

DOCTORAL PROGRAM IN
LAW AND BUSINESS

XIX cycle

**THE DEMERGER OF A NEGATIVE EQUITY FROM
THE COMPANY LAW AND THE FISCAL LAW
POINT OF VIEW.**

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ABSTRACT

With this work we wanted to show how the demerger of a negative equity, although not expressly governed by the legislator, can find recognition in the legal system, because of the general and heterogeneous purposes and the different forms of the demerger.

It is discussed, in fact, if the discretion of the board of directors in choosing the assets that is the object of the demerger, can even go on to compose it mainly of liabilities and if a transaction so structured can presents the typical features of the demerger.

The feature of the split is in fact the division of society into separate organizations, through a store that consequently affect the position of the shareholders and the company's assets.

This phenomenon highlights the core of the demerger, which is the reorganization of the companies involved, which concerns not only the capital element, but also the subjective one.

In light of these circumstances, therefore, it is understandable why there is no rule which requires the entrepreneur, when making a split, to attribute to the spun-off company an equal proportion of assets and liabilities.

On the contrary, in the necessary discretion that must characterize all business decisions, the company can choose with wide freedom the elements that will form the subject of cleavage.

This conclusion seems also supported by the legislation, characterized by the use of generic words, that encourages a wide interpretation of it.

Moreover, from the point of view of economic reasons that can support a demerger of a negative equity, they are compatible with the overall function of the split case.

In fact, according to the distinction between "book" values and "current" values , a business unit whose book value is negative may be characterized by a positive current value: in such cases, the fact that the book value is negative assumes secondary importance, because this operation is able to pursue the same purposes of "normal" demerger.

But even if the current value is negative, it is also possible to find valid reasons for the operation.

For example, in the case where the demerged company has company branches which have a negative value due to the small size of it and to an imbalance in the financial structure, but for which there are prospects for development if inserted in a better and more developed structure, like that of the recipient company.

Furthermore, if the companies involved are linked by significant subsidiaries, the operation would be very convenient, even in the corporate group perspective.

In these cases, it is very important to prepare a detailed demerger plan and an analitic boards of directors' report, in which the operation must be justified and explained from the legal and economic point of view.

From the fiscal point of view, finally, the tax treatment of the case necessarily follows from the qualification of the operation as a demerger or as a sale transaction with assumption of debt.

Obviously, the admissibility of the demerger of a negative equity leads the consequences on the tax plan that the transaction remains subject to the full neutrality, that characterizes the demerger in general.