Transfers of Undertaking: Employees Rights

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Over the past few years prior to Romania's accession to the EU, the legal environment regarding employment experienced substantial changes. Efforts were made to finalize the transition from the legal framework inherited from the communist regime to a modern system matching the rules and principles applicable in EU member states, including employees' rights in the event of a transfer of undertaking.

Legal Background

Prior to and as part of the conditions for EU accession many relevant European enactments were implemented in Romania, including the Council Directive no. 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 ("Directive 2001/23/EC").

Directive 2001/23/EC was transposed into the Romanian legislation by Law no. 67/2006 on the protection of employees' rights in the event of a transfer of business, unit or parts thereof ("Law no. 67/2006"). Law no 67/2006 came into force on Romania's EU accession date, January 1, 2007.

Several legal provisions addressing the protection of employees' rights in the event of transfers of undertakings existed even before Romania's accession to the EU. For example, Government Ordinance no. 48/1997, repealed by Law no. 67/2006, provided for certain social protection measures for employees when the ownership rights over the shares of the company were transferred. However, as discussed below, there is some doubt about the qualification of a transfer of shares as a transfer of undertaking.

The Labor Code also provides protection when a "transfer of a company, unit or parts thereof (…) to another employer, under the law" occurs.

Currently the Romanian legal framework regulating the protection of employees' rights in the event of a transfer of business, unit, or part thereof is comprised by the Labor Code and Law no. 67/2006, which transposes the provisions of Directive 2001/23/EC.

The Concept of Transfer of Undertaking

According to Law no. 67/2006, a transfer of undertaking occurs if ownership over a business or part of a business is transferred from the transferor company to the transferee company with the objective of keeping such undertaking in operation after the transfer. The Labor Code also refers to a transfer between companies of assets and activities, and of employees who carry out work related to such assets and activities.

Given this, Law no.67/2006 and the Labor Code may be understood as referring exclusively to the transfer of assets, of corresponding activities, and of employees who do work related such assets and activities.

Notwithstanding this definition under Romanian law, pursuant to the Article 1 of the Directive 2001/23/EC, a transfer of undertaking or business represents a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether the activity is central or ancillary.

The European Court of Justice (the "Court") has stated in several judgments (see, eg, Nurten Güney-Görres (C-232/04) and Gul Demir (C-233/04) v Securicor Aviation (Germany) Ltd and Kötter Aviation Security GmbH & Co. KG, 15 December 2005) 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."

Therefore, according to the European case law, in order to determine whether the conditions for the transfer of an organised economic entity are met, it is necessary to consider all the facts in question. This includes in particular the type of undertaking or business concerned, whether its tangible assets (buildings and movable property) are transferred, the value of its intangible assets at the time of the transfer, whether the majority of its employees are taken over by the new employer, whether 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 the Directive 2001/23/EC must be interpreted as meaning that, in examining whether there is a transfer of an undertaking or business within the meaning of that article, the transfer of assets is not the essential criterion.

Based on the Court's judgments and the provisions of Article 1 of the Directive 2001/23/EC, other European member states (eg, the United Kingdom, by "The transfer of undertakings [Protection of Employment]" Regulation 2006) included within their national legislation that the provisions regarding the safeguarding of employees' rights in the event of transfers of undertakings shall apply also to situations regarding a "service provision change." A "service provision change" is where 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 a contract.

In the event of a conflict between the local and the European law, the European legislation prevails. Moreover, the Court's interpretation of the European enactments is deemed mandatory.

Further, Law no. 67/2006, in compliance with the European enactments, regulates the transferor and the transferee as legal entities that acquire the status of employer of the employees of the undertaking subject to the transfer. From this perspective, one could construe that the assignor and the assignee of shares of an undertaking do not qualify as transferor and transferee in the sense of Law no. 67/2006 and, therefore, that a share transfer does not entail a transfer of undertaking. This is because in the event of a share transfer, there is a change of control over the employer but the employer remains the same legal entity.

On the other hand, according to our knowledge of the European practice, while the argument has been raised in various cases that a share transfer does not entail a transfer of undertaking in the sense of Directive 2001/23/EC, the courts have not yet reached a unitary practice on the matter.

The courts are reluctant to hold that a transfer of undertaking – and, consequently, the provisions for protection of employees – occurs in transactions involving only transfers of shares.

Implementation: Steps Prior to the Transfer of Undertaking

Pursuant to the provisions of the Labor Code, the transferor employer will be under the obligation to inform and consult the trade unions as regards the legal, economic, and social consequences to the employees resulting from the transfer. This obligation to inform the trade unions is stated under general terms, no specific procedure being provided by the Labor Code (for as long as no collective dismissal is implemented.)

Unlike the Labor Code, Law no. 67/2006 comprises detailed regulations with respect to the term and content of the notice to be sent to the trade unions. Article 11 of Law no. 67/2006 provides that "in case the transferor or the transferee envisages measures on its own employees it will consult the employees' representatives with a view to reaching an agreement at least 30 days prior to the transfer date."

Article 12 of Law no. 67/2006 establishes an additional obligation of "the transferor and the transferee to inform in writing the representative of its own employees," at least 30 days prior to the transfer, with respect to (i) the (proposed) transfer date; (ii) the reasons for transfer;

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dilution as it is hardly conceivable that Prigat ads are indeed susceptible of reducing those famous marks' capacity to identify their goods.

The Romanian Approach

In Romania, the approach would be to file an action against trademark infringement (i.e. counterfeiting) under law no. 84/1998 (Trademark Law).

An action against unfair competition would not be possible in this specific case due to the fact that Prigat, a soft drinks producer, is not competing with either Puma or Lacoste.

In Romania the concept of dilution is practically nonexistent and the harmed trademark owner is limited exclusively to trademark infringement actions.

However, the trademark infringement concept in Romania embodies both scenarios when:

- the alleged infringer uses an identical/similar mark for identical/similar products, thus creating confusion among consumers as to the source or sponsorship of the products, and

- there is use in the course of trade (without the owner's consent) of any sign which is identical with or similar to a mark in relation to goods or services, which are not similar to those for which the mark is registered, where the latter has a reputation in Romania and where use of that sign without due cause could take advantage of the distinctive character or reputation of the mark, or where such use would cause prejudice to the owner of the mark.

The legal steps against trademark infringement are essentially the same as for dilution: the owner of a famous trademark may seek redress in court by filing an action against counterfeiting, asking the court to preclude any future use. The owner may also obtain a temporary injunction until a final decision is reached by the court, and it may obtain damages for any injury suffered as a result of the wrongful "diluting" act.

What differs substantially is the kind of action triggering different requirements for a successful case. The action against counterfeiting is mostly a civil action for tort (under the Trademark Law, the acts of trademark counterfeit may also trigger criminal liability), which is admissible only if the following conditions are met: (i) an illegal act, (ii) an injury, (iii) a link between the illegal act and the injury.

The illegal act in this case would obviously be the commercial use of a sign similar to a famous mark without the owner's consent for the purpose of taking advantage of the distinctiveness and reputation of that mark, causing an injury to the economic value of the trademarks in the marketplace.

The burden of proof with respect to the legitimate use of the trademark is on the alleged infringer. The injury may be either a reduction in sales or a harm resulting from the trademark's reputation being affected.

In Romania, the court would normally not require for establishing an actionable dilution that the use of a junior mark necessarily reduces the capacity of a previous famous trademark to identify the goods of its owner.

As the Trademark Law provides, a potential undue advantage resulting from the use of a famous and distinctive trademark would typically meet the requirements for the above purpose, regardless of whether the power of the famous trademark to identify its products is actually diminished. Moreover, there is no explicit parody exemption in Romania and, although freedom of expression is a right acknowledged by the Romanian Constitution, the courts have very rarely and inconclusively dealt with the applicability of such right within the context of trademark infringements.

However, the Trademark Law prohibits diluting attempts only when intended for commercial purposes, as the law unambiguously requires that the undue advantage or the injury to business reputation be caused in the course of trade.

It follows from the above that, unlike in the U.S. where Lacoste and Puma would need to show that the mental association between Prigat and the two famous trademarks are actually lessening the capacity of the trademarks to identify and distinguish their products, in Romania, Prigat has hardly any defense due to the more flexible test laid down by the Trademark Law for finding a trademark infringement. ■

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(iii) the legal, economical and social consequences of the transfer on the employees; (iv) "the measures" to be taken with respect to the employees; and (v) work conditions at the new place of work.

The law does not explain what kind of "measures" it refers to or whether such measures include dismissal of personnel.

Moreover, it is not clear if the obligation to "consult the employees' representatives for the purpose of reaching an agreement" compels the transferor employer and the transferee employer to reach an agreement with the employees' representatives as a condition precedent to the transfer of undertaking, or if such obligation is limited to mere consultation.

Pursuant to the provisions of Articles 11 and 12 of Law no. 67/2006, it appears that the same 30-day term is applicable for both procedures of consulting the employees' representatives and informing the employees with respect to the envisaged measures. This overlap does not seem to have any sense as the transferor employer and the transferee employer would have to consult first the employees' representatives on the measures to be undertaken and then inform the latter once again on the same measures.

It is recommendable that, prior to the implementation of the transfer of undertaking, both the transferor employer and the transferee employer take the following steps in order to avoid further contestations by the trade unions:

- consult the trade unions earlier than the 30 day term with respect to any envisaged measures;
- inform the trade unions in accordance with the provisions of Article 12 of Law no. 67/2006 within the term provided thereof (30 days) about the measures to be undertaken in relation to the transfer.

The obligation to consult the employees' representatives stated in Article 11 of Law no. 67/2006 should not be interpreted as establishing the obligation to obtain 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.

As mentioned above, Law no. 67/2006 does not provide any details on what kind of measures are to be subject to the consultation/notification procedures.

Implementation: Procedure

There are two alternatives with respect to employees in implementing the transfer of undertaking:

- The employees terminate their initial employment with the transferor employer and are employed with the transferee employer in the same job position;
- The employees terminate their initial employment with the transferor employer and are employed with the transferee employer in a different job position.

The employees can be transferred to the transferee employer only based on their express consent.

In such case, irrespective of whether the job position is maintained or modified, the individual employment agreements between the transferor employer and the employees are subject to termination by mutual consent, in accordance with the provisions of Article 55(b) of the Labor Code. Termination forms are to be submitted to the Territorial Labor Inspectorate. At the same time, new individual employment agreements will be executed between the transferred employees and the transferee employer, subject to the same registration formalities.

Restrictions

Both the Labor Code and Law no. 67/2006 establish a protection regime applicable to the employees transferred to the transferee employer. The transferee employer is bound to observe the rights of the employees under the initial individual employment agreement and under the collective bargaining agreement applicable to the transferor employer. Consequently, the transferred employees cannot be granted rights that are inferior to those they had under the collective bargaining agreement with the transferor employer.

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

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