LEGAL ASPECTS OF THE TRANSPOSITION OF DIRECTIVE 2001/23/EC REGARDING THE SAFEGUARDING OF EMPLOYEES' RIGHTS IN THE EVENT OF TRANSFERS IN THE ROMANIAN LAW

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Abstract
The transfer of undertakings, businesses or parts of undertakings or businesses by legal transfer or merger determine important changes in the structure of the participant entities. The change of their juridical organisation has significant consequences on the employees' rights, reason why, both nationally and internationally, normative acts that would regulate appropriate safeguarding mechanisms have been adopted. The paper aims to analyse the transposition into national law of the communitarian norms in the field. As a result, the legal aspects with regards to which the legislator chose a restrictive transposition, as well as the additional rights established by them in favour of the employees, in comparison to the directive are identified. At the same time, the study emphasizes the aspects with regards to which the Romanian law requires to be changed and therefore makes some proposals de lege ferenda, so that the transposition of the communitarian normative act into national law would be a precise one and consistent to the other dispositions regarding national law.

Keywords: *transfer, employees, labour contract, enterprise, transposition.*

1. Introduction

The objective of the European regulations regarding the employees' protection in the event of transfers is that of offering them a juridical framework that would safeguard them from illegal measures affecting the rights they won, such as the modification of the working conditions, or the individual or collective dismissal.

The consecrated principle is that of the employees' labour contracts continuity, under the same conditions they were concluded, in the event of employer change as a result of a transfer process by legal transfer or merger. **The employees' safeguarding mechanisms in the event of the stock company reorganisation aim at guaranteeing the respect of the employees' rights, those previously gained, within the new juridical structure.** The dispositions regarding the maintenance of the employees' rights in the event of transfers of undertakings, businesses or parts of them by legal transfer or merger have to become legal guaranties for the stability of the labour report and the content of the labour contract between the employees and the employers involved in this kind of operations.

The Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[1] was transposed into national law by Articles 173-174 of the Law 53/2003 of the Labour Code[2] and the Law 67/2006 concerning the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of these ones[3].

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[1] Published in the Official Journal, nº L 82/2001, p. 6-20.

[2] Republished in the Romanian Official Journal, 1st Part, nº 3445, the 18th of May 2011.

[3] Published in the Romanian Official Journal, 1st Part, nº 276, the 28th or March 2006. It entered into force once Romania became a member of the European Union. Previously, the regulation in the field was realised by the dispositions of Articles 169-170 of the Labour Code and the Government Ordinance 48/1997 regarding the establishment of measures of social protection for employees in the event of transfer of shares or social parts of stock companies, repealed by the Law 67/2006.

With regards to the relation between the two articles in the Labour Code and the norms of the Law 67/2006, the doctrine states that these are "general norms, placed at the same legislative level"[4]. The way in which the national framework regarding the employees' safeguarding in the event of transfer of undertakings leads to the same conclusion, being shown that "in accordance with the Directive 2001/23/EC, Articles 173-174 of the Labour Code and the Law 67/2006 concerning the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of these ones[5] have been adopted. As to what we are concerned, we agree with the current opinion and we consider that the provisions of the Labour Code, by their general content, are meant to complete the legal framework regarding the employees' safeguarding regime.

The Law 67/2006 is divided into three chapters, the number of legal norms present in its articles being rather few. Of course, the quantitative criterion cannot be determinant within the qualification of the regulation activity, but it might be an appreciation factor for this one, namely if it applies to a normative act whose role is to introduce into national law communitarian norms and, therefore, it can be the object of a comparative analysis.

The study of the provisions of the Law 67/2006 compared to those provided by the Directive 2001/23/EC emphasizes to which level the transposition into national of the communitarian norms, has a restrictive or an extensive character.

2. Aspects with regards to which the Law 67/2006 is restrictive compared to the Directive 2001/23/EC.

In accordance with the Directive 2001/23/EC that it transposes, the Law 67/2006 has as object of regulation the conditions under which the safeguarding of the employees' rights is accomplished, as provided in their individual labour contracts and in the collective labour agreement, in the event of transfers of undertakings, businesses or parts of these ones towards another employer, as a result of a legal transfer or merger process, according to the law (Article 1). Unlike the Directive, the national regulation is more restrictive under the following aspects:

a) If according to the Directive 2001/23/EC the juridical regime regarding the safeguarding of the employees' rights applies to any transfer of undertakings, businesses or parts of these ones, conforming to the Law 67/2006, the norms regarding the maintenance of the employees' rights are applicable only in case of a transfer resulting in the passage of the transferred unit property right from the cedent to the legal transferor.

It is true that according to Article 1, paragraph (1), letter (a) of the Directive 2001/23/EC, the provisions of the communitarian normative act "apply only in the case of any transfer of undertakings, businesses or parts of undertakings or businesses towards another employer, as a result of a conventional legal transfer or a merger".

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[4] Uluitu, *Drepturile salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora*, in Revista Romana de Dreptul Muncii nr. 1(2006),29. The author expressed this opinion in an analysis he wrote regarding a different point of view, contained by the doctrine, concerning the relevant provisions about the safeguarding of employees following the transfer of the undertakings in the former regulation prior to the Law 67/2006. Before, the regulation in the field was realised by the dispositions of Articles 169-170 of the Labour Code and the Government Ordinance 48/1997 regarding the establishment of social protection measures for employees in the event of transfer of the property right on shares or social parts of stock companies. The legal analysis is topical, although meanwhile there have been legislative modifications. The opinion we discussed stated that the juridical situations regulated by the Government Ordinance 48/1997 were different from those considered by the legal norms of the Labour Code, though both normative texts regard the employees' protection. (C.Galca-R*eorganizarea intreprinderilor. Analiza dispozitiilor noului Cod al muncii in raport cu legislatia europeana,* Editura Rosetti Bucuresti, 2005).

[5] I.T. Stefanescu, *Tratat teoretic si practice de drept al muncii*, (Bucharest: Universul Juridic Publishing House, 2012), 467.

Similarly to the Directive, the national law establishes that its provisions apply only in case of a transfer resulted from a legal transfer or a merger process, but, unlike the Directive, in a restrictive way compared to the transposed communitarian act (the above mentioned Directive), it defines in Article 4, letter (d) the notion of "transfer" as "the passage of undertakings, businesses or parts of these ones from the cedent's property to the legal transferor's property".

Such a limitation does not affect the employees' protection if the transfer takes place by a merger process. On the contrary, it can apply in case of an entity's legal transfer that doesn't result in a property transfer.

However, given that the underlying reasoning of the Directive is that the structural reorganisations by legal transfer, involving the employer's change, take place with the safeguarding of the employees' rights, and considering that such a structural modification happens in other juridical situations than those characterised by a property transfer, it is obvious that the Romanian law is contrary to the communitarian normative act.

On the other hand, the jurisprudence of the Court of Justice constantly showed in its decisions that the notion of "legal transfer" has a larger understanding than that of operation meant to ensure the transfer of an entity property right from one employer to another one. Thus, the Court stated that the communitarian directive applies not only when the owner of the enterprise remains the same, as it is the case of a rent contract, a legal transfer contract or a leasing contract. In one of the cases assigned to the Court, it was shown that "the Directive applies once the change of the physical or moral person responsible with the exploitation of the enterprise takes place, and which, under this consideration, assumes the obligations of the employer towards the employees working in the factory, whether the transfer of the enterprise ownership takes place or not[6].

It is true that these opinions of the Court of Justice were formulated with regard to the previous regulation in the matter (Directive 77/187/EEC), but the amendments contained in the Directive 2001/23/EEC do not change at all the given interpretation. Our conclusion is confirmed by the 8th consideration of the current regulation, according to which "Because of security reasons and legal transparency, it was necessary to clarify the notion of transfer, according to the jurisprudence of the Court of Justice. This clarification didn't change the application field of the Directive 77/187/EEC, as interpreted by the Court of Justice".

Thus, due to a deficient transposition activity, in full contradiction with the goal of the Directive and the jurisprudence in the matter of the Court of Justice, the Romanian legislator introduced an unacceptable limitation in the application field of the regulation[7]. The restrictive regulation of the transfer notion allows a limited protection to the employees in all the situations when, despite a transfer of undertakings, it doesn't result in a property transfer.

It is the role of the jurisprudence to provide a larger understanding of the notion of company transfer. The national courts, within their interpretation competency, are the ones responsible to apply the national law according to the text and the finality of the directive.

De lege lata, finding a solution to cases regarding juridical issues related to the application of the Law 67/2006 can be based on the principle of primacy of the European Law on the member states' national law, and on the principle of precise interpretation. Therefore, given the inconsistency of the Romanian law with the communitarian Directive, national instances are obliged to give priority to the latter and to leave the national law unenforceable. Additionally, according to the principle of precise interpretation, they "must do everything related to their competence, while taking into consideration the entire national legislation and applying interpretation methods it knows, in

[6] The *Allen* Decision from the 2nd of December, point nº 8 among the considerations, case C-234/98.

[7] For a more detailed analysis of the regulation regarding the employees' safeguarding according to the Law 67/2006, read O. Tinca, *Observatii critice la Legea nr. 67/2006 privind protectia drepturilor salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti ale acestora*, in Dreptul nr. 2(2007), 22-27.

order to guarantee the full effectiveness of the concerned directive and to reach to a solution in accordance with the final objective pursued by this one[8].

De lege ferenda, we propose the express abrogation of the provision of Article 4 of the Law 67/2006 stating that „the passage from the cedent's property in the legal transferor's property of undertakings, businesses or parts of these ones"

Of course, there is also the alternative of the quoted text reformulation, meaning that the enumeration of the juridical act or the juridical effects resulting from the transfer should be an illustrative, and not an exhaustive one.

We consider that such a regulation solution is useless and rather formal with regards to the inclusive notion of transfer, as it is provided by the Directive 2001/23/EC. Given the diversity of the juridical acts by means of which the transfer can be realised, and, implicitly, of the juridical effects it can generate, any terminological clarification can lead to a restriction of the application field of the norms concerning the employees. Moreover, the abrogation solution is consistent with the European principle of loyal cooperation.

b) If according to the Directive 2001/23/EEC, it can be considered as transfer of undertakings, businesses or parts of these one, the transfer of "an entity that preserves its identity, understood as organized assembly of means, whose objective is to undertake an economic activity, irrespective if that activity is central or auxiliary" (Article 1, letter (b)), the transposition of the communitarian disposition into the Law 67/2006 provides that the transfer's "aim is the continuation of the main or the secondary activity, regardless of whether it follows or not obtaining a profit" (Article 4, letter e).

The juridical literature expressed the opinion according to which the wording of the Romanian law is also more restrictive compared to that of the communitarian normative act. By defining the transfer, the national law provides that the cessionary's goal has to be that of developing the cedent's main or secondary activity, contrary to the directive which provides that the cessionary's objective has to be the undertaking of an economic activity, regardless if it continues the cedent's previous activity or not.

The faulty transposition of the directive is obvious, given that its dispositions didn't mention as an application condition the maintenance or the remission of the cedent's activity. *De lege ferenda*, the modification of the Article 4, letter (e), in terms of eliminating the condition of the development of the activity contained by the transfer notion, is required.

In our opinion, the interpretation possibility that the formulation of the legal text allows can lead to solutions contrary to the rationale of the regulation. More precisely, from the *per a contrario* interpretation of the transfer definition provided by national law, it appears that the provisions of the Law 67/2006 regarding the employees' protection don't apply if the legal transferor's activity is different, but similar to that of the cedent. The absence of the goal for a main or secondary activity to continue within a transfer realised by legal transfer or merger excludes the operation in question from the application field of the Romanian law. Therefore, the accomplishment of the transfer without any obligation on the cedent or the cessionary regarding the employees is perfectly legal, so it won't lead to any penalty. In other words, the text we analysed allows both the cedent and the cessionary to take unfavourable decisions towards the employees and to avoid therefore the rights protection norms that concern them.

On the other hand, from the legal transferor's perspective, that, by hypothesis, wants to follow exactly the law 67/2006, being part of a transfer procedure implicitly means taking upon itself the obligation of preserving the cedent's activity. Or, certainly, this solution isn't consistent with the communitarian legislator's rationale either.

[8] The *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) Decision from the 4th of July 2006, case C-212/04.

c) The Romanian legislator excluded from the application field of the Law 67/2006 those cases in which the cedent is the subject of a juridical reorganization process or bankruptcy, without any derogation. According to the Romanian law, in such situations, the entire transfer of the cedent's rights and obligations resulting from the individual labour contract and the collective labour agreement at the moment of the transfer aren't applicable. The fact that the cedent's insolvency procedures are or not established in order to liquidate its goods is unimportant for the solution chosen by the Romanian legislator.

From a purely technical point of view, this transposition method is in accordance with the provisions of Article 5 of the Directive, which gives the Member States the freedom to establish by internal dispositions, the juridical regime applicable to those situations when the cedent is the object of a bankruptcy procedure or other similar insolvency processes.

On the other hand, we consider that the transposition is criticisable because paragraph (2) of Article 5 of the Law 67/2006 is not correlated with Article 238 (4) of the Law 31/1990, according to which "The merger or the division, as defined in paragraphs (1) or (2), can be made although dissolved companies are in liquidation, provided that they hadn't started the liquidation process".

Thus, although the Romanian legislator considers as acceptable a transfer by merger if the cedent stock company knows a liquidation process, the same legislator doesn't appreciate as necessary to establish a safeguarding procedure for the employees of that company in terms of obliging the participating parts to the transfer to inform and consult the employees, on the one hand, and of forcing the legal transferor to preserve the employees' rights, on the other hand.

However, the meaning of the directive transposition is precisely that of giving the Member States the possibility to answer to the object of the communitarian normative act, taking into consideration at the same time the particularities of the legal national system regarding the regulated matter. We tend to believe, nevertheless, that this lack of systematization of the Romanian legislator is due to the lacking harmonization experience at that moment, and to the fear of being wrong. We affirm this as from the entire regulation one can observe that the national law avoids to establish any rule for the atypical hypotheses, preferring to keep quiet or to offer a blurry interpretation in such cases.

De lege ferenda, the Romanian legislator has to correct the inconsistency between the two normative acts, so that their law subjects can benefit from a clear and coherent juridical framework.

d) With regards to the juridical responsibility, the Law 67/2006 states that the inobservance by the cedent or the cessionary of the obligations provided by the law represents a contravention and is sanctioned with a fine between 1,500 (RON) and 3,000 (RON).

The competency for the contraventions establishment and the fines impositions belongs to the labour inspectors. We are in presence of a single article that regulates a sanction for the breaking of a law.

It is true that the provisions of the directive regarding the sanctions are, in what they are concerned, generally expressed, the reason why we cannot talk about its improper application.

In the literature the opinion was expressed according to which the text writing requires a high degree of generalisation, which is inadequate for the sanction of some contraventions. On the other hand, we believe that the European legislator's intention was to allow the Member States the possibility of choosing the most suitable sanctions.

It is our belief that beyond the possible justifications concerning the incomplete character of the legislative text, the little quantum of the fine raises big questions with regards to the efficiency of such a sanction. *De lege ferenda,* we consider as necessary a clear description of the circumstances under which sanctions are applicable, a differentiation of the sanctions according to the importance of the contravention and a rise of the fine quantum.

3. Aspects with regards to which the Law 67/2006 is extensive compared to the Directive 2001/23/EC.

In the juridical literature it was considered that "the legislator didn't want to offer additional rights to the employees"[9]. Unlike this viewpoint, we identified some aspects with regards to which the Law 67/2006 offers an additional protection to the employees compared to the Directive 2001/23/EC:

a) The Romanian law does not provide any limitation to the employees' information and consulting obligation that the Directive provides. Under this aspect, the Romanian legislator understood to offer equal protection to all the employees concerned by the transfer.

Article 7, paragraph (5) of the Directive regulates the capacity of the Member States to limit the information and consulting obligations by the enterprises and units that, depending on the number of employees, fulfil the necessary conditions for the election or the establishment of a collegial body that would represent the employees.

Despite the possibility offered by the Directive, but also considering that, according to the Labour Code, in the units with more than 20 employees, workers' representatives can be designated, the Law 67/2006 doesn't introduce any difference regarding the content of the information and consulting obligations, depending on the number of employees. Thus, the information and consulting obligations have to be accomplished without any exception, both in the enterprises with less than 20 employees, and in those with more than 20 employees, and which fulfill therefore, from the point of view of the number of workers, the necessary conditions for the election or the establishment of a representative body.

Moreover, unlike the Directive, which established that in case there is no employees representative, due to causes independent from their will, the information process will be directly addressed to them, the Romanian law regulating the obligation to inform the employees, without making any distinction between the situation when the absence of a representative body is due to independent or dependent reasons from their will. Consequently, including the situations when the lack of a representative body can be attributed to the employees' choice, they have the right to be informed about the transfer process.

According to our national law, the employees' representatives are the representatives of the syndicates or, if there are no syndicates, the people chosen and delegated to represent the workers according to the law (Article 4, letter e) of the Law 67/2006). If the undertakings, the business or parts of these lose their autonomy following a transfer, the transferred employees will be represented, with their expressed agreement, by the representatives from the legal transferor's enterprise, until the establishment or the nomination of new representatives, according to the law (Article 10, paragraph 2 of the Law 67/2006).

b) The Romanian law provides a special term during which the obligation to inform and consult the employees' has to be accomplished by the cedent, respectively by the legal transferor, eliminating therefore the failures possibly generated by the expression "in due time", that the directive contains.

According to the provisions of Article 12 (1), informing the representatives of, or the employees themselves, by the cessionary or the legal transferor has to be performed at least 30 days before the transfer. Beside this certain term, the Romanian legislator expressly demands for a written form of the information to exist. Concerning the content of the information, apart the transfer date, or the date suggested for the transfer, the reasons of the transfer, the juridical, economic and social

[9] A.Uluitu, *Drepturile salariatilor in cazul transferului intreprinderii, al unitatii sau al unei parti al acestora*, in Revista Romana de Dreptul Muncii nr. 1(2006), 35.

consequences of the transfer for the employees, the envisioned measures concerning the employees as provided by the directive, the Law 67/2006 requires that the written form should also contain information regarding work conditions and work qualification.

Finally, according to Article 11 of the Law 67/2006, the same 30-day minimum term has to be respected also with regards to the obligation to consult with the employees' representatives, with the goal of reaching an agreement, whenever the cedent or the legal transferor envisages taking measures with regards to their own employees. In the juridical literature it was shown that the obligation of reaching an agreement is an obligation of means, and not an obligation of result, therefore this will be considered as accomplished irrespective of the conclusion of an agreement between the cedent, respectively the legal transferor, and the employees, agreement whose object should the envisaged measures[10].

c) The Law 67/2006 contains some provisions more favourable to the collective labour contract compared to the Directive.

Just like the directive, national norms regulate the legal transferor's obligation to respect the rights given to the employees through the collective labour contract existing in the moment when the transfer takes place and in force until its call-off or expiration, respectively the application of a new convention as a result of a new negotiation of the contract; a new contract cannot enter into force before a minimum of one year after the transfer, even if the contracting parts agree to renegotiate before the expiration of the one-year term.

In the juridical literature, there is an opinion according to which, as an exception to Article 133, paragraph 2 of the law 62/2011, according to which in every unit only one collective labour contract is to exist, in situations when both the cedent and the legal transferor apply a collective labour contract, " in the same unit will temporarily coexist two collective labour contracts (until the annual renegotiation of one of them)"[11].

Additionally to the directive, the Romanian law establishes rules in the matter in case the transferred entity doesn't preserve its autonomy. Therefore, according to Article 9, paragraph 3, if, as a result of the transfer, the undertakings, the business, the unit or parts of these ones don't keep their autonomy, and the collective labour agreement applicable to the legal transferor's level is more favourable, the transferred employees will benefit from the collective labour agreement that is more favourable to them.

4. Conclusions

The study of the transposition into national law of the communitarian norms regarding the employees' protection in the event of transfers of undertakings, businesses or parts of these ones revealed important disparities between the two normative acts. From this point of view, we consider the opinion expressed in the juridical literature according to which "the Law 67/2006 represents a proof of progress in the field, by catching up with the most important provisions of the Directive 23/2001/EC and having only one default, which is however an important one, that of including within its application sphere only the situations concerning the property transfer"[12], as being wrong

Unlike other harmonization normative acts, Law 67/2006 is rather an unsuccessful experience. If, commonly and naturally, national transposition laws are more practical and more detailed compared to Directives, in this case the contrary is true. For a better understanding of the national law, the prior study of the Directive is necessary; this most certainly is not the way to go for the beneficiary of the law. The Romanian legislator lost sight of the fact that Directives addresses

[10] I.T. Stefanescu, *ibidem,* p 473.

[11] I.T. Stefanescu, *ibidem,* p. 472.

[12] P. A. Levente*, Protecția angajatilor in cazurile de schimbari intervenite in persoana angajatorilor în UE si in Romania*, in Studia Universitatis Babes-Bolyai nr.1(2007) 10.

Member States, and that every Member State has the obligation to transpose it correctly, clearly in the interest of those benefiting from it. Furthermore, given that a directive's provisions can be invoked directly only in a limited number of situations and conditions, the transposition activity has to be characterized by rigor, and national norms have to be self-assured and efficient.

In our opinion, *de lege lata*, the criticised aspects can lead in practice to inequitable solutions, starting with the narrowing, for various reasons, of the application field of the dispositions contained in the Law 67/2006, up to an inefficient sanctioning when breaking its provisions. As we have shown in our *de lege ferenda* proposals, a future revision of the legislative text requires modifications, as to the purpose of the transposed Directive to be reached no matter the interpretation.

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