Invalidity and irreversibility of the merger operation:

matters of law and possible remedies

- abstract -

The merger between companies in the Italian law is an operation with many specific characteristics in comparison to all the other forms of economic aggregation, characteristics that make the merger operation an autonomous juridical figure, since before the 1942 civil code formulation, having own particular discipline and an articulated procedure of realization.

Within this procedure of realization the Italian law prescribes different phases, each of which provides particular tools of protection for the subjects that can have contrary or favourable interests to the operation.

Concluded the phases of the procedure of fusion, the law provides the last and more debated mean of protection, that is irreversibility of the operation after the registration of the act of fusion into the Italian register of the enterprises (the instrument of legal publicity). Consequently the only remedy for all the subjects eventually injured by the invalidity of the operation is the pecuniary legal reparation.

The legislative diction that speaks about the "invalidity of the fusion", including all the actions, the phases and the terms of the procedure, and not only the conclusive deliberation, seem not to leave any space of interpretation inside the clean preclusion that the law sets towards whatever the remedy of nullity is.

However, it is beneficial to investigate on what the affairs are struck by an absolute preclusion of reversibility of the operation, and if cannot be particular cases in which it would be more coherent to assure a real protection, and not merely economic
reparation, to partners and third parties damaged. It is beneficial also to investigate what are the consequences of the irreversibility for the market and if the preclusion can have any regulatory effects; also what are the possible abuses which can be objected by the discipline and on the other side what are the alternative and real remedies (if any) for partners or third parties that assume to have been damaged from an operation of invalid fusion.

Finally it is necessary to clarify what are the relationships among the norms provided by the civil code and those provided by the Italian competition law that in certain cases seem to expressively undermine the principles of civil code.

In order to investigate the phenomenon of irreversibility of the merger operation and all the resulting problems, it is beneficial to look at the actions from the most general operation of merger, to individualize juridical nature, ratio and concrete discipline, to appraise specific and problematic forms of it, to understand if the preclusion of art. 2504quater of civil code works equally for the whole hypothesis, and finally with the help of most recent jurisprudence to deepen all aspects related to cases of invalidity with the purpose to individualize types and ways of deriving tools for protection of partners, third parties and the market.