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Publisher:<!--BEGIN-OF-PUBLISHER-->Incisive Media<!--END-OF-PUBLISHER--><!--END-OF-FILE-LIST--></div><p> </p><p> During the past few years, prior to Romania’s accession to the European Union this year, employment law in Romania has experienced substantial changes.

Many relevant European laws were implemented in the country, including Council 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 thereof.

Currently, the Romanian legal framework regulating the protection of employees’ rights in the event of a transfer of business is provided by the labour code and law 67/2006.

A transfer of undertaking is defined by the relevant legislation as a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing a central or ancillary economic activity.

The European Court of Law stated within several judgments that “the aim of Directive 2001/23/EC is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of the Directive 2001/23/EC is, therefore, whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed… the term ‘entity’ thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.”

According to European case law, in order to determine whether the conditions for the transfer are met, it is necessary to consider all the facts in question, such as:

- the type of undertaking or business concerned;

- whether or not its tangible assets are transferred;

- the value of its intangible assets at the time of the transfer;

- whether or not the majority of its employees are taken over by the new employer;

- whether or not its customers are transferred; and

- the degree of similarity between the activities carried on before and after the transfer.

Moreover, the Court stated that article 1 of Directive 2001/23/EC must be interpreted as meaning that the transfer of the assets is not the essential criterion.

Some European member states decreed through their national legislation that the provisions regarding this issue shall also apply to situations in which some activities cease to be carried out by a company on its own behalf and are carried out instead by another company on the first one’s behalf, based on contractual relationship.

As to the question of whether the share transfer does or does not entail a transfer of undertaking, the European courts did not come to a unitary practice and have ruled differently on the matter. Generally, we have noticed that the courts are reluctant to retain that the provisions regarding the transfer of undertaking apply in transactions involving only transfers of shares.

Pursuant to the provisions of law 67/2006, both the transferor and the transferee employer have to inform the employees’ representatives, as regards the consequences deriving from the transfer. Also, they must consult the employees for the purpose of reaching an agreement, as a condition precedent to the transfer of undertaking.

The obligation to consult the employees’ representatives should not be interpreted as establishing the obligation for obtaining the employees’ agreement with respect to the measures to be undertaken in relation to the transfer, although the consultation procedures have to be followed for the purpose of reaching such an agreement.

It is to be mentioned though that law 67/2006 does not provide any details on what kind of measures are to be subject to the consultation procedures.

Given that Romanian law does not establish a particular procedure in order to implement the transfer of undertaking, one of the logical possibilities would be for the employees to terminate their initial employment with the transferor and to be employed by the transferee in the same job position.

Pursuant to the relevant legal provisions, the transferred employees cannot be granted rights that are inferior to those they had under the individual employment agreement or the collective bargaining agreement.

The transferee employer will not be allowed to modify the collective bargaining agreement applicable to the transferred employees until the expiry of a 12-month term from the date of transfer.

The transferred employees may not be dismissed for reasons due to or in relation to the transfer of undertaking.

</p> <p> Andreea Ionescu is a partner and head of employment at
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