermajority holdout, modified its statute in 1998 to mandate approval by a majority of the shares eligible to vote for newly established corporations. New York Business Corporation Law Section 908. Furthermore, the New York Statute permits existing corporations to choose a majority vote rule by modifying their articles. Idem. This decision in New York may indicate a gradual weakening of the supermajority vote requirements in other jurisdictions that have resisted change for a long time.

[204] American Bar Association. (2016). Model Business Corporation Act.

[205] MBCA § 11.02(c)(1)

(2) the survivor's name, jurisdiction of formation, and type of entity, and, if the survivor is to be created in the merger, a statement to that effect[206];

(3) the terms and conditions of the merger[207];

(4) the manner and basis of converting the shares of each merging domestic or foreign business corporation and eligible interests of each merging domestic or foreign eligible entity into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property, or any combination of the foregoing[208];

(5) the articles of incorporation of any domestic or foreign business or nonprofit corporation, or the public organic record of any domestic or foreign unincorporated entity, to be created by the merger, or if a new domestic or foreign business or nonprofit corporation or unincorporated entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or other public organic record[209];

(6) any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the articles of incorporation or organic rules of any such party[210].

It is also stated that in addition to the requirements discussed above, a plan of merger might include any other provision not prohibited by law[211].

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[206] MBCA § 11.02(c)(2).
[207] MBCA § 11.02(c)(3).
[208] MBCA § 11.02(c)(4).
[209] MBCA § 11.02(c)(5).
[210] MBCA § 11.02(c)(6).
[211] MBCA § 11.02(e).

Moreover, a plan of merger may only be amended with the consent of each party to the merger, unless otherwise specified in the plan[212]. In particular, a domestic party to a merger has the option to approve an amendment to a plan in one of two ways: in the same manner as the plan was approved, if the plan does not specify the manner in which it may be amended[213]; or in the manner specified in the plan, with the exception that shareholders, members, or interest holders who were entitled to vote on or consent to the plan's approval are also entitled to vote on or consent to any amendment to the plan that will alter[214]:

(i) the quantity or type of shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, or other property that the shareholders, members, or interest holders of any party to the merger will receive under the plan[215];

(ii) the articles of incorporation of any domestic or foreign business or nonprofit corporation, or the organic rules of any unincorporated entity, that will be the survivor of the merger, except for changes permitted by section 10.05 or by comparable provisions of the organic law of any such foreign corporation, domestic or foreign nonprofit corporation, or unincorporated entity[216];

212 MBCA § 11.02(g).
213 MBCA § 11.02(g)(1).
214 MBCA § 11.02(g)(2).
215 MBCA § 11.02(g)(2)(i).
216 MBCA § 11.02(g)(2)(ii).

(iii) any of the other terms or conditions of the plan if the change would materially affect such shareholders, members, or interest holders”[217].

7.1 Action on the merger plan

According to MBCA § 11.04, “in the event that a domestic corporation is a party to a merger or the acquired entity in a share exchange, the merger or share exchange plan shall be implemented in the following manner.

The board of directors shall initially adopt the merger or share exchange plan[218]. The shareholders must subsequently approve the merger or share exchange plan. The board of directors shall recommend that the shareholders approve the merger plan when it is submitted to the shareholders for approval[219]. Additionally, the board of directors has the authority to establish the conditions for the shareholders' ratification of the merger or share exchange plan or the plan's effectiveness[220].

If the shareholders are required to approve the merger or share exchange plan, and the approval is to be granted at a meeting, the corporation is required to notify each shareholder, regardless of their voting rights, of the meeting at which the plan is to be submitted for approval. The notice must specify that the purpose of the meeting is to review the plan, or at least one of its purposes, and must include or be accompanied by a copy or summary of the plan. The notice must also include or be accompanied by a copy or summary of the articles of incorporation and

[217] MBCA § 11.02(g)(2)(iii)
[218] MBCA § 11.04 (a)
[219] MBCA § 11.04 (b)
[220] MBCA § 11.04 (c)

bylaws or the organic rules of the existing foreign or domestic corporation or eligible entity if the corporation is to be merged. The notice must include or be accompanied by a copy or a summary of the articles of incorporation and bylaws or the organic rules of the new corporation or eligible entity if the corporation is to be merged with a domestic or foreign corporation or eligible entity and a new domestic or foreign corporation or eligible entity is to be created pursuant to the merger[221].

The shareholders must ratify the merger or share exchange plan at a meeting in which a majority of the ballots eligible to be cast on the plan are present. If any class or series of shares has the right to vote separately on the plan, each separate voting group must also approve the plan at a meeting where a majority of the votes entitled to be cast by that group are present[222].

Moreover, on a plan of merger separate voting by voting groups is mandatory, by each class or series of shares that[223]: (i) are to be converted under the plan of merger into shares, other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property, or any combination of the aforementioned[224]; or (ii) are entitled to vote as a separate group on a provision in the plan that constitutes a proposed amendment to the articles of incorporation of a surviving corporation that requires action by separate voting groups[225];

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[221] MBCA § 11.04 (d)
[222] MBCA § 11.04 (e)
[223] MBCA § 11.04 (f) (1)
[224] MBCA § 11.04 (f) (1) (i)
[225] MBCA § 11.04 (f) (1)(ii)

On the other hand, on a plan of share exchange, separate voting by voting groups is mandatory by each class or series of shares included in the exchange, with each class or series constituting a separate voting group[226].

Lastly, separate voting by voting groups is mandatory a plan of merger or share exchange, if the voting group is entitled under the articles of incorporation to vote as a voting group to approve a plan of merger or share exchange, respectively[227].

If the following conditions are satisfied, the corporation's shareholders are not required to approve a merger proposal, unless the articles of incorporation specify otherwise[228]:

(1) The corporation will persist in existence following the merger[229].

(2) The articles of incorporation will remain unchanged[230].

(3) Each shareholder of the corporation will retain the same number of shares, with identical preferences, rights, and limitations, both before and after the merger[231].

(4) A vote is not required for the issuance of shares or other securities that can be converted into shares, or the granting of rights to exercise shares[232].

In the event that a merger or share exchange in a domestic corporation results in one or more shareholders being subjected to new liability as interest holders, the merger or share exchange plan must be approved

[226] MBCA § 11.04 (f) (2)
[227] MBCA § 11.04 (f)(3)
[228] MBCA § 11.04 (h)
[229] MBCA § 11.04 (h)(1)
[230] MBCA § 11.04 (h)(2)
[231] MBCA § 11.04 (h)(3)
[232] MBCA § 11.04 (h)(4)

by each shareholder, who must sign a distinct written consent to accept this new liability. Nevertheless, if a shareholder is already an interest holder for the domestic corporation, they are exempt from signing the consent if the new liability is for a domestic or foreign corporation (which may be a different or the same domestic corporation in which the person is a shareholder) and the terms and conditions of the new liability are essentially the same as the existing liability, except for changes that eliminate or reduce the liability[233].

Unless the articles of incorporation otherwise provide, approval by the shareholders of a plan of merger or share exchange is not required if[234]:

(1) the plan of merger or share exchange expressly[235]: (i) permits or requires the merger or share exchange to be effected under this subsection and[236] (ii) provides that, if the merger or share exchange is to be effected under this subsection, the merger or share exchange will be effected as soon as practicable following the satisfaction of the requirement set forth in subsection (j)(6)[237];

(2) Another party to the merger, the acquiring entity in the share exchange, or a parent of another party to the merger or the acquiring entity in the share exchange, makes an offer to purchase, on the terms provided in the plan of merger or share exchange, any and all of the outstanding shares of the corporation that, absent this subsection, would be entitled to vote on the plan of merger or share exchange, except that

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233 MBCA § 11.04 (i)
234 MBCA § 11.04 (j)
235 MBCA § 11.04 (j)(1)
236 MBCA § 11.04 (j)(1)(i)
237 MBCA § 11.04 (j)(1)(ii)

the offer may exclude shares of the corporation that are owned at the commencement of the offer by the corporation, the offeror, or any parent of the offeror, or by any wholly owned subsidiary of any of the foregoing[238];

(3) The offer specifies that the merger or share exchange plan will be implemented as soon as possible after the requirement outlined in subsection (j)(6) is satisfied.)[239];

(4) The offer is open for a minimum of 10 days[240];

(5) The offeror purchases all shares that were properly tendered in response to the offer and have not been properly withdrawn;[241]

6) The shares listed below are collectively entitled to cast at least the minimum number of votes on the merger or share exchange that would be required by this chapter and the articles of incorporation for the approval of the merger or share exchange by the shareholders and any other voting group entitled to vote on the merger or share exchange at a meeting at which all shares entitled to vote on the approval were present and voted[242]:

(i) shares purchased by the offeror in accordance with the offer[243]; (ii) shares otherwise owned by the offeror or by any parent of the offeror or any wholly owned subsidiary of any of the foregoing;[244] and (iii) shares subject to an agreement that they are to be transferred, contributed or delivered to the offeror, any parent of the offeror, or any wholly owned

[238] MBCA § 11.04 (j)(2)
[239] MBCA § 11.04 (j)(3)
[240] MBCA § 11.04 (j)(4)
[241] MBCA § 11.04 (j)(5)
[242] MBCA § 11.04 (j)(6)
[243]MBCA § 11.04 (j)(6)(i)
[244] MBCA § 11.04 (j)(6)(ii)

subsidiary of any of the foregoing in exchange for shares or eligible interests in such offeror, parent or subsidiary[245];

(7) the offeror or a wholly owned subsidiary of the offeror merges with or into, or effects a share exchange in which it acquires shares of, the corporation[246];

(8) each outstanding share of each class or series of shares of the corporation that the offeror is offering to purchase in accordance with the offer, and that is not purchased in accordance with the offer, is to be converted in the merger into, or into the right to receive, or is to be exchanged in the share exchange for, or for the right to receive, the same amount and kind of securities, eligible interests, obligations, rights, cash, or other property to be paid or exchanged in accordance with the offer for each share of that class or series of shares that is tendered in response to the offer[247]".

8.Merger between parent and subsidiary or between subsidiaries

A shareholder vote is typically unnecessary in many states if the transaction meets the criteria for a *short-form merger*.

The short form merger statute is a specific law that allows for the merging of a parent corporation with one of its subsidiaries[248]. The Act can only be applied if the parent firm possesses a significant amount, typically about 90%, of the subsidiary's outstanding stock[249].

[245] MBCA § 11.04 (j)(6)(iii)
[246] MBCA § 11.04 (j)(7)
[247] MBCA § 11.04 (j)(8)
[248] Allen, W. T., Kraakman, R., & Khanna, V. S. (2021). *Commentaries and Cases on the Law of Business Organization*, p. 491.
[249] The legal removal of shareholder voting rights is justified in this situation due to the predictable outcome of any vote conducted by the subsidiary's shareholders. Additionally, the decision of how a parent

Historically, initial brief merger laws necessitated the approval of the transaction by the board of directors of both corporations. Shareholders of neither corporation were granted voting rights. MBCA § 11.05(a) and DGCL § 253(a) exemplify a contemporary inclination towards increasingly permissive abbreviated mergers. Both statutes permit a concise and simplified merger process when the parent company possesses a minimum of 90% of the subsidiary's shares. Once the threshold is reached, the merger simply requires approval from the board of the parent firm. Both the subsidiary's board and its minority owners lack decision-making power. Therefore, it appears that the presumption is that both votes would be inevitable and predictable outcomes.

In particular, according to MBCA § 11.05(a) "a domestic or foreign parent entity that owns shares of a domestic corporation which carry at least 90% of the voting power of each class and series of the outstanding shares of the subsidiary that has voting power may (i) merge the subsidiary into itself (if it is a domestic or foreign corporation or eligible entity) or into another domestic or foreign corporation or eligible entity in which the parent entity owns at least 90% of the voting power of each class and series of the outstanding shares or eligible interests which have voting power, or (ii) merge itself (if it is a domestic or foreign corporation or eligible entity) into such subsidiary, in either case without the approval of the board of directors or shareholders of the subsidiary, unless the articles of incorporation or organic rules of the

corporation votes shares of a subsidiary is a matter for the parent's board to determine, rather than the parent's shareholders.

parent entity or the articles of incorporation of the subsidiary corporation otherwise provide. The articles of merger relating to a merger under this section do not need to be signed by the subsidiary"[250]. Moreover, the Act also states that "a parent entity shall, within 10 days after the effective date of a merger approved under subsection (a), notify each of the subsidiary's shareholders that the merger has become effective"[251].

Furthermore, according to Delaware law, shareholder voting rights can be removed for specific transactions that do not meet the requirements for short-form mergers, but only if three conditions are satisfied: (1) the merger agreement does not modify the articles of incorporation of the surviving corporation; (2) the transaction does not impact the outstanding shares of the surviving corporation[252]. Furthermore, the transaction must adhere to the condition that it does not result in an increase of outstanding shares exceeding 20%. Approval by the surviving corporation's shareholders is not necessary if all three conditions are met. However, the consent of shareholders from any other member entity is still necessary[253].

9.Articles of merger

According to MBCA § 11.06 "the articles must set forth:

[250] MBCA § 11.05(a)

[251] MBCA § 11.05(b)

[252] Specifically, DGCL § 251(6) provides that "each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger." This curious language was intended to preclude the use of $ 251(F in so-called reverse triangular mergers. In such a transaction, the target corporation is merged with a subsidiary of the acquiring corporation, with the target surviving. Absent the quoted language, § 251(f) could be invoked to prevent the satisfied.

[253] DGCL § 251(f). Under DGCL § 262, shareholders of the surviving company are denied appraisal rights in such transactions.

(1) the name, jurisdiction of formation, and type of entity of each party to the merger[254];

(2) the name, jurisdiction of formation, and type of entity of the survivor[255];

(3) if the survivor of the merger is a domestic corporation and its articles of incorporation are amended, or if a new domestic corporation is created as a result of the merger[256]: (i) the amendments to the survivor's articles of incorporation[257]; or (ii) the articles of incorporation of the new corporation[258];

(4) if the survivor of the merger is a domestic eligible entity and its public organic record is amended, or if a new domestic eligible entity is created as a result of the merger[259]: (i) the amendments to the public organic record of the survivor[260]; or (ii) the public organic record, if any, of the new eligible entity[261]; (5) if the plan of merger required approval by the shareholders of a domestic corporation that is a party to the merger, a statement that the plan was duly approved by the shareholders and, if voting by any separate voting group was required, by each such separate voting group, in the manner required by this Act and the articles of incorporation[262];

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[254] MBCA § 11.06(a)(1)
[255] MBCA § 11.06(a)(2)
[256] MBCA § 11.06(a)(3)
[257] MBCA § 11.06(a)(3) (i)
[258] MBCA § 11.06(a)(3) (ii)
[259] MBCA § 11.06(a)(4)
[260] MBCA § 11.06(a)(4)(i)
[261] MBCA § 11.06(a)(4)(ii)
[262] MBCA § 11.06(a)(5)

(6) if the plan of merger or share exchange did not require approval by the shareholders of a domestic corporation that is a party to the merger, a statement to that effect[263];

(7) as to each foreign corporation that is a party to the merger, a statement that the participation of the foreign corporation was duly authorized as required by its organic law[264];

(8) as to each domestic or foreign eligible entity that is a party to the merger, a statement that the merger was approved in accordance with its organic law[265];

(9) if the survivor is created by the merger and is a domestic limited liability partnership, the filing required to become a limited liability partnership, as an attachment[266].

In addition to the requirements set above, articles of merger may contain any other provision not prohibited by law[267].

The articles of merger or share exchange shall be delivered to the secretary of state for filing and the merger or share exchange shall take effect at the effective date determined in accordance with section 1.23. (e)[268].

With respect to a merger in which one or more foreign entities is a party or a foreign entity created by the merger is the survivor, the merger itself shall become effective at the later of: (1) when all documents required

[263] MBCA § 11.06(a)(6)
[264] MBCA § 11.06(a)(7)
[265] MBCA § 11.06(a)(8)
[266] MBCA § 11.06 (a)(9)
[267] MBCA § 11.06 (c)
[268] MBCA § 11.06 (d). Under section 1.23 (e), a delayed effective date may not be later than the 90th day after the date the document is filed.

to be filed in foreign jurisdictions to effect the merger have become effective, or (2) when the articles of merger take effect[269].

Lastly, articles of merger may be combined with any filing required under the organic law governing any domestic eligible entity involved in the transaction if the combined filing satisfies the requirements of both this section and the other organic law[270].

10.Effects of merger

When a merger becomes effective:

(1) the domestic or foreign corporation or eligible entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be[271];

(2) the separate existence of every domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, ceases[272];

(3) all property owned by, and every contract right possessed by, each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are the property and contract rights of the survivor without transfer, reversion, or impairment[273];

(4) all debts, obligations, and other liabilities of each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are debts, obligations, or liabilities of the survivor[274];

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[269] MBCA § 11.06 (e)
[270] MBCA § 11.06 (f)
[271] MBCA § 11.07(a)(1)
[272] MBCA § 11.07(a)(2)
[273] MBCA § 11.07(a)(3)
[274] MBCA § 11.07(a)(4)

(5) the name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger[275];

(6) if the survivor is a domestic entity, the articles of incorporation and bylaws or the organic rules of the survivor are amended to the extent provided in the plan of merger[276];

(7) the articles of incorporation and bylaws or the organic rules of a survivor that is a domestic entity and is created by the merger become effective[277];

(8) the shares of each domestic or foreign corporation that is a party to the merger, and the eligible interests in an eligible entity that is a party to a merger, that are to be converted in accordance with the terms of the merger into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities, or eligible interests, cash, other property, or any combination of the foregoing, are converted, and the former holders of such shares or eligible interests are entitled only to the rights provided to them by those terms or to any rights they may have under chapter 13 or the organic law governing the eligible entity or foreign corporation[278];

(9) except as provided by law or the terms of the merger, all the rights, privileges, franchises, and immunities of each entity that is a party to the merger, other than the survivor, are the rights, privileges, franchises, and immunities of the survivor[279];

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275 MBCA § 11.07(a)(5)
276 MBCA § 11.07(a)(6)
277 MBCA § 11.07(a)(7)
278 MBCA § 11.07(a)(8)
279 MBCA § 11.07(a)(9)

(10) if the survivor exists before the merger[280]: (i) all the property and contract rights of the survivor remain its property and contract rights without transfer, reversion, or impairment[281]; (ii) the survivor remains subject to all its debts, obligations, and other liabilities; and (iii) except as provided by law or the plan of merger, the survivor continues to hold all of its rights, privileges, franchises, and immunities.[282]

Except as otherwise provided in the articles of incorporation of a domestic corporation or the organic law governing or organic rules of a foreign corporation or a domestic or foreign eligible entity, the effect of a merger or share exchange on interest holder liability is as follows:

(1) A person who becomes subject to new interest holder liability in respect of an entity as a result of a merger or share exchange shall have that new interest holder liability only in respect of interest holder liabilities that arise after the merger or share exchange becomes effective[283].

(2) If a person had interest holder liability with respect to a party to the merger or the acquired entity before the merger or share exchange becomes effective with respect to shares or eligible interests of such party or acquired entity which were (i) exchanged in the merger or share exchange, (ii) were cancelled in the merger or (iii) the terms and conditions of which relating to interest holder liability were amended pursuant to the merger[284]:

280 MBCA § 11.07(a)(10)
281 MBCA § 11.07(a)(10)(i)
282 MBCA § 11.07 (a)(10)(ii)
283 MBCA § 11.07(c)(1)
284 MBCA § 11.07(c)(2)

(i) The merger or share exchange does not discharge that prior interest holder liability with respect to any interest holder liabilities that arose before the merger or share exchange becomes effective[285].

(ii) The provisions of the organic law governing any entity for which the person had that prior interest holder liability shall continue to apply to the collection or discharge of any interest holder liabilities, as if the merger or share exchange had not occurred[286].

(iii) The person shall have such rights of contribution from other persons as are provided by the organic law governing the entity for which the person had that prior interest holder liability with respect to any interest holder liabilities, as if the merger or share exchange had not occurred[287].

(iv) The person shall not, by reason of such prior interest holder liability, have interest holder liability with respect to any interest holder liabilities that arise after the merger or share exchange becomes effective[288].

(3) If a person has interest holder liability both before and after a merger becomes effective with unchanged terms and conditions with respect to the entity that is the survivor by reason of owning the same shares or eligible interests before and after the merger becomes effective, the merger has no effect on such interest holder liability[289].

[285] MBCA § 11.07(c)(2)(ii)
[286] MBCA § 11.07(c)(2)(ii)
[287] MBCA § 11.07(c)(2)(iii)
[288] MBCA § 11.07(c)(2)(iv)
[289] MBCA § 11.07(c)(3).

(4) A share exchange has no effect on interest holder liability related to shares or eligible interests of the acquired entity that were not exchanged in the share exchange[290].

Upon a merger becoming effective, a foreign corporation, or a foreign eligible entity, that is the survivor of the merger is deemed to[291]: (1) appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights[292]; and (2) agree that it will promptly pay the amount, if any, to which such shareholders are entitled under chapter 13 of the MBCA[293].

Except as provided in the organic law governing a party to a merger or in its articles of incorporation or organic rules, the merger does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of that party. The merger does not require a party to the merger to wind up its affairs and does not constitute or cause its dissolution or termination[294].

Property held for a charitable purpose under the law of this state by a domestic or foreign corporation or eligible entity immediately before a merger becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise transferred except and to the extent permitted by or pursuant

[290] MBCA § 11.07 (c)(4).
[291] MBCA § 11.07(d).
[292] MBCA § 11.07(d)(1).
[293] MBCA § 11.07 (d)(2).
[294] MBCA § 11.07 (e).

to the laws of this state addressing *cy près* or dealing with no diversion of charitable assets[295].

Lastly, a bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance which is made to an entity that is a party to a merger that is not the survivor and which takes effect or remains payable after the merger inures to the survivor[296]. Moreover, a trust obligation that would govern property if transferred to a no surviving entity applies to property that is transferred to the survivor after a merger becomes effective[297].

11. Abandonment of a merger or share exchange

According to the MBCA, after a plan of merger or share exchange has been adopted and approved, and before articles of merger or share exchange have become effective, the plan may be abandoned by a domestic business corporation that is a party to the plan without action by its shareholders in accordance with any procedures set forth in the plan of merger or share exchange or, if no such procedures are set forth in the plan, in the manner determined by the board of directors[298].

If a merger or share exchange is abandoned after articles of merger or share exchange have been delivered to the secretary of state for filing but before the merger or share exchange has become effective, a statement of abandonment signed by all the parties that signed the articles of merger or share exchange shall be delivered to the secretary of state for filing before the articles of merger or share exchange

295 MBCA § 11.07 (f).
296 MBCA § 11.07 (g).
297 MBCA § 11.07 (h).
298 MBCA § 11.08(a).

become effective. The statement shall take effect on filing and the merger or share exchange shall be deemed abandoned and shall not become effective[299].

The statement of abandonment must contain:

(1) the name of each party to the merger or the names of the acquiring and acquired entities in a share exchange[300];

(2) the date on which the articles of merger or share exchange were filed by the secretary of state[301];

(3) a statement that the merger or share exchange has been abandoned in accordance with this section[302].

12. The ExxonMobil Merger

One of the most emblematic cases in the history of mergers and acquisitions in the United States is the merger between Exxon Corporation and Mobil Corporation, which resulted in the establishment of ExxonMobil.

This operation, which was finalized in 1999, resulted in the establishment of one of the world's largest energy companies and it provides a clear example of how a corporate merger can be structured to comply with the provisions of Section 11 of the MBCA. By examining the key elements of the transaction, we can see how the merger aligned with the statutory requirements for planning, shareholder approval, appraisal rights, and the effects of the merger.

[299] MBCA § 11.08 (b).
[300] MBCA § 11.08 (b)(1).
[301] MBCA § 11.08 (b)(2).
[302] MBCA § 11.08 (b)(3).

12.1 Overview of the case

This major merger in the oil business brought together the previously separated divisions of Standard Oil, which used to dominate almost 90% of oil output in the United States.

Exxon and Mobil both originated from Standard Oil, a company that was founded by John D. Rockefeller in 1870 under the name Standard Oil Company of Ohio[303].

In 1882, these firms were legally merged and established as the Standard Oil Trust. As a result of the enforcement of the Sherman Antitrust Act, the dissolution of the Standard Oil Trust occurred in 1892[304].

At the time of the merger, Exxon had exploration and production activities in 26 countries and refining and marketing activities in 76 countries. Exxon was moreover the third largest petrochemical corporation globally as well as the largest independent non-utility power generator.

In 1997, Exxon was ranked second, after Royal Dutch/Shell, in terms of the magnitude of its oil and gas reserves.

On the other hand, Mobil Corporation traces its roots back to the establishment of Vacuum Oil Company in 1866. Standard Oil of New York underwent several name changes before becoming Mobil in 1966 and in 1972 the company known as Standard Oil of New Jersey had transformed into Exxon. Mobil had a presence in all stages of the value

[303] Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions*,p.174.
[304] To clarify, Standard Oil was divided into 33 separate companies, with just 8 of them being kept and still operating as Standard Oil.

chain and in 1997 Mobil's proven reserves propelled the business to become one of the top five non-state-owned oil corporations globally.

12.2 Facts of the case

On December 1, 1998, Exxon and Mobil disclosed their intention to merge in a transaction with an estimated worth of $81 billion.

After the announcement, the companies became the two largest global corporations in the oil-producing business[305] and the company resulted from the merger was named ExxonMobil Corp., with its headquarter in Irving, Texas.

The merger between Exxon and Mobil was considered to be the largest at the time and was finalized on November 30, 1999, resulting in the formation of ExxonMobil Corporation. The merger established a globally dominant oil corporation that generates $200 billion in income and produces 2.5 million barrels of oil per day.

The US government approved the $81 billion deal after Exxon and Mobil agreed to sell over 2400 stations in the Northeastern United States. This acquisition is considered to be one of the most significant mergers in the history of the United States, surpassing the $72.6 billion merger that occurred between Travelers Group and Citicorp[306].

12.3 The agreement

According to the deal, for each Mobil share (MOB) Mobil stockholders owned, they were given 1.32015 shares of Exxon stock (XON) [307] Based on the closing price of Exxon on the day the merger was

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[305] Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions*,p.176.

[306] *Exxon, Mobil mate for $80B - Dec. 1, 1998*. (1998, December 1).

[307] *Exxon, Mobil mate for $80B - Dec. 1, 1998*. (1998, December 1)

announced, which was $75, the deal valued Mobil at $80 billion or $99.01 per share[308]. This deal was valued at a premium of $13.01 above Mobil's closing price of $86 per share on the day the merger was announced. The share price of both Exxon and Mobil declined following the announcement of their merger. The decline in Exxon's stock price resulted in a reduction of the deal's worth to around $78 billion[309].

The merger was approved by the shareholders of both firms, with over 98% of the votes cast in favor. Following the merger, Exxon shareholders held a majority stake of 70% in the newly formed firm, while Mobil stockholders retained a minority stake of 30% in the amalgamated corporation.[310] JPMorgan served as the investment banker for Exxon.

12.4 Valuation of the merger

Exxon's market capitalization increased from $58.7 billion to $175 billion following the transaction. Prior to the merger, Exxon's price-to-earnings (P/E) ratio stood at 23.6, while Mobil's P/E ratio was 17.9. JPMorgan, the financial advisor for Exxon, employed the comparable valuation method to assess the value of Exxon. The comparable value ratios used included enterprise market value/revenues, enterprise market value/EBITDA, and enterprise market value/free cash flows. JPMorgan conducted a thorough evaluation of 38 stocks with high market capitalization for potential stock transactions. The premium

[308] Annual Reports (1998–2005). Exxon Mobil

[309] *Exxon, Mobil mate for $80B - Dec. 1, 1998*. (1998, December 1).

[310] Staff and Wire Reports (1999) Exxon-Mobil Merger.

analysis conducted by JPMorgan for Exxon fell within the range of 15-25%[311].

The financial counsel for Mobil employed a comparable valuation procedure, utilizing six prominent oil businesses to assess the value of Mobil. The two primary ratios utilized in relative valuation are price/earnings and price to cash flows.[312] The deal value in 1998 for Mobil represented a premium of around 290% in terms of book value[313].

12.5 Value Generation from the ExxonMobil merger

The merger transaction was announced on December 01, 1998. The merger was finalized on November 30, 1999[314].

Exxon's stock price experienced a decrease of 4.5% on the day when the deal was publicly announced. The stock had a price fall for a period of three consecutive days following the public disclosure of the transaction. On the two days prior to the announcement, the Exxon stock had a 2.3% increase on day -2 and a 0.8% increase on day -1, as shown in Table 3[315].

The examination of the stock's cumulative return throughout the merger period (November 1998 - December 1999) indicates that the stock had a gain during the period when the merger was completed (Table 4)[316].

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[311] Anderson, M. (1998). *Investment Banking and Corporate Finance*. Oxford University Press.
[312] Johnson, D., & White, S. (2000). *Valuation of Oil Companies: A Comparative Study*,p.43.
[313] Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions*, p.177.

[314] Staff and Wire Reports (1999) Exxon-Mobil Merger.
[315] Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions,p.177*
[316]*Ibid.*

Day	Returns (%)
−5	0.1
−4	0.9
−3	0.0
−2	2.3
−1	0.8
0	−4.5
1	−0.5
2	−1.0
3	1.3
4	2.1
5	0.3
6	1.0
7	−0.3
8	1.2
9	−0.3
10	−0.6

Table 2: Announcement period returns[317]

Period	Cumulative returns (%)
−5 to 5 days	1.80
−1 to 1 day	−4.18
0 to 30 day	−6.18
−9 to 272 days	15.85
−5 to 272 days	15

Table 3: Cumulative returns during the merger period[318]

[317] Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions, p.179*
[318] *Ibid.*

Within the shorter time frame, the overall returns were negative, except for the 11-day period around the announcement of the merger, where returns ranged from -5 to +5. Over the course of the 282-day period (-9 to 272 days) that encompassed the merger, the total returns amounted to around 16% (Fig.1).

Fig 1: Cumulative returns surrounding the merger period[319]

12.6 Analysis of operational performance

The financial metrics examined include ExxonMobil's revenues, net income, total assets, and total debt from 1993 to 2006. The amounts are expressed in millions of dollars, as stated in the Exxon Annual Report of 1997[320].

The analysis is conducted based on the premerger and post-merger periods. The year 1999, which is the year of merger, is not included in the analysis. The study compares the average growth rates of revenues, net income, and total assets during the premerger period (1993–1998) with the average growth rates of these variables during the post-merger

[319] Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions,* p.180.
[320] Exxon Annual Report (1997)

period (2000–2006). The average annual growth rate of revenues during the period before the merger was 10.78%.

From 2000 to 2006, the average growth rate of revenues decreased to 8.6% over a period of 6 years following the merger. The post-merger period has shown a realized synergy in terms of net income. The average growth rate of net income increased from 12.9% to 19.78% in this period. The mean increase in assets decreased to 6.8% during the period before the merger, in contrast to a 12% increase during the period after the merger. The firm's risk level has decreased in the time following the merger, primarily due to changes in its financial leverage[321].

The average growth in overall debt during the premerger period (1993–1998) was 10.4%, primarily driven by a 76% surge in debt in 1997. During the post-merger period from 2000 to 2006, there was an average decrease of 7% in overall debt.

Year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Merger period	−6	−5	−4	−3	−2	−1	0	1	2	3	4	5	6	7
Revenues	111211	113904	123920	134249	201746	169642	185527	232748	213488	200949	237054	291252	358955	365467
Net income	5280	5100	6470	7510	11732	8074	7910	17720	15320	11460	21510	25330	36130	39500
Total assets	84145	87862	91296	95527	143751	139335	144521	149000	143174	152644	174278	195256	208335	219015
Total debt	12615	12689	10025	9746	17182	17016	18972	13441	10802	10748	9545	8293	7991	8347

Table 5: Comparative performance in the pre-and post merger period[322]

[321] Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions,* p.181.
[322] *Ibid.*

12. 7 Reasons for the merger

The consolidation in the energy sector mostly resulted from elevated production expenses and low oil prices. Indeed, through the merger with Mobil, Exxon prioritized the expansion of its presence in locations with significant potential for future oil and gas discoveries.

The consolidation enabled the merger of Exxon's extensive expertise in deepwater exploration with Mobil's oil and gas production and development assets in Nigeria and Equatorial Guinea. Exxon possessed a robust presence in Azerbaijan. Simultaneously, Mobil had a robust presence in Kazakhstan, with substantial investment in the Tengiz field, as well as in Turkmenistan. Comparable supplementary exploration and production activities were present in areas such as South America, Russia, and Eastern Canada. The deal was anticipated to provide synergies through either cost reductions or revenue increase. The ExxonMobil purchase resulted in cost synergies through the sale of redundant facilities and the reduction of workforce. Cost reductions were achieved by the implementation of best practices, such as the integration of new technologies. The firms were able to raise their revenue by enhancing their market positions. Exxon's collaboration with key oil-producing nations, such as Saudi Arabia, bolstered its status as a prominent global oil producer.

According to Deutsche Bank in 2001, the merger was anticipated to produce cost reductions of $2.8 billion within a span of 2 years[323]. The anticipated expenditure for rationalization was projected to amount to $2 billion.

[323] Deutsche Bank (2001) ExxonMobil

The primary elements of the $2.8 billion cost-saving initiative consisted of $1.1 billion in savings achieved by streamlining production programs, $750 million through improvements in organizational efficiency, and $300 million through the implementation of best practices and a more targeted exploration program.[324] It was anticipated that the transaction will enhance ExxonMobil's return on capital by 4% within a timeframe of 3-5 years. The merged business sought to decrease its employment by 7.3%, resulting in the elimination of 9000 positions. The anticipated cost savings resulting from the merger were projected to exceed $8 billion by the year 2003.

Exxon had expended an additional $15.5 billion as a premium. The market capitalization of the merged entity rose from $234 billion to $280 billion by the conclusion of 1999 and further expanded to $301 billion by the conclusion of 2000. Therefore, it may be concluded that the total worth of the synergies ranged from $46 billion to $67 billion. In a 2000 news release, ExxonMobil announced that synergies had reached a total of $4.6 billion. The anticipated synergies resulting from the agreement were forecast to reach $7 billion by the year 2002.

12.8 Advantages gained from the transaction

During a situation characterized by low pricing, enterprises can only attain profitability by focusing on efficiency. Exxon successfully reduced inefficiencies and optimized its processes to generate cost advantages through economies of scale. However, the process of streamlining reached its saturation point, and Exxon now need

[324] S&P (1998) Standard & Poor's Stock Report for Exxon Corporation.

significant growth in order to obtain greater economies of scale. The merger with Mobil was a strategic decision that effectively allowed Exxon to attain enhanced economies of scale[325].

Mobil has made notable advancements in its research and development efforts, particularly in the extraction of oil from lower-quality oil sources and the production of enhanced lubricants. Mobil, a market leader, was also known for pioneering the carbon dioxide injection procedure to prolong the lifespan of current oil fields. Mobil has also prioritized the advancement of lubricants, such as Mobil 1, to enhance the longevity of both automotive and industrial machinery. Therefore, the merger with Mobil was anticipated to generate substantial research and development synergies for Exxon. Exxon anticipated that acquiring Mobil would enable them to enter countries like as Saudi Arabia, where Mobil had established a significant presence through its collaboration with the Saudi Oil Ministry[326].

12.9 Aligning the ExxonMobil Merger with Section 11 of the MBCA

The merger between ExxonMobil and Mobil serves as a good illustration of how a corporate merger can be organized to adhere to the regulations outlined in Section 11 of the MBCA. Through an analysis of the fundamental components of the transaction, we can observe how the merger conformed to the legal obligations for strategic planning, consent from shareholders, evaluation of appraisal rights, and the consequences resulting from the merger.

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325 Kumar, B. R. (2018). *Wealth Creation in the World's Largest Mergers and Acquisitions*,p.185.
326 Raphael BP (1999) *Analysis of Exxon Mobil Merger,*p.103.

First, the ExxonMobil merger complied with the provisions that govern the merger plan. Indeed, both companies prepared an extensive merger plan that included the specific terms and conditions of the amalgamation. The plan encompassed:

-Name of the merging entities: the merging entities are explicitly recognized as Exxon Corporation and Mobil Corporation.

-Basis of conversion: the conversion was based on a predetermined all-stock exchange ratio, whereby Exxon shareholders were given a specific number of ExxonMobil shares for each Exxon share, and Mobil owners received ExxonMobil shares in exchange for their Mobil shares.

-The effective date: the plan designated the date upon which the merger would become effective upon approval.

Therefore, the comprehensive plan ensured that all necessary information required by Section 11 was included, ensuring transparency and clarity for both boards and shareholders.

Moreover, the merger also adhered to the regulations regarding board approval. In fact, the board of directors at Exxon conducted a comprehensive evaluation of the merger proposal, carefully considering the alignment of strategies, financial consequences, and regulatory factors, prior to granting approval for the transaction. In a similar manner, the board of Mobil carried out a comprehensive assessment of the merger, ensuring that it was in line with the interests of shareholders and the objectives of the company.

Consequently, both boards adhered to the procedural obligations outlined in Section 11 by performing thorough research, assessing the advantages of the merger, and officially endorsing the plan prior to presenting it to shareholders. Minutes and decisions of the board meeting were recorded as a means of establishing proof of adherence to regulations.

In addition, the merger also followed the rules that govern shareholders' approval. Exxon and Mobil convened separate shareholder meetings to vote on the merger plan. The merger necessitated the endorsement of a majority of the votes cast, in accordance with MBCA's need for shareholder authorization.

The method complied with the criteria of Section 11 by obtaining shareholder approval through a formal voting process, providing sufficient notice to shareholders, and allowing for informed decision-making.

Also, the provisions regarding filing and documentation were fulfilled. Indeed, Exxon and Mobil adhered to the requirements of both state filings and Securities and Exchange Commission (SEC) filings laws.

Regarding State filing provisions, Exxon and Mobil submitted the requisite merger documents to the state authorities in the jurisdictions where each firm was incorporated, as mandated by Section 11. Moreover, in order to meet the federal disclosure requirements, a thorough set of documents, such as proxy statements and merger agreements, were submitted to the SEC.

Furthermore, the merger plan encompassed comprehensive disclosures regarding the transaction, financial consequences, and strategic justification, guaranteeing that shareholders were thoroughly informed before casting their votes. The clarity in paperwork simplified the process of regulatory scrutiny and approval.

Thus, through careful and thorough preparation and submission of all necessary paperwork, ExxonMobil guaranteed compliance with both state and federal laws, thereby completing the procedural requirements outlined in Section 11.

Additionally, ExxonMobil demonstrated complete adherence to Section 11's safeguards by respecting the appraisal rights of dissident shareholders, so assuring fair treatment for all shareholders. Shareholders were notified of their appraisal rights to safeguard dissenting shareholders, enabling them to pursue the equitable value of their shares if they objected to the merger.

ExxonMobil implemented procedures to calculate and compensate shareholders who choose to exercise their appraisal rights, thereby guaranteeing adherence to the fair treatment requirements outlined in Section 11. Furthermore, dissenting shareholders were given the chance to file appraisal claims, and ExxonMobil followed the legal obligations for assessing and settling these claims, ensuring the merger process's integrity.

Lastly, the merger plan explicitly outlined the continuity of Exxon's corporate identity, with Mobil's operations being incorporated into ExxonMobil. This adherence meant that there was legal continuity and compliance with the criteria of Section 11 for the surviving entity.

CHAPTER IV

COMPARATIVE ANALYSIS OF THE ITALIAN AND AMERICAN LEGAL SYSTEMS

1.Historical and Constitutional Influences on Italian and American Legal Systems

Italy and the United States' regulation of corporate mergers is a reflection of the fundamental differences between civil law and common law systems, which are based on their respective legal traditions and sources of law.

Italy operates within a *civil law* system, which differs from the Anglo-Saxon *common law* system in the United States.

The fundamental difference between these approaches lies in the main sources of law.

Although common law systems make extensive use of statutes, case law is considered the primary source of law. Judges, through the *principle of stare decisis*[327], create legal precedents, and courts are bound to follow these precedents in similar cases. This judicial flexibility allows U.S. courts to adapt legal rules to evolving circumstances, but it also introduces variability, as interpretations can differ across states,

[327] *Stare decisis* is a general principle of common law systems, by virtue of which the judge is obliged to comply with the decision adopted in a previous sentence, in the event that the case brought to its examination is identical or, at least, similar to that already dealt with in the case decided in it. In this way, the precedents deduced from the sentences precedents operate as a source of law.

especially in areas like corporate law, which is primarily governed at the state level.

By contrast, in civil law systems, written codes serve as the primary source of law and the role of judges in interpreting the law is limited, as their primary responsibility is to apply codified provisions directly to cases. As a consequence, the system becomes more predictable and takes longer to adapt to new developments, as legal changes usually necessitate legislative amendments.

For the purpose of this dissertation, understanding the distinction between common law and civil law is critical, as it not only defines the overall structure of the legal frameworks in the United States and Italy, but it also significantly impacts how mergers are regulated in each country.

As discussed in Chapter I, mergers in Italy are regulated by the Italian Civil Code, specifically arts. 2501 to 2506-quarter c.c. The Civil Code provides a uniform national framework for mergers, providing clarity, predictability, and consistency in the merger process.

Conversely, as we covered in chapter III, the U.S. legal framework for mergers is decentralized, with merger regulation falling primarily under state jurisdiction. The MBCA serves as a model statute, but its adoption and interpretation vary across states. In this context, case law plays a crucial role in shaping merger regulations, allowing for more flexibility but at the expense of uniformity.

As we will explore further, this results in the difference with the mandatory disclosure requirements, such as in the merger plan. Italian law, with its civil law foundation, is more prescriptive in outlining the precise information that must be disclosed, offering more protection through transparency. In contrast, U.S. regulations offer greater flexibility, especially for private enterprises, with more room for negotiation and discretion in the presentation of information.

This distinction between civil law and common law also affects stakeholder protection. Italy's civil law framework provides explicit protections for various stakeholders, including minority shareholders, creditors, and employees. By contrast, the U.S. system, while addressing stakeholder protection, places a stronger emphasis on shareholder primacy and market efficiency, which often translates into fewer formal protections for non-shareholder stakeholders.

To fully understand the different approaches to mergers in these two countries, it is necessary to examine their historical and constitutional development.

Following World War II, Italy's economy was devastated, and the government played a central role in rebuilding industries. This led to a high degree of state involvement in corporate governance, with many companies characterized by concentrated ownership structures, often controlled by families or the government. This historical context fostered a stakeholder-centric approach to corporate mergers, where the legal framework prioritizes the interests of not only shareholders but also creditors, employees, and minority shareholders.

In contrast, the U.S. experienced an earlier and more extensive growth of public equity markets, which fostered a regulatory system that was focused on market-driven efficiency, where the primary objective of mergers is to maximize shareholder value.

Therefore, the legal system favors flexibility and minimal state intervention, enabling companies to adapt quickly to market conditions and take advantage of opportunities for consolidation. This flexibility, however, often results in less protection for non-shareholder stakeholders, such as creditors and employees, compared to the Italian system.

2.Differences and similarities in the merger process

Ruling no. 21970/2021 by the Italian Court of Cassation brought the Italian merger procedure closer to that of the United States, particularly in its adoption of the extinguishing-successory theory. However, despite this alignment, significant differences, and similarities between the two systems remain, which we will explore in the following subparagraphs. These distinctions reflect the distinct legal traditions, regulatory frameworks, and economic contexts of each country, influencing how mergers are initiated, approved, and regulated.

2.1 The merger plan

As discussed above, the differences in the legal framework reflect also on the merger plan.

Both art. 2501-ter c.c. and Section 11.02(c) of the MBCA require the preparation of a merger plan as a crucial document outlining the details of the proposed merger. In both systems, the merger plan must contain detailed information, which typically encompasses critical components of the merger, including the share exchange ratio, the terms and conditions of the merger, and the treatment of the merging entities' shares. Moreover, both systems require disclosure of the merger plan to shareholders and other stakeholders before the merger can be approved. However, in contrast to the Italian Civil Code, the MBCA's merger plan requirements are less prescriptive. Indeed, the Italian Civil Code provides very specific requirements for the content of the merger plan, with eight mandatory elements listed in art. 2501-ter c.c.[328]. The MBCA mandates that the merger plan should include the parameters of the merger, the conversion of shares, and any amendments to the articles of incorporation. However, it does not require as many explicit disclosures as Italian law, such as the bylaws of the new entity, how shares and options are handled, any special conditions of the merger, and information on the company's assets and liabilities.

2.2 Supporting documentation

Both the Italian Civil Code and Section 11 of the MBCA recognize the relevance of supporting documentation that accompany the merger plan. These documents provide essential information for shareholders and stakeholders to make informed decisions regarding the merger.

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[328] Art 2501-ter c.c.:
The administrative body of the companies participating in the merger draws up a merger plan, which must in any case include:
1) the type, name or company name, headquarters of the companies participating in the merger;
2) the articles of association of the new company resulting from the merger or of the incorporating one, with any amendments deriving from the merger;
3) the exchange ratio of the shares or quotas, as well as any cash compensation;
4) the methods of assignment of the shares or quotas of the company resulting from the merger or of the incorporating company;
5) the date from which such shares or shares participate in profits;
6) the date from which the operations of the companies participating in the merger are charged to the financial statements of the company resulting from the merger or of the incorporating company;
7) the treatment possibly reserved for particular categories of members and holders of securities other than shares;
8) any particular advantages proposed in favor of the subjects responsible for the administration of the companies participating in the merger.

Firstly, both legal frameworks require the disclosure of financial information to assess the viability and impact of the merger. This is crucial for evaluating the legitimacy and implications of the merger on the companies involved.
Moreover, for what concerns the Board of Directors’ report, in both systems the board of directors is required to generate a report that elucidates and substantiates the merger. In particular, this report typically outlines the strategic reasons for the merger, the expected benefits, and the effects on the companies' stakeholders.
The key differences in the two legal systems concern the experts’ report, the report of the administrative body and the financial statements.
As regard to the experts’ report, art. 2501-sexies c.c. requires an independent expert report. The expert must be independent and is appointed by the court or, in certain cases, by the company. This report is crucial and must assess the fairness of the share exchange ratio, ensuring the protection of shareholders, particularly minority shareholders.
On the contrary, the MBCA does not demand an independent expert report as a statutory requirement. Nevertheless, in order to guarantee that the merger terms are equitable, organizations frequently solicit a fairness opinion from a financial advisor. Although this impartial opinion is comparable to the independent expert report in Italy, it is not legally required by the MBCA.
As regard to, the report of the administrative body, according to art. 2501-quinquies c.c., the administrative body must prepare a detailed report which explains the merger’s rationale, the criteria for

determining the exchange ratio, and the potential impact on shareholders and employee. On the other hand, the MBCA only requires a merger plan, which is typically accompanied by a report or proxy statement provided to shareholders. This document outlines the reasons for the merger and its anticipated effects, but it does not follow the same formal structure as the Italian administrative body report.

Lastly, art. 2501-quater c.c. requires that the companies involved in the merger provide the latest financial statements as part of the merger documentation. This includes the balance sheet, profit and loss statement, and explanatory notes. Additionally, if the financial statements are older than six months, interim financial statements must be prepared.

Conversely, the MBCA does not have a specific requirement for providing financial statements as part of the merger documentation. While financial information is typically provided to shareholders, the specifics are more flexible and are often dictated by securities regulations or the discretion of the company's board.

2.3 Filing of the documents

The filing of the documents in the merger process under art. 2501-septies c.c. and section 11.06 of the MBCA can be compared to reveal both similarities and differences.

For what concerns the similarities, both art. 2501-septies c.c. and Section 11.06 of the MBCA emphasize the importance of transparency. Therefore, they both require the filing of key documents related to the merger, which ensures that shareholders and other stakeholders have access to essential information.

Moreover, to ensure that the merger complies with legal requirements and that interested parties may access all pertinent information, the merger plan and other required papers must be submitted formally in both systems.

Instead, the differences concern the specific filing criteria and the timing of the filing. Italian law requires the filing of the merger plan, including with financial data and reports from the administrative body and the experts, with the Companies Register. This filing must be submitted no later than 30 days before the shareholders' meeting scheduled to authorize the merger. Conversely, pursuant to Section 11.06 of the MBCA, the merger proposal must be submitted to the Secretary of State of the respective state after its approval by the shareholders. This file serves as a formal documentation of the merger with the state and is essential for the merger to have legal recognition.

As regard to the timing of the filing, the filing under art. 2501-septies must be finalized before to the shareholders' meeting, thereby guaranteeing that all relevant parties are afforded the opportunity to examine the papers and express any considerations. In contrast, the filing under Section 11.06 of the MBCA occurs after the shareholders have approved the merger.

2.4 Protection of minority shareholders

Italy and the United States adopt distinct legal strategies to protect the interests of minority shareholders, with the Italian system often providing stronger safeguards.

1. Approval thresholds and appointment rights

Italy requires higher approval thresholds for mergers. Indeed, in the European Union, the Third Company Law Directive established a baseline requirement of either two-thirds of the votes at a shareholders' meeting or one-half of the outstanding shares for approval[329].

Conversely, most U.S. jurisdictions require more straightforward approval requirements and often a simple majority is sufficient. Typically, it is required a majority of all outstanding shares to approve a merger or consolidation. In practice, this often translate to a need for around 70 percent or more of the shares that are voted [330].

Moreover, to safeguard the interests of minority shareholders, Italy relies on appointment rights, specifically through minority-elected board members. In the U.S. the tendency is in the opposite direction, specifically, away from empowering minority groups through mechanisms like cumulative voting and strong supermajority voting

[329] Art. 7 Third Company Law Directive 2011/35/EU, 2011 O.J. (L 110) 1, applicable to domestic mergers of public companies. This article also requires the consent of each class of shareholders whose rights are affected, voting separately, not just of the shareholders' meeting. On "class rights" see Section 7.2. 2.. Moreover, a few of member states enforce even more stringent criteria. For example, Germany mandates that a merger must win the approval of 75 percent of the voting shareholders. In addition to the two-thirds majority requirement, France mandates a minimum of one-fourth of the outstanding shares.

[330] § 251(c) DGCL; § 11.04(e) RMBCA. If only 70 percent of shareholders vote, more than 71 percent of voting shareholders must approve a transaction to provide a majority of outstanding shares

rules[331]. In particular, the U.S. relies on independent directors, requiring a strong mandatory disclosure system[332].

Several scholars have examined the reasons why most jurisdictions, like the US, do not mandate minority friendly appointment rights for listed companies[333].

First, the presence of minority shareholders in controlled firms can incur significant expenses, as it tends to create conflicts during board meetings, discourage candid business conversations, and, in the most severe cases, grant competitors' access to confidential information[334].

Secondly, another explanation is that in Italy, institutional investors, rather than ordinary block holders, often appoint minority directors for the largest corporations[335].Conversely, in the United States, strict regulations on insider trading and onerous ownership disclosure standards that prohibit cooperation among shareholders have traditionally deterred institutional investors from exercising

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[331] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p. 101.

[332]Indeed, as independent directors can be nominated by controlling shareholders, their allegiance is always questionable. For this reason, the US requires a disclosure system to enhance the trusteeship. U.S. securities law imposes disclosure duties to all companies, U.S. and (to some extent) foreign, that trade in the public market.These companies must report annually all transactions that exceed U.S. $120,000 in value and in which directors, executive officers, or a large shareholder have a "material interest." See SEC Regulation S-K, Item 404. Moreover, U.S. generally accepted Accounting Principles ("'U.S.-GAAP") complement this requirement by imposing annual disclosure of all "material" transactions between the company and its officers, directors, or controlling shareholders." See See Statement of Financial Accounting Standards (SFAS) 57, Related Party Disclosure.

[333] *Ibid.*

[334]Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p.167

[335] Institutional investors nominate around one-third of the minority-appointed directors in companies voluntarily providing such information. See Assonime, *Corporate Governance in Italy: Compliance with the CG Code and Directors' remuneration* 2013, p.67-70.

appointment rights, therefore reducing the attractiveness of this approach[336].

Lastly, the two legal systems use different approaches also because of the different relationship the systems have with the ownership structures and the legal protection of minority shareholders[337].

Indeed, in jurisdictions where concentrated ownership prevails, like Italy, controlling shareholders tend to obstruct the implementation of legislation that might limit their private benefits. On the other hand, in jurisdictions where ownership is dispersed, like the U.S., institutions and the investing public are more likely to have significant political influence in pushing for reforms that decrease minority expropriation[338]. In particular, in the U.S. political influence is balanced between institutional investors and professional managers and the disclosure requirements, as well as holding company regulations[339], and taxation of intra-corporate distributions[340] are all indications of the comparative weakness of controlling shareholders under U.S. law. Conversely, in Italy controlling shareholders exercise a strong political influence since large shareholders control most listed companies[341].

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[336] However, the inclusion of minority investors on corporate boards has been shown to be a powerful strategy for activist investors, including hedge funds, even within the United States. See Kobi Kastiel, *Against All Odds: Shareholder Activism in Controlled Companies*, 2016, Columbia Business Law Review, p. 60.

[337] See e.g. Lucian Bebchuk and Mark Roe, A Theory of Path Dependence in Corporate Ownership and Governance, 52 Stanford Law Review 127 (1999).

[338] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p. 104.

[339] See Mark J. Roe, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance 273 (1994).

[340] Randall Morck and Bernard Yeung, Dividend Taxation and Corporate Governance (2005), 19 Journal of Economic Perspectives 163.

[341] *Ivi,*p. 104.

The Italian and American constitutional principles reflect these different approaches. As regard to Italy:

1. Art. 2 Cost.[342]: emphasizes social solidarity as a fundamental principle. This principle underpins a corporate governance framework that prioritizes the interests of a broad range of stakeholders, not just shareholders. In practice, this means that corporate actions, including mergers, must consider the impact on minority shareholders, creditors, and employees. The emphasis on social solidarity translates into the implementation of robust safeguards designed to protect these groups during merger transactions.
2. Art. 3 Cost.[343]: promotes substantive equality, which directly influences corporate law by providing increased protection for potentially vulnerable parties, such as minority shareholders. The commitment to substantive equality reinforces the idea that corporate governance should not only serve the interests of the majority but also safeguard the rights of minority stakeholders, guaranteeing their fair treatment during corporate transactions.
3. Art. 41 Cost.[344]: acknowledges the right to economic initiative but stipulates that it cannot be conducted in conflict with social

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[342] Art. 2 Cost: "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed and requires the fulfillment of the fundamental duties of political, economic, and social solidarity."

[343] Art. 3 Cost: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions."

[344] Art. 41 Cost: "Private economic initiative is free.
It cannot be conducted in conflict with public utility or in such a manner that could harm safety, liberty, or human dignity.
The law determines appropriate planning and controls so that public and private economic activity may be directed and coordinated for social purposes."

utility. This principle advocates for comprehensive regulatory supervision of corporate activities, including mergers. It emphasizes that while companies have the freedom to operate and pursue economic opportunities, they must do so in a manner that serves the public good and aligns with broader social objectives. As a result, mergers in Italy are subject to stringent regulatory oversight to ensure that they do not adversely affect the market, consumers, or vulnerable groups.

Conversely, in the US, corporate governance is deeply influenced by the 5th and 14th Amendments, which set the *due process of law clause,* and art.1 section 8 Cost., which set the *commerce clause.* In particular:

1. 5th amendment[345]: establishes protections for due process and property rights. It ensures that individuals cannot be deprived of their property without adequate legal procedures. In the context of corporate mergers, this principle provides shareholders with certain rights and protections, such as the right to receive fair value for their shares in the event of a merger. The emphasis on due process can lead to a more flexible approach to corporate governance, where judicial interpretations allow for greater autonomy in corporate decision-making[346]. While this flexibility can enhance market efficiency, it may also result in less

[345] Fifth Amendment U.S. constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[346] Hall, A. "Strategies for Structuring Shareholder Agreements to Safeguard Minority Interests." Aaron Hall, 2023. Available at: https://aaronhall.com/strategies-for-structuring-shareholder-agreements-to-safeguard-minority-interests/.

protection for non-shareholder stakeholders, such as employees and creditors, who may not have the same legal recourse or visibility in the merger process.

2. 14th amendment[347]: the 14th Amendment reinforces the principle of equal protection under the law and extends the due process protections of the 5th Amendment to state actions. This means that shareholders are entitled to fair treatment during mergers and that any laws affecting their rights must be applied equally. However, the focus on individual property rights and shareholder primacy can sometimes overshadow the interests of other stakeholders. In practice, this leads to a corporate governance model that prioritizes maximizing shareholder value, often at the expense of broader stakeholder concerns.
3. Commerce clause (art.1 section 8 Cost.)[348]: the commerce clause allows Congress to regulate interstate commerce, setting up a framework for economic activity that enhances market efficiency. This clause plays a significant role in shaping corporate law and merger regulation in the United States, enabling companies to pursue mergers that enhance their competitive position in the market. The focus on promoting free trade and reducing barriers to commerce means that regulatory scrutiny of mergers may be less stringent compared to the Italian system. As a result, while

[347] Fourteenth amendment U.S. Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[348] Art.1 section 8 Cost: "The Congress shall have Power To... regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

this can foster a dynamic business environment, it may also result in mergers that prioritize market dominance and shareholder profits over the welfare of other stakeholders.

Therefore, Italy's emphasis on social solidarity, substantive equality, and social utility fosters a stakeholder-oriented framework that prioritizes the interests of a broad range of parties involved in corporate transactions. In contrast, the U.S. system's focus on individual rights, due process, and market efficiency promotes a shareholder-centric model that may not always adequately protect the interests of non-shareholder stakeholders.

2. Appraisal rights and withdrawal rights

Nevertheless, both the Italian Civil Code and the MBCA offer minority shareholders mechanisms to exit the company and receive fair compensation in the event of their disagreement with a merger or other substantial corporate activities.

The American legal system provides *appraisal rights (or dissenter's rights)* for charter amendments that significantly impact the rights of dissenting shareholders[349].

In the U.S. the appraisal remedy allows shareholders who are dissatisfied with major corporate changes, such as mergers, to avoid the financial impact of these changes by selling their shares back to the corporation at a reasonable price[350].

[349] Art. 2437 c.c. (Italy) (appraisal right granted for charter amendments regarding e.g. voting rights or significant changes in the scope of business); § 13.02 Revised Model Business Corporation Act (hereafter "RMBA") (U.S.).

[350] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p. 186.

The scope of the appraisal remedy differs greatly among states in the United States and other countries that provide this option. Indeed, the exercise of appraisal rights may be a laborious, time-consuming, and unpredictable procedure in practice, which frequently discourages smaller shareholders from pursuing them.

For instance, in Delaware shareholders who wish to use their appraisal rights must negotiate a convoluted administrative procedure. Their obligations include:

1. Submit a formal objection to the proposed transaction prior to the shareholders' meeting when the transaction will be subject to a vote.
2. Abstain from casting a vote in support of the transaction at the meeting.
3. Potentially engage in prolonged court proceedings, which can extend for two years or more before a judgment is reached.

Furthermore, certain jurisdictions in the United jurisdictions, such as Delaware and those that adhere to the Revised Model Business Corporation Act (RMBCA)[351], enforce a "stock market exception" on appraisal rights[352]. The exclusion stipulates that stockholders are not entitled to an appraisal if the merger consideration comprises stock from a publicly listed corporation, as opposed to cash, debt, or private equity. The justification for this exemption is either to safeguard the liquidity of shareholders rather than the intrinsic worth of their shares or to presuppose that market values, however flawed, are typically as

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[351] *Revised Model Business Corporation Act* (Am. Bar Ass'n 2023).

[352] § 13.02 RMBCA; § 262 DGCL.

precise as judicial price assessments. Therefore, shareholders seeking to contest the value of shares acquired in stock-based mergers involving public corporations find appraisal rights to be considerably less beneficial[353].

Conversely, the EU legislation does not explicitly provide appraisal rights for mergers. Nevertheless, several member states have adopted measures that provide comparable safeguards. For instance, the laws of France, Germany, and Italy entitle companies to appraisal rights for substantial modifications to their charter, which may encompass some mergers[354]. Italy confers upon minority shareholders the right to withdraw from the company if they do not consent to specific substantial alterations, such as mergers or changes in corporate purpose. If shareholders exercise this right, they are entitled to receive the equitable worth of their shares, as established according to the conditions specified in the Civil Code.

The concept of fair value, essentially the reasonable price for shares, varies significantly between the U.S. and Italy, particularly in the methods used to establish this value.

In Italy, the assessment of fair value for shares frequently depends on non-judicial methods. It is usually determined with two procedures that do not require Court involvement:

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[353] See Paul G. Mahoney and Mark Weinstein, *The Appraisal Remedy and Merger Premiums*, 1 American Law and Economics Review 239 (1999) (analyzing 1,350 mergers involving publicly held firms from 1975–91); Joel Seligman, *Reappraising the Appraisal Remedy*, 52 George Washington Law Review 829 (1984) (only about 20 mergers from 1972–81 resulted in appraisal proceedings)

[354] Art. 2437 c.c. (Italy) (appraisal right granted for charter amendments regarding e.g. voting rights or significant changes in the scope of business). See also Alain Viandier, OPA, OPE et Autres Offres Publiques 460–1 (5th edn., 2014).

1. Company’s balance sheet: the value may be based on the company's balance sheet, which provides a summary of the company’s financial position[355].
2. Expert’s evaluation: an independent expert may be appointed to assess the value of the shares. This evaluation usually takes into account various factors, including the market value of the shares at the time of the merger or significant transaction[356].

In contrast, the U.S. approach, particularly under the MBCA involves a more judicial process. Indeed, under the MBCA, if the shareholder and the corporation cannot agree on the fair value, the shareholder can initiate a court proceeding, where the court determines the fair value based on evidence presented[357].

3. Business judgment rule

American courts typically apply the *business judgment rule[358],* narrowing judicial second guessing of business decisions unless there is evidence of fraud, conflict of interest, or gross negligence.

The business judgment rule has been part of English and American common law concerning corporations for more than 250 years[359], and it constitutes “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and

[355] Art 2343 c.c.
[356] Art.2343-bis c.c.
[357] Model Business Corporation Act (MBCA), Section 13.30.
[358] In *Charitable Corp. v. Sutton* in 1742 the English Court first proposed that directors should not be held responsible for bona fide judgments taken on behalf of the corporation, even if such actions result in unfavorable consequences. In 1829 with *Percy v. Millaudon*, the Louisiana Supreme Court rendered a ruling that embodies the principles established in Sutton.
[359] *See, e.g.,* Lori McMillan, *The Business Judgment Rule as An Immunity Doctrine*, 4 Wm. & Mary Bus. L. Rev. 521, 521 (2013); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine?*, 57 Vand. L. Rev. 83, 83-84 (2004); Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. Cal. L. Rev. 287, 289 (1994); S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 Hofstra L. Rev. 93, 93 (1979).

in the honest belief that the action taken was in the best interests of the company."[360]. Thus, Court will not second guess the substance of business decisions of directors who performed their duties:

1) in good faith;
2) with the care that an ordinarily prudent person in a comparable situation would exercise under similar circumstances (meaning that directors must act on an informed basis);
3) in a manner the directors reasonably believe to be in the best interests of the company[361];

The reason why the American courts adopt the business judgment rule is to avoid the director's conduct is influenced by fear with prejudice for the corporation. Indeed, if directors are consistently held responsible for incorrect economic decisions, it would be immensely challenging to identify individuals who are willing to act as directors. Moreover, without the protection of the BJR, directors might become overly cautious, avoiding potentially beneficial but risky decisions.

Therefore, the business judgment rule is very difficult to overcome, and it constitutes a burden for minority shareholders who, in the case of challenging a business decision, must prove the evidence "that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty – good faith, loyalty or duty of care"[362].

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[360] Orman v. Cullman, 794 A.2d 5, 19-20 (Del.Ch.2002). See also MLA style: "Business Judgment Rule." Wikipedia, The Free Encyclopedia. Mantese, Joseph, and James Fields. The Business Judgment Rule. January 2020. Mantese Law, 2020.

[361] Aronson v. Lewis, 473 A.2d 805, 812 (1984); Kaplan v. Centex Corp., Del. Ch., 284 A.2d 119, 124 (1971); Robinson v. Pittsburgh Oil Refinery Corp., Del. Ch., 14 Del. Ch. 193, 126 A. 46 (1926). See also American Bar Association. Model Business Corporation Act. 2016.

[362] *Cede & Co. v. Technicolor, Inc.* (Del. 1993)*, 634 A.2d 345, 361.* See also GCK Legal. "Business Judgment Rule: Limits and Exceptions."

Nevertheless, in the leading case *Smith v. Van Gorkom*[363] the Delaware Court emphasized that the business judgment rule's protection is not absolute and established a higher standard for director conduct in merger decisions. In *Smith,* the shareholders of a publicly traded company filed a derivative lawsuit against the directors over a merger. The Court found that the board of directors had breached their duty of care by failing to inform themselves adequately[364] about the company's value before agreeing to the merger[365]. In particular, the *Smith* board members were found to be "grossly negligent" for the approval of a merger proposal based solely on a 20-minute presentation and were held jointly and severally liable for $23 million[366].

In Italy the business judgment rule, albeit not codified, has been applied by Courts[367]. However, Italy requires one more requirement for the directors to invoke the shield of the BJR with the result that, one more time, the Italian legal system seems to protect shareholders more.

Similarly, to the U.S., Italy requires directors to act with good faith[368], in the best interests of the company and on an informed basis. Before the 2003 reform, art. 2392 c.c. established that the level of diligence

[363] *Smith v Van Gorkom* (Del 1985) 488 A2d, 858.

[364] Directors are informed when they apprise themselves of all material information reasonably available before making a decision.

[365] Furman, J. "The Business Judgment Rule and the Limitation of Liability: A Comparison of Statutory and Common Law." University of Washington Law Review, vol. 90, no. 4, 2015.

[366] *See, e.g.,* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. Penn. J. Bus. L. 675, 679 (2009). See also: Mantese, Joseph, and James Fields. The Business Judgment Rule. January 2020. Mantese Law, 2020.

[367] See: Cass. Civ., January 16 1982, n. 280, Giur. Comm., 1983, I, 603; Cass. Civ., July 27 1978, n. 3768, Giur. Comm., 1980, II, 904; Cass. Civ., April 28 1997, n. 3652, Società, 1997, 1389; Cass. Civ. August 12 2009, n. 18231, Società, 2009, 10, 1247; Court of Milan, May 30 1977, RD Comm., 1978, II, 320; Court of Milan, March 28 1985, Foro It., 1986, I, 256; Court of Milan, June 26 1989, G Comm, 1990, II, 122; Court of Milan, September 3 2003, Giur. It., 2004, 350; Cass. Civ., March 23 2004, 5718, Guida al Diritto, 2004, 18, 66; Court of Milan, April 14 2004, Giur. It., 2004, 1897

[368] Art 2391 c.c.

required for the director was the same as that required for the "mandatario". Under art. 1710 c.c., the director was expected to exercise the same level of diligence that a responsible family father ("buon padre di famiglia") would, given comparable circumstances. This criterion was very similar to the one of the "prudent person" established in the U.S.

However, the majority of the scholars[369] and case law have emphasized that, considering the nature of the corporation-director relationship and the requisite skills for successful directorship, the level of diligence required by the director is equivalent to that of a professional man carrying out his duties. The 2003 reform codified the aforementioned principle, therefore imposing a greater degree of vigilance on the director compared to the *"mandatario"*. Accordingly, article 2392 c.c. now specifically mentions the diligence of the "professional man" rather than the *"mandatario"* diligence.

Moreover, Italian courts seem to emphasize the requirement of the rationality of the decision in order to apply the BJR, while American Courts apply the further requirement of rationality only when the business decision is totally absurd or irrational or when the director has an interest in the decision[370].

According to the Italian legal system, in order to apply the BJR, directors must select the most rational decision among the provided

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[369] M. GIORGIANNI, L'inadempimento, Milano, 1970, 337; G. COTTINO, Diritto commerciale, Padova, Vol. I, 547; S.RODOTA', Diligenza (dir. Civ.), in Enc. Dir., XII, Milano, 1964, 545; R. WEIGMANN, Responsabilità e potere legittimo degli amministratori, Torino, 1974, 143; Court of Appeal of Milano, January 21 1994, in Società, 1994, 923; Court of Reggio Emilia, June 12 1996, in Dir. Fall., 1996, II, 718; Court of Milan, September 14 1992, in Società, 1993, 511.

[370] As suggested by F. BONELLI, Gli Amministratori di S.p.A. dopo la riforma delle società, Milano 2004, 183 e ss.

alternatives[371]. This stance of Italian Courts is justified by some authors'[372] observation that in the absence of such additional requirement, directors may evade any responsibility by implementing a meticulous and thorough decision-making process (at the corporation's cost) without considering the ultimate choice made[373].

2.5 Protection of creditors

To describe the different approaches regarding creditor protection, scholars categorize countries' legal regimes as either "debtor-friendly" or "creditor-friendly"[374], depending on how they facilitate or restrict creditor enforcement against a financially distressed debtor [375].

Thus, the U.S. is considered to have a debtor-friendly legal system, while Italy's legal system is often described as creditor-friendly[376].

As regard to solvent firms, in Italy, the legal framework traditionally emphasizes "creditor-friendly" measures, providing standardized terms

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371 See: Court of Milan, May 30 1977, in RD Comm., 1978, II, 320; Court of Milan, March 28 1985, Foro Italiano, 1986, I, 256; Court of Milan, June 26 1989, Giur. Comm., 1990, II, 122; Cass. Civ., August 12 2009, n. 18231, Società, 2009, 10, 1247.

372 A ROSSI, Commento all'art. 2392, in AA.VV., Il nuovo diritto delle società, a cura di A. MAFFEI ALBERTI, Padova, 2005, 800.

373 However, other authors do not agree with this theory and affirm that should the aforementioned hypothesis be implemented, it is probable that directors would be reluctant to make particularly hazardous judgments due to concerns that such decisions may be seen irrational and detrimental to the organization. Consequently, the business judgment rule may prove to be ineffective. *See* F. BONELLI, Gli Amministratori di S.p.A. dopo la riforma delle società, Milano 2004, 183 e ss. *A. DE NICOLA, Commento all'art. 2392 c.c., in AA.VV., Amministratori, a cura di F. GHEZZI, in AA.VV., Commentario alla riforma delle società, diretto da P. MARCHETTI, L.A. BIANCHI, F. GHEZZI, M. NOTARI, Milano, 2005, 558.*

374 Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p.140.

375 See e.g., Julian R. Franks, Kjell G. Nyborg, and Walter N. Torous, A Comparison of U.S., UK, and German Insolvency Codes, 25 Financial Management 86 (1996); Sefa Franken, Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited, 5 European Business Organization Law Review 645 (2004)

376 Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p. 192.

that make it easier for creditors to contract with firms. This includes specific accounting principles and capital rules designed to protect creditors' interests. This is because the legal structure supports a banking system where firms typically raise debt from banks. Since debt is concentrated within these banks both at the firm level and country level, it simplifies coordination among creditors, making monitoring and renegotiation more manageable. This system helps address potential conflicts between shareholders and creditors, especially in firms with concentrated share ownership[377].

Conversely, the U.S. has adopted a more "market-oriented" approach[378]. Instead of imposing strict capital constraints, it relies on comprehensive market disclosure requirements. This different approach can be traced back to the fact that the U.S. financial system historically had lower banking concentration and more dispersed share ownership. This means that corporate debt is often spread out among various creditors, which can make coordination more difficult and reduce the benefits of standardized contractual terms. As a result, while standardized terms might not offer much advantage in this context, they still impose costs on debtors without providing significant benefits[379].

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[377] See John Armour, Brian R. Cheffins, and David A. Skeel, Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom, 55 Vanderbilt Law Review 1699 (2002); Jan Mahrt-Smith, The Interaction of Capital Structure and Ownership Structure, 78 Journal of Business 787 (2005).

[378] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p.141

[379] Other countries fall between these two extremes. For example, France's approach is closer to Germany's, with a greater emphasis on creditor-friendly terms, while the UK's system aligns more with the U.S.'s market-oriented model.*Ibid.*

However, share ownership patterns are evolving across different jurisdictions. In Germany, for instance, there is a trend towards greater fragmentation of share ownership among large companies. This fragmentation increases the difficulty shareholders face when trying to coordinate with each other, which in turn lessens the risk of conflicts between shareholders and creditors. On the other hand, in the U.S., stock ownership is becoming more concentrated in the hands of activist institutional investors. This concentration tends to amplify the conflicts between shareholders and creditors[380].

These shifts in share ownership affect how corporate law protects creditors, depending on the debt finance structure in each region. In Europe, secondary markets for debt have expanded, leading to a diversification of debt holders, even though banks are still the initial source of many loans[381]. This diversification was accelerated by the financial crisis, which resulted in tighter capital controls and a decrease in credit supply from banks[382]. To address this, the European Commission has introduced the "Capital Markets Union" initiative[383] to enhance capital market financing for both debt and equity[384].

Consequently, the growing variety among creditors and the increased complexity of coordinating among them have diminished the

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[380] See Edward B. Rock, Adapting to the New Shareholder-Centric Reality, 161 University of Pennsylvania Law Review 1907, 1984–6 (2012)

[381] See e.g. Deutsche Bank, Corporate Bond Issuance in Europe: Where Do We Stand and Where Are We Heading? 31 January 2013

[382] See e.g. Fiorella De Fiore and Harald Uhlig, Corporate Debt Structure and the Financial Crisis, ECB Working Paper No 1759 (2015)

[383] European Commission. Capital Markets Union: Action Plan. European Commission, 2015.

[384] Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p. 142

effectiveness of standardized creditor protection terms, making them more problematic. This development explains why European measures designed to protect creditors—such as minimum capital requirements and strict accounting rules—have been slightly eased in recent years.

In contrast, the U.S. has not experienced a shift towards more bank-based financing at the expense of market-based debt. Therefore, while the increasing concentration of shareholders might lead to greater conflicts between shareholders and creditors, the fragmented nature of debt holders in the U.S. still limits creditors' ability to work together effectively and utilize standardized protections. Consequently, it is less practical for U.S. law to expand creditor protections in response to the rising potential for shareholder opportunism.

Another difference that is worth to highlight is the different role that bankruptcy law plays in the two legal systems.

When a firm has only a few creditors, corporate bankruptcy law mostly functions to liquidate the company, with viable businesses often restructured through private "workouts." However, as the number of creditors increases, achieving a private resolution becomes more challenging.

Chapter 11 of the Bankruptcy Code[385] in the United States permits management of financially troubled companies to supervise a court-ordered recovery process while maintaining control[386]. Historically,

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[385] U.S. Congress. Chapter 11 of Title 11 of the United States Code: Bankruptcy. 11 U.S.C. § 1101 et seq. 1978.

[386] *See* Stijn Claessens and Leora F. Klapper, Bankruptcy Around the World: Explanations of Its Relative Use, 7 American Law and Economics Review 253, 262 (2005) (U.S. bankruptcy rate—proportion of firms filing for bankruptcy proceedings—was higher than all our other juris- dictions: U.S. 3.65 percent, France 2.62 percent, UK 1.65 percent, Germany 1.03 percent, Italy 0.54 percent, and Japan 0.22 percent).

prominent American corporations have obtained financing from a wide range of creditors, typically depending more on bonds and less on bank loans in comparison to other countries[387]. This framework corresponds to a disorganized financial infrastructure, which encountered no opposition to the "manager-friendly" bankruptcy legislation implemented in 1978[388].

By contrast, Italy uses a distinct strategy. The Italian corporate bankruptcy legislation prioritizes the active participation of creditors in the bankruptcy legal proceedings. Italian enterprises often have a more consolidated creditor base, frequently controlled by banks. This framework supports a more interventionist approach to bankruptcy, in which creditors have a substantial involvement in restructuring endeavors. Historically, the Italian system, like other European countries, has predominantly depended on bank funding rather than bond markets, indicating a preference for formal bankruptcy procedures over private workouts[389].

Nevertheless, recent developments show that differences in debt structures between the U.S. and European countries, including Italy, are

[387] See e.g., Jenny Corbett and Tim Jenkinson, How is Investment Financed? A Study of Germany, Japan, the United Kingdom and the United States, 65 (Suppl.) Manchester School 69, 74–5, 80–1, 85 (1997); William R. Emmons and Frank A. Schmid, Corporate Governance and Corporate Performance, in Corporate Governance and Globalization 59, 78 (Stephen S. Cohen and Gavin Boyd eds., 1998) ("Simply put, firms in the United States and Canada issue significant amounts of bonds but nowhere else in the G7 countries is this true").

[388] See e.g., Mark J. Roe, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance (1994).

[389] An alternative model is represented by the UK, which has historically favored the enforcement of individual creditors' security interests with minimal judicial intervention. A bank holding a security interest over a debtor's assets could control asset realization privately, reflecting a concentrated banking sector and lower reliance on bond financing. This has meant that private workouts are significant, and bankruptcy is typically reserved for more severe cases. See Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W-G., & Rock, E. (2017). The Anatomy of Corporate Law: A Comparative and Functional Approach, p.143.

becoming less pronounced due to the rise of secondary debt markets and increased concentration of distressed debt in the U.S., often held by hedge funds. These changes suggest that variations in bankruptcy laws may now be more influenced by the functioning of judicial institutions rather than the traditional debt structures. This evolution highlights the complexities of implementing effective bankruptcy strategies to manage creditor conflicts and agency costs[390].

As part of the merger process, the Italian Civil Code includes provisions for creditor protections. Creditors are granted a formal mechanism to safeguard their interests during a merger through art. 2503 c.c. The proposed merger must be disclosed to creditors, and a 60-day waiting period[391] is required following the merger plan's registration with the Companies Register. During this time, creditors are entitled to oppose the merger if they believe it imperils their claims.

If a creditor files an opposition, the merger cannot proceed until the court resolves the matter. The court may allow the merger to proceed if the company provides adequate guarantees to the creditor, such as a security or other form of collateral.

On the other hand, there is no specific provision in the MBCA that grants creditors a statutory right to oppose a merger. This is because the MBCA prioritizes the rights and protections of shareholders during mergers, delegating creditor protection to general contract law,

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[390] *See* e.g. Mehnaz Safavian and Siddharth Sharma, When Do Creditor Rights Work?, 35 Journal of Comparative Economics 484, 500–2, 506–7 (2007); Kenneth Ayotte and Hayong Yun, Matching Bankruptcy Laws to Legal Environments, 25 Journal of Law, Economics & Organization 2 (2009); Mark J. Roe and Federico Cenzi Venezze, A Capital Market, Corporate Law Approach to Creditor Conduct, 112 Michigan Law Review 59 (2013).

[391] 30 days if no joint-stock companies are involved.

bankruptcy law, and other pertinent legal frameworks. Creditors in the United States typically rely on contractual agreements that may include covenants or clauses in loan agreements or other contracts that mandate the company to obtain creditor approval before engaging in significant transactions such as mergers.

2.6 Effects of the merger: similarities and differences before and after ruling no.21970/2021

Following the Court of Cassation's ruling no. 21970/2021, the effects of mergers in Italy have aligned more closely with the U.S. legal framework.

Prior to this ruling, significant differences existed between the Italian and U.S. legal frameworks concerning the dissolution of merging entities and the transfer of their responsibilities. In Italy, there was considerable ambiguity surrounding whether the merging companies ceased to exist and how their assets, liabilities, and legal relationships were transferred. This lack of a clear, unified interpretation created uncertainty about the automatic succession of these rights and obligations.

On the other hand, the U.S. system, particularly under the MBCA, had long provided a clear procedure for mergers. According to the MBCA, upon the effective date of a merger, the surviving entity automatically inherits the rights, liabilities, and assets of the merged entities without the need for additional legal action. This seamless transfer ensured a smooth transition of ownership and responsibilities, preventing any legal gaps.

The Court of Cassation's ruling no. 21970/2021 marked a pivotal shift in the Italian approach, aligning it more closely with the U.S. system. The ruling clarified that in Italy, like in the U.S., the transfer of assets and liabilities occurs automatically once the merger is effective, removing the previous legal uncertainty. Both systems now confirm that no further formalities are needed once the merger is completed, guaranteeing a smoother transition for the merging companies.

Additionally, both jurisdictions acknowledge that mergers take effect immediately upon completion of the required paperwork, albeit they also provide flexibility to postpone the effective date if needed. In Italy, under the Civil Code, a merger becomes effective upon the registration of the merger plan in the Companies Register. Similarly, in the U.S., the merger takes effect upon filing the articles of merger with the Secretary of State. This procedural similarity further reflects the convergence of the two systems following the 2021 ruling, though their historical and constitutional foundations still maintain unique distinctions.

3.Comparison of Fiat Chrysler and Exxon Mobil merger

The Fiat-Chrysler and ExxonMobil mergers provide a rich comparison of the different economic and legal frameworks governing corporate mergers in Italy and the United States. Both operations reflect the broader characteristics of their respective legal systems, showcasing how different priorities shape the structure and outcomes of mergers. To analyze these differences, we must consider the following key aspects: legal systems, merger processes, economic rationales, and the treatment of shareholders and creditors.

1. Legal Systems and Approaches

The ExxonMobil merger was governed primarily by the MBCA which, while still emphasizing shareholder approval and transparency in the merger process, allows more flexibility than its Italian counterpart.

This approach aligns with the U.S. legal tradition, which is more market-oriented and less prescriptive in terms of statutory requirements for creditors or other stakeholders. Indeed, U.S. corporate law operates within a decentralized legal system, where corporate regulations are primarily state-driven, and mergers rely heavily on shareholder consent and market forces. This allows for quicker adaptations to market dynamics, fostering efficiency but potentially leaving other stakeholders, like creditors and employees, with fewer direct protections

In the ExxonMobil case, statutory requirements were met, but the process was more flexible, particularly in terms of internal assessments and financial advisors providing evaluations. Moreover, shareholders played a pivotal role through appraisal rights and explicitly defined share conversions. This emphasis on shareholder protection reflects the core tenets of American common law, which prioritizes shareholder interests, especially in major corporate transactions.

On the other hand, the Fiat-Chrysler merger adhered to the Italian Civil Code (arts. 2501–2504 c.c.), with additional elements of Dutch law as the final entity was incorporated in the Netherlands.

Italy’s legal system is far more statutory-driven and stakeholder-oriented, emphasizing protections not only for shareholders but also for creditors, employees, and minority shareholders. The Fiat-Chrysler merger was conducted in accordance with strict regulations, which included the need for independent expert reports to guarantee the fairness of the share exchange ratio and the protection of creditors under article 2503 c.c., which gives creditors the right to oppose the merger within a waiting period following the registration of the merger plan.

This approach reflects the civil law tradition found in Italy and many other European countries, where the legal framework is more prescriptive and emphasizes procedural rigor. The role of courts and mandatory disclosure mechanisms is significant, and mergers are designed to balance the interests of multiple stakeholders. This ensures that creditors and employees have a say in the process, reflecting Italy's broader focus on social welfare and economic stability.

2. Merger Structures and Processes

The ExxonMobil merger was structured as an all-stock transaction valued at $81 billion, where Exxon acquired Mobil by issuing new shares to Mobil's shareholders. This type of transaction is common in the U.S., where mergers are often driven by market forces and the need to create value for shareholders.

Following the requirements of the MBCA, the merger underwent detailed evaluation by boards of both companies, received shareholder approval, and followed the strict disclosure requirements set by the U.S. Securities and Exchange Commission (SEC). However, U.S. law approach concerning documentation and expert evaluations is more flexible, focusing more on protecting shareholders' interests. Indeed, unlike Italy's stringent statutory requirements for creditor opposition and expert valuation, the ExxonMobil merger relied on internal assessments by financial advisors. Therefore, the ExxonMobil case exemplifies how the U.S. legal system prioritizes speed and efficiency in merger processes, emphasizing shareholder interests above all. The transaction was designed to optimize operational synergies without the stringent procedural safeguards found in other jurisdictions, such as Italy.

On the other hand, in the Fiat-Chrysler merger Fiat incrementally acquired stakes in Chrysler over several years, starting from 20% in 2009 to full ownership in 2014. This gradual acquisition, combined with compliance with both Italian and Dutch legal frameworks, reflected a more complex and staged merger process. The Italian merger law mandates a meticulous merger plan, which was subjects to approval by the boards and shareholders of both entities, as well as provisions to safeguard creditor rights and independent experts' evaluations in order to ensure the fairness of the exchange ratio.

Unlike the ExxonMobil merger, the Fiat-Chrysler merger was slower and more regulated, reflecting the need to safeguard not only shareholder interests but also creditors and employees. Indeed, Italian law's strict requirements for disclosure, expert reports, and creditor opposition rights made the process more transparent but also more time-consuming. This demonstrates Italy's emphasis on safeguarding the whole economy and making sure that all parties are treated fairly .

3. Economic Rationale and Strategic Goals

The ExxonMobil merger was driven by a desire to achieve economies of scale in the oil industry during a period of low oil prices.

At the time, oil prices were low, and both Exxon and Mobil needed to consolidate their resources to remain globally competitive. The merger allowed for significant cost reductions, including operational synergies, and expanded ExxonMobil's market reach. One more time, this is in line with the U.S. emphasis on market efficiency and maximizing shareholder returns.

The merger also reflects the U.S. legal system’s focus on shareholder primacy. By prioritizing market forces and operational synergies, ExxonMobil sought to increase shareholder value through a large-scale consolidation. This strategy is in line with the broader American business mindset, which promotes efficiency, capital expansion, and competitiveness.

In contrast, Fiat's acquisition of Chrysler was motivated by survival and expansion. Chrysler had filed for bankruptcy during the 2008 financial crisis, and Fiat saw an opportunity to save the company while expanding its own presence in the North American market. This strategic alliance allowed Fiat to leverage its managerial expertise and Chrysler's strong foothold in the U.S. automotive sector, creating a global automotive giant.

Specifically, the long-term goal of the merger was to expand both companies' market reach and product capabilities by merging Fiat's European operations with Chrysler's U.S. strengths. This stakeholder-oriented strategy demonstrated Italy's emphasis on economic stability and communal welfare by aiming to safeguard creditors, shareholders, and employees equally.

4. Shareholder and Creditor Rights

U.S. corporate law, particularly under MBCA, provides strong protections for shareholders, including the right to appraisal and detailed disclosure of the merger's financial implications, with less explicitly statutory protections for creditors.

In the ExxonMobil merger, shareholders had the right to appraisal if they disagreed with the merger terms, ensuring they could receive compensation for their shares at a fair value. The focus on shareholder rights in U.S. mergers reflects the common law tradition, where shareholder primacy is a key tenet. However, protections for creditors are less explicit and rely more on contractual agreements.

The Fiat-Chrysler merger, by contrast, provided significant protections for both shareholders and creditors, reflecting the stakeholder-centric model of Italian law. Creditors were given the right to oppose the merger under art. 2503 c.c., and their interests were safeguarded before the transaction was finalized. Moreover, shareholders benefited from independent expert reports that ensured the fairness of the exchange ratio, protecting minority shareholders from potential exploitation.

This emphasis on comprehensive stakeholder protection highlights the differences between Italy's civil law tradition, which gives priority to collective welfare, and the U.S. common law system, which prioritizes individual shareholder rights. Italian law's procedural safeguards reflect a deeper commitment to social and economic stability, ensuring that all parties involved in the merger are treated fairly.

Consequently, we can say that the Fiat-Chrysler and ExxonMobil mergers underscore the legal and economic differences between Italy's stakeholder-centric, statutory-driven system and America’s shareholder-focused, market-oriented approach. While the U.S. emphasizes efficiency, flexibility, and shareholder primacy, Italy's approach to mergers is more prescriptive and protective of broader stakeholder interests, including creditors and employees.

CONCLUSIONS

The analysis of corporate mergers in both the Italian and American legal systems reveals the intricate interactions between legislative frameworks, judicial interpretations, and the evolving nature of corporate law. Throughout this dissertation, I have examined how Italy and the United States, while pursuing similar goals in regulating mergers, differ fundamentally due to their distinct historical, legal, and economic contexts.

The Italian legal landscape, shaped by its civil law tradition, has undergone a significant evolution in its understanding of mergers. Initially rooted in the *extinguishing-successory theory* from the 1942 Civil Code, Italian jurisprudence shifted with the 2003 company law reform toward the *evolutionary-modifying theory*. This view reframed mergers as reorganizations, rather than the extinction of the merging companies. However, the Italian Court of Cassation's ruling no. 21970/2021 marked a return to the *extinguishing-successory theory*, reflecting the ongoing debate about whether mergers dissolve companies or merely transform them. Each shift has impacted companies, creditors, and stakeholders, demonstrating the fluid nature of Italian corporate law.

The current legal stance, as reaffirmed by the Italian Court of Cassation, views mergers as a process of legal dissolution followed by universal succession. This realigns Italian law with its traditional roots, while also bringing it closer to the U.S. model, where the extinction of merging companies has never been in question.

In contrast, the United States has consistently maintained that mergers are primarily restructuring tools that preserve corporate continuity. Under the MBCA, mergers are seen as transformative events that allow companies to reorganize without dissolving. This approach, typical of the common law system, emphasizes flexibility and business continuity, minimizing procedural complexities that are more prevalent in the Italian system.

The comparison between the two systems highlights how legal traditions shape corporate law and affect stakeholder protection. Italy's structured, stakeholder-centric approach is deeply embedded in its constitutional principles, offering strong protections for minority shareholders, creditors, and employees. The U.S. system, by contrast, emphasizes efficiency and shareholder primacy, which promotes rapid business growth but can sometimes neglect broader social concerns.

Historical contexts also play a pivotal role. Italy's post-World War II emphasis on social solidarity and state involvement has led to an interventionist approach to corporate regulation. In contrast, the U.S. focus on market freedom and minimal state intervention has fostered a regulatory environment centered on economic growth and market competitiveness.

Despite these differences, Italy's recent legal developments, especially ruling no. 21970/2021, suggest a potential convergence with the American model in terms of understanding the extinction of entities in mergers. However, fundamental differences rooted in historical, legal, and constitutional principles are likely to persist, preserving the distinctiveness of each system.

In my opinion, the differences between the two systems highlight the difficulty in determining which is superior, as each approach presents distinct strengths and weaknesses.

The U.S. system excels in its flexibility and market efficiency. It enables mergers to be carried out quickly, fostering a dynamic and competitive business environment. Companies are able to adapt quickly to shifting market conditions, and the emphasis on shareholder primacy aligns corporate actions with shareholder interests, promoting economic growth. However, this approach also has drawbacks, including the potential for minority shareholder exploitation and insufficient protection for stakeholders like creditors and employees. The focus on short-term gains can sometimes come at the expense of long-term sustainability.

On the other hand, the Italian system provides strong protections for minority shareholders and creditors, ensuring that mergers consider the interests of all affected parties. This stakeholder-centric approach leads to more equitable outcomes, particularly in industries with significant social and employment impacts. However, the Italian framework is often slower and more complex due to extensive regulatory requirements, making it harder for companies to execute strategic mergers quickly or respond to market opportunities as flexibly as their U.S. counterparts.

Thus, neither system is perfect, and an ideal approach to corporate mergers may lie in integrating the advantages of both. The U.S. system could benefit from improved safeguards for stakeholders, ensuring that mergers do not disproportionately harm non-shareholder interests.

Meanwhile, the Italian system could simplify certain procedures to provide greater corporate flexibility without sacrificing its commitment to stakeholder protection.

Therefore, a hybrid model that combines the efficiency and flexibility of the U.S. system together with the strong stakeholder protections of the Italian system may provide a fair framework for mergers. However, adapting such a hybrid model would require careful consideration of the legal, economic, and cultural contexts of each country, as what works well in one system may not easily transfer to another.

In conclusion, while some convergence between the two systems may occur as global markets continue to integrate, the fundamental differences in their legal philosophies and constitutional principles are likely to maintain distinct approaches to merger regulation in Italy and the United States for the foreseeable future.

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