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Employing the former employees of a former service provider represents transfer of undertakings (RO)

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Summary

The Bucharest Court of Appeal has ruled that the employment of the former employees of a previous service provider by the current service provider contracted by a legal entity and the performance of the same activity by the same employees in the same work locations constitutes a transfer of undertaking.
Relying on the findings of ECJ cases C-13/95 (*Süzen – v – Zehnacker*) and C-60/17 (*Somoza Hermo*), the Bucharest Court of Appeal analysed the conditions for the existence of a transfer of undertakings exhaustively. The Court also analysed the principle of the primacy of EU law and the obligation of interpretation in conformity with the relevant directive and the obligation to refrain from applying national legislation contrary to a framework decision as analysed by the ECJ in cases C-106/89 (*Marleasing*) and C-12/08 (*Mono Car Styling*).

Legal background

Council Directive 2001/23/EC of 12 March 2001 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 (the 'Directive') has been transposed into Romanian law by Law no. 53/2003 – Labour Code, and Law no. 67/2006 on the protection of employees' rights in the case of a transfer of undertakings, business or parts thereof ('Transfer of Undertakings Law').
According to national provisions, a 'transfer' should be understood as the transfer of ownership of an enterprise, unit or part thereof, from the transferor to the transferee, with the aim of continuing the main or secondary activity, whether or not it seeks to make a profit.
Further, the rights and obligations of the transferor arising out of individual employment agreements and the applicable collective labour agreement existing at the transfer date fully transfer to the transferee at the date of the transfer.

Facts

Mrs. A was employed in 2016 by Company 1 as a security agent and performed her work at one of the locations of a bank which contracted security services from Company 1 (location V). Following a tendering procedure, the bank selected a new security service provider (Company 2) and concluded an agreement on 14 May 2018.
Following the termination of the security service agreement with the bank, Company 1 performed a restructuring procedure and terminated the employment relation with Mrs. A.
At the same time, Company 2 was hiring security agents for the performance of their agreement with the bank. After she had applied for a job there, Mrs. A was subsequently hired by Company 2. She was instructed to perform work at the same location (location V) as she had previously worked.
On 25 May 2018, Mrs. A entered into a new open-ended employment agreement with Company 2 with a probation period of 90 days. At the end of the probation period, Mrs. A was dismissed as of 25 August 2020.
Mrs. A started proceedings against Company 2 before the Bucharest Tribunal to have her dismissal annulled and be reinstated in her former position. By a judgment of 29 March 2019, the Bucharest Tribunal rejected her claims and declared the notification valid as it had been issued following observance of the legal provisions. Mrs. A then appealed to the Bucharest Court of Appeal.
Company 2 argued that on the date when it took over the bank's locations and provided security services, it had not merged or taken over other security companies that already had a contract with the bank. Instead, after winning the tendering procedure, it had entered into employment agreements with over 90 people who were

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employees of various security companies with which the bank had terminated the contractual relations (as in the case of Company 1). Company 2 further argued that no transfer of employees had taken place in the given context because new employment contracts were concluded with the respective persons.

Judgment

The Court of Appeal ascertained that the concept of 'transfer' within the meaning of the Directive refers to cases where an economic entity, respectively an organized group of persons and assets that facilitates the pursuit of an economic activity, retains its identity as a result of the transaction in question. In those circumstances, the mere loss of a service contract for another competitor cannot, in itself, indicate the existence of such a transfer.

On the other hand, it is possible that in certain sectors which rely mainly on a workforce a group of workers organized in a stable manner may, taking into account the number and skills of the workers in that group, constitute an economic entity liable to be transferred.

Neither the fact that such transfer relates only to an ancillary activity of the transferor, nor the fact that it is not accompanied by a transfer of tangible assets, nor the number of employees concerned, will exclude such operation from the scope of the Directive, since the decisive criterion for determining whether there is a transfer within the meaning of that Directive is whether the undertaking concerned retains its identity, resulting, in particular, from the continuation or resumption of activity by the new employer of the same or similar activities.

Based on the above, the Court concluded than an economic entity consisting exclusively of a group of workers is able to maintain its identity after it has been transferred, when the new employer carries out activities similar to those carried out by the transferor prior to the transfer. Thus, although one of the criteria used to determine whether a business transfer takes place is that of the transfer of goods between the companies participating in the transfer, the absence of that transaction cannot necessarily lead to the conclusion that a business transfer did not take place, especially in the situation where the development of the activity depends to a large extent on the labour force. Therefore, the economic entity may be represented by a group of employees performing a continuous economic activity.

The Court established that three of the five employees who had been working at location V, and were fired by Company 1, had uninterruptedly continued to work at the same location in their capacity as employees of Company 2.

Further, the Court of Appeal concluded that a transfer of undertakings can take place in the absence of a contractual link between the transferor and the transferee if the following premises are met:

- there is a high degree of similarity between the activities performed before and after the transfer;
- there is a transfer of customers from the transferor to the transferee;
- the activities are carried out, both before and after the transfer, in a stable manner;
- the group of transferred workers is an economic entity that maintains its identity; and
- the transferee took over most of the workers performing the activity in favour of the transferor.

In the given situation, Company 2 took over most of the staff placed at location V. Therefore, a continuity in the activity carried out by security agencies after the change of the service provider existed. Moreover, security agents represented an economic entity that maintained its identity as the activities performed before and after the transfer remained the same and were carried out, both before and after the transfer, in a stable manner.

Following such conclusion, the notification was annulled and the employee reinstated in their former position within Company 2.

The Court also made reference to the additional limitations regulated by the Transfer of Undertakings Law which condition the existence of the transfer of undertaking by the transfer of ownership from the transferor to the transferee and considered such provision to restrict the scope of the law in relation to that of the Directive which it has transposed.

In the case at hand, the Court appreciated that the condition of the transfer of ownership or the contractual link between the transferor and the transferee does not constitute a *sine qua non* condition for the transfer of an undertaking within the meaning of Directive 2001/23/EC and, although provided for by national law, it cannot have adverse effects by restricting the scope of the Directive. In these considerations, the Court referred to ECJ cases C-106/89 (*Marleasing*) and C-12/08 (*Mono Car Styling*) which state that the obligation of conforming interpretation mandates national courts to take national law into account in its entirety to assess the extent to which it may be applied so as not to lead to a result contrary to the Directive.

Commentary

This case on the Transfer of Undertakings Law represents a classic example of improper transposition by the Romanian authorities and it is not the sole inconsistency identified.

Another non-conformity of the national provisions is that the rules governing the transfer of undertakings cannot apply in the situation in which the transferor is subject to insolvency or a reorganisation procedure. Given that a reorganisation procedure will not automatically and securely lead to bankruptcy, the mere fact that this operation may also aim at maximizing creditors' satisfaction cannot turn it into an open procedure for the

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liquidation of the transferor's assets, therefore the reorganisation procedure as regulated by the Romanian legislation cannot be assimilated with a bankruptcy or other similar insolvency proceedings. Such conclusions were confirmed by the ECJ in cases C-509/17 (*Plessers*) and C-362/89 (*D'Urso*).
It remains unanswered why, at the time of Romania's accession to the European Union, when the Romanian legislator with the help of European institutions had the obligation to align national legislation with European law, it did not properly transpose the Directive and the corresponding case law.
In this respect, our firm has identified several issues regarding the improper transposition of the Directive by the Romanian legislator and have made public comments and recommendations *de lege ferenda* in this respect, in order to fully respect the rights of employees and to avoid the initiation of a possible procedure to amend it by the institutions of the European Union. As of 2006 the Transfer of Undertakings Law was subject to only one amendment in relation to the transfer of shipping personnel, with no other legislative projects being proposed/initiated in this respect.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Vera Habe, Zeiler Floyd Zadkovich): Austrian courts would have applied similar criteria to assess whether a transfer of undertaking had taken place. Under Austrian law a transfer of undertaking requires the transfer of an 'economic entity'. The term 'economic entity', however, is not defined by law. According to Austrian case law such qualification has to be done on the overall facts of the individual case. Criteria can be in particular the transfer of personnel, equipment or customers. A direct contractual relationship between the transferor and the transferee, however, is not necessarily required according to Austrian case law.
Thus, in line with Austrian case law in relation to other cases concerning a change of contractors (e.g. Austrian Supreme Court 9 ObA 154/05w) Austrian courts may have come to a similar conclusion as the Court of Appeal and would have qualified the situation as a transfer of undertaking.

Czech Republic (Anna Diblíková, FERRO Legal): A similar case had been heard before the Czech Supreme Court in 2017 with reasoning along the lines of the Romanian Court of Appeal.
Despite the rather general definition of the transfer of undertaking in the Czech labour code (see below) the Czech Supreme Court limited the occurrence of the transfer of undertaking by applying the following ECJ case law:

- C-340/01 (*Abler – v – Sodexho*) on the possibility of a transfer of undertakings taking place even in the absence of a contractual link between the transferor and the transferee (in this case the majority of assets were taken over); and
- C-463/09 (*CLECE SA*) on the transfer of an undertaking which is heavily reliant on workforce rather than movables and where the detrimental factor concerning the transfer is whether the transferee continues in the same or similar business activity but also whether it took over the majority of the transferor's former employees (considering their number and qualification).

Those criteria (among others deriving from the ECJ case law) will be newly explicitly stipulated in the definition of the transfer of undertaking in the Czech labour code from 1 January 2021 replacing the previous very broad wording which simply required only the transfer of the activity (or its part) to happen without the additional criteria to consider (see above).
Though this change was prompted by improper transposition of the EU Directive on the transfer of undertakings (again similar to Romania), some are of the opinion that now the law goes one step too far. It does not stipulate the criteria as items to be considered specifically for each individual case, it strictly requires all the criteria to take place to enable the transfer of undertaking.
We will see how this will impact the Czech Supreme Court case law.

Denmark (Christian K. Clasen, Norrbom Vinding): The Romanian case report illustrates, among other things, that the decisive criterion when determining if a transfer within the meaning of Directive 2001/23/EC has taken place is whether or not the economic entity in question has retained its identity. Furthermore, the case illustrates the well-known obligation to interpret national law in conformity with EU law.
A recent judgment delivered by the Danish Western High Court concerned a situation comparable to the Romanian case. The question in the Danish case was whether or not the Danish Transfer of Undertakings Act, implementing Directive 2001/23/EC, applied to two municipalities' repatriation of home care services after a private sector service provider went bankrupt. Similar to the Romanian case, this case involved services based mainly on manpower.
With reference to ECJ case law, the High Court noted that all facts of the transfer must be taken into account when assessing whether or not a transfer within the meaning of Directive 2001/23/EC has taken place. In a case concerning home care services, a transfer may have taken place if the transferee has carried on the economic activity in question at the former employer and, in addition, has taken over a considerable part of the workforce which, based on numbers and skills, carried on the activity at the former employer.
The High Court took into account that the municipalities had hired less than 50% of the former employees of the private sector service provider, while they had hired a considerable number of employees who were not former employees of the private sector provider. The High

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Court also attached importance to the fact that the municipalities had not hired any managers or coordinators of the former employer. Taking into account the merits of the case, the High Court held that no business transfer had taken place.
Consequently, the Danish case – like the Romanian case – illustrates the assessment made by the national courts of whether or not a transfer within the meaning of Directive 2001/23/EC has taken place, including some of the facts that may be taken into account in this assessment.

Germany (Andre Schüttauf and Phyllis Schacht, Luther Rechtsanwaltsgesellschaft mbH): In Germany since 1972 the regulations on the transfer of undertakings are found in Section 613a of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'). With the former version of Section 613a BGB national law already complied in principle with Directive 2001/23/EC.
In the event that a company decides to withdraw a service from one company and transfer it to another, the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') stated as early as 1997 that no direct contractual relationship between the two service providers is required (ruling of 11 December 1997 – 8 AZR 729/96). The BAG thus agreed with the result of ECJ cases C-13/95 (*Süzen – v – Zehnacker*) and – practically in anticipation – C-60/17 (*Somoza Hermo*).
Whether the takeover/new employment of a certain number of employees represents a transfer of undertakings depends on the individual case. In the case mentioned above, the BAG considered a takeover of 60 out of 70 employees as a transfer of undertakings.

Greece (Effie Mitsopoulou, Effie Mitsopoulou Law Office): This case has many similarities to the Supreme Court of Greece case reported in EELC 2020/23.
The Supreme Court, using a similar reasoning to the Romanian Court of Appeal, underlined that in order to have a transfer of undertaking the transferred elements must have a certain identity maintained under the new legal entity, so that these are capable of realising the target aimed at by the previous entity. The assessment on the retention or not of the identity of an economic unity depends on the total evaluation of the circumstances of the specific case.
Substantial factors are of course the transfer of tangible or non-tangible assets, the employment of the personnel of the transferred business, the transfer of the customers, the identity of the activities exercised, and the eventual interruption of such activities.
The retention of the functional and organisational link between the business factors transferred is a '*conditio sine qua non*' for the retention of the autonomous identity of the transferred economic unity. The judicial control should focus and ascertain whether the business factors transferred retain such a link thus allowing the transferee to use these factors for the exercise of a specific economic activity.
It is interesting to note that in addition to the above requirements, the Romanian Court issued a requirement of continuity: "the same activities are carried out before and after the transfer *in a stable manner*".
I consider that the Greek courts would have reached the same decision as the Romanian Court.
Since the Romanian Court established that three of the five employees who had been working at location V and were fired by Company 1 had uninterruptedly continued to work at the same location in their capacity as employees of Company 2, it would be interesting to know whether Mrs. A had the right under Romanian law to sue company 1 jointly with company 2.

Hungary (Zsofia Olah and Greta Baksa, Orbán and Perlaki Attorneys at Law, OPL): The Hungarian courts would have come to the same conclusion as the Bucharest Court of Appeal, which decision is in line with the long-standing practice of the ECJ since its decision in case C-13/95 (*Süzen*).
In connection with this judgment, it is interesting to refer to a decision of the Hungarian Supreme Court from 2014 (EBH 2014.M.6.) which shows how employers may successfully avoid applying the transfer of undertakings rules for activities primarily based on manpower rather than on (tangible or intangible) assets.
The subject matter was whether outsourcing a labour-intensive activity constituted a transfer of undertakings or not. In the given case, the employer decided to outsource office administration activities carried out by three assistants to an external service provider. As a consequence of outsourcing these activities, the employer terminated the employment of the three assistants.
The new service provider did not employ any of the three employees, but hired new employees in order to be able to provide these administration services. The Supreme Court concluded a transfer of undertakings did not occur in the given case. It referred to the ECJ case C-463/09 (*CLECE SA*) and found that the identity of an economic entity, which is essentially based on manpower, cannot be retained if the majority of its employees are not taken on by the alleged transferee. As the ECJ found in the *CLECE SA* case:

> it is of no consequence, whether the majority of employees are taken on following a legal transfer negotiated between the transferor and the transferee, or whether it is the result of a unilateral decision made by the former employer to terminate the employment contracts of the transferred employees, followed by a unilateral decision made by the new employer to take on the majority of the same employees to carry out the same work.

Thus, the essence of this Hungarian case was that although the office administration activity outsourced remained unchanged after the outsourcing took place, the service provider did not take on any of the employees previously performing the activity, neither based on

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an agreement between the companies concerned, nor as a result of the service provider's unilateral decision.
Since in the referred Romanian case the new service provider reemployed the majority (more than 50%) of the former employees without any interruption and in the same location, the Romanian Court of Appeal's decision regarding the applicability of the transfer of undertakings rules can be regarded as 'straightforward'. There might be other cases, however, where the factual situation does not lead to an easy decision. If only two of the five employees would have been reemployed, or only the manager among the five employees, or if the three employees would have been employed at another location, would the economic entity have still maintained its identity?

United Kingdom (Richard Lister, Lewis Silkin LLP): Andreea and Teodora provide a rather scathing assessment of the failure of the Romanian legislative authorities properly to transpose the requirements of the EU Transfer of Undertakings Directive into national law. On the facts of this case, it seems clear that the definition of a transfer of undertaking under the Directive should be held to apply.
The case concerns a classic example of what in the UK would be treated as a 'service provision change' (SPC) under TUPE – the Transfer of Undertakings (Protection of Employment) Regulations. In contrast to Romania, the provisions in TUPE that apply it to SPCs significantly enhance the minimum requirements of the Directive – an example of 'gold-plating' UK legislation which goes further than EU law requires. The cessation of an activity by one service provider and its continuation by a new service provider may qualify as an SPC, and so be covered by TUPE, even if for some reason it does not constitute a transfer of an undertaking in terms of EU law.
It is interesting to speculate about what will happen to TUPE and other UK employment legislation that derives from EU law after the Brexit transition period ends on 31 December 2020. Much will depend on the terms of the future trade deal between the EU and the UK (if indeed a deal is concluded) and the extent to which it requires alignment of UK and EU employment rights and protections. Whatever the outcome of the negotiations, it is likely that in a post-Brexit world the UK will be released to some degree from its obligations to comply with the Transfer of Undertakings Directive and judgments of the European Court of Justice interpreting its provisions.
There are, however, good reasons for thinking TUPE will be allowed to continue in force in the short to medium term, including the SPC rules mentioned above. The UK government is likely to conclude that the benefits of continuity and certainty provided by the current legislative regime for transfers should be preserved, to avoid exacerbating the economic and commercial turbulence that UK business will already be experiencing after Brexit.

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