Chapter 1.

The Impact of Merger on Employees'Rights in European Law

1.1. Introduction

The regulation of the social implications of transfers of undertakings is a topic that has made its way in the European law with quite enough difficulty, but became in time an increasingly discussed topic.

Since the transfer of an undertaking from an employer to another could not be achieved with disregard of its human capital, the European legislator has established a legal framework ensuring the safeguarding of employees' rights in the event of transfers of undertakings.

Currently, the main legal basis in the field consists of 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 of undertakings or businesses – the Transfer Directive. [1]

The analysis of european regulations on the protection of employees' rights in the event of transfer of undertakings as a result of a merger, of the obligation to inform and consult employees in advance and the transfer of rights and obligations

[1] Published in OJ L 82, 22 March 2001.

arising from the contract of employment as a result of a merger highlight matters on which the current legal framework requires improvements so that the achieving of its objective be possible beyond interpretation and controversy.[2]

1.2. Legal Framework

In order to protect employees' rights which could be impacted in the context of restructuring of their employer, Article 12 of Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies and Article 11 of Directive 82/891/EEC of 17 December 1982 concerning the division of public limited liability companies provide the informing and consulting procedure of employees' representatives, in the event of domestic mergers and divisions, in accordance with Council Directive 77/187/EEC of 14 February 1977 on the approximation of laws of the Members States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

Council Directive 77/187/EEC of 14 February 1977 on the approximation of laws of the Members States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses[3] referred by the Merger Directive and the Division Directive, is the first european legislative act regulating the protection of employees in the event of change of employer.

[2] This subject on the impact of mergers on employees' rights in European Law was published with the title The European Law regarding the Impact of Merger on Employees'Rights in the Romanian Journal of European Affairs, Vol 13, No 2, 2013, p. 28 and the following.

[3] Published in OJ L 16, 20 January 1978.

In time, Directive 77/187/EEC, although supplemented by Directive 98/50/EC, proved to be insufficient compared to the subsequent development of the European legislation, of the legislation of Member States and of the case law of the Court of Justice of the European Communities, therefore a new regulation became necessary.

Thus, in the European legal framework, Directive 77/187/EEC has been replaced by 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 of undertakings or businesses (the Transfer Directive), which is the current legal base of the protection of employees' rights in the event of a transfer of undertakings, lato sensu.

1.3. The scope of the Transfer Directive: a critical look

According to the Article 1 of Directive 2001/23/EC, any transfer of an undertaking, business, or part of an undertaking or business to another employer falls under the European legislative act, irrespective of the public or private nature of the undertakings and whether or not they are operating for profit.

In the European legislation, the transfer of an undertaking means the transfer of a business, from one employer to another, as a result of a conventional assignment or a merger. The employer which transfers the undertaking has the capacity of transferor, whereas the one taking over the undertaking has the capacity of transferee.

From the content of Article 1(1)(b) of the Directive, it follows that the transferred undertaking represents an organised grouping of resources which retains its identity and

has the objective of pursuing an economic activity, whether or not the activity is central or ancillary. For the sake of clarity, the case law of the Court of Justice stated that an undertaking, business or a part of an undertaking or business should be understood as a stably organized grouping of people and elements, which allows the pursuing of an economic activity in order to achieve a specific objective and retains its identity after the completion of the transfer.[4]

Transfer of undertakings through mergers

The merger of companies as modality to implement the transfer within the meaning given by the Directive and its implications in terms of employee protection are of interest. In the event of a merger, the participating companies have the capacity of transferor[5], whereas the absorbing company and the newly created company, as the case may be, has the capacity of transferee.[6]

Given that the *ratione personae* scope of the merger is clearly provided by Directive 78/855/EEC concerning mergers

[4] The expression of "transfer" and the expression of "undertaking" have been the subject of numerous case law and doctrinaire interpretations. For a detailed analysis, please see - O. Tinca, "Critical observations on Law no. 67/2006 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses", The Law Journal no. 2/2007.

[5] According to the Article 2 (1) (a) of the Directive 2001/23/CE, "transferor" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business.

[6] According to the Article 2 (1) (b) of the Directive 2001/23/CE "transferee" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business.

of public limited liability companies, the concept of undertaking in the event of a transfer as a result of a merger does not raise interpretation issues. The entities participating to the merger, thus subject to the transfer, are companies established according to the national law of Member States, legal entities having their own organizing and patrimony and pursuing legal economic activities for gain.

As a particular aspect, it must be mentioned that in the european case law it was shown that all limited liability companies fall under the scope of the Directive, whether or not under the national law of Member States the shareholders are governed by public or private regulations. Thus, the Court of Justice ruled in one case that "a limited liability company governed by private law, whose sole shareholder is a social assistance association governed by public law, is among entities subject to Article 3(1) and the first sentence of Article 1(1)(c) of Directive 2001/23/EC [...]" [7] for which reason its provisions apply to a subsequent transfer under the Directive.

Transfer of undertakings through division

With regard to the scope, it can be observed that Directive 2001/23/EC does not expressly refer in its content to the division of companies. Are divisions excluded from the scope of the

[7] Case C-297/03, *Sozialhilfeverband Rohrbach v. Arbeiterkammer Oberösterreich and Österreichischer Gewerkschaftsbund*, http://eurlex.europa.eu .We mention that the first paragraph of Article 3 has the following content: "The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee [...]", whereas the first sentence of Article 1(1)(c) provides: "This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain".

Directive concerning the safeguarding of employees' rights?

In our opinion, although not expressly regulated by the Community legislative act, the division of companies falls under its scope. Our position is based on the following arguments:

a) From the systematic and teleological interpretation of Article 12 of the Merger Directive and of Article 11 of the Division Directive, which refer to Directive 77/187/ EEC (currently Directive 2001/23/EC) with regard to the information and consultation of employees, we come to the conclusion that the absence of division from its scope is only a flaw of the legislator. To argue otherwise is equivalent to denying the recitals for which the European legislator adopted provisions for protection of employees. In addition, our opinion relies on the rule of logical interpretation *actus interpretandus est potius ut valeat quam ut pereat.* In other words, the cited european regulations must be interpreted as to achieve their objective and not as to be inapplicable;

b) The argument by analogy *ubi eadem est ratio, eadem solutio esse debet* also supports the solutions argued by us in the event of divisions. The merger and division are ways of restructuring companies impacting on the contracts of employment and on employment relationships. Or, as the reasons for which the European legislator has regulated the protection of employees in the event of a merger are found also in the case of division we are of the opinion that the same should apply to this operation also; and

c) The special interest given at european level to employee protection and their working conditions is further proof in this regard.

Thus, the enactment of Directive 2001/23/EEC has had as starting point, among other things, the Community Charter of Fundamental Social Rights of Workers, which provides that the information, consultation and participation of employees must

be developed and implemented in time, especially in the event of restructuring or mergers that affect the employment of work.[8] However, the expression "restructuring" also includes division which is a symmetrical operation in relation to merger.

On the other hand, from its preamble it results that the objective of the directive is to protect employees in the event of restructuring the company where the activity is performed and of change of employer. Or, similarly to the merger, the division represents a restructuring involving for part of the divided company, a change of employer.

Transfer of undertakings through border mergers

Similarly to divisions, cross-border mergers are not expressly mentioned in the content of the legislative act. Do the provisions of Directive 2011/23/EC apply to cross- border mergers?

We believe that after the interpretation of recital 12 of Directive 2005/56/EC together with provisions of Article 14(4) of the same Directive and the *ubi lex non distinguit, nec nos distinguere debemus* rule of interpretation, the answer can only be affirmative.

Recital 12 cited above expressly refers to the provisions of Directive 2001/23/EC as concerns the safeguarding of employees' rights in the event of a transfer.

Meantime, Article 14(4) of Directive 2005/56/EEC expressly provides that the rights and obligations of the merging companies arising from contracts of employment or employment relationships, existing at the date of coming into force of the cross-border merger are transferred to the company resulting

[8] This document was adopted by the European Council in December 1989 and provided a set of minimum principles for the social dimension of Internal Market.

from the cross-border merger, due to the entry into force of this cross-border merger, at the date of coming into force of the cross-border merger.

Finally, since it can be observed that Directive 2001/23/EC does not distinguish between domestic and cross-border mergers in terms of employee protection in the event of a transfer, we are of the opinion that cross-border mergers fall within the scope of the Directive with regard to the safeguarding of employee rights.

In conclusion, for all these reasons, we believe that the wording of the law which allows for the possibility that only the merger falls within its scope is more limited than the actual intent of the legislator and that it is necessary to supplement it so as to expressly comprise the division and the cross-border merger.

Consequently, we suggest the correction and supplementing *de lege ferenda* of Article 1(1)(a) as follows: "This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a domestic or cross-border conventional assignment or division or merger".

The companies participating to the transfer and the types of operations that fall within the definition of a transfer do not deplete all legal issues raised by the scope of Directive 2011/23/EC.

Ratione loci, the scope provided by Directive 2011/23/EEC is limited to companies located in the territorial applicability of the Treaty establishing the EEC (Article 1 paragraph (2) of the Directive). Or, the directive on cross-border mergers applies to Members States of the European Union and to the states of the European Economic Area. Will the Directive apply if the statutory registered office of the companies to be transferred is

in Norway, Iceland or Liechtenstein?

We are of the opinion that, in this situation, the principle of non-discrimination should prevail and for this reason we believe that the protection of employees' rights must be ensured in all companies participating to a cross-border merger, given that the provisions of the Directive on cross-border merger apply equally to companies from Member States of the EEA.

With reference to the contracts of employment falling within the scope of the Transfer Directive, certain clarifications must be brought.

As a rule, it is for the Member States to establish the definition of the expression "contract of employment", respectively "employment relationship". However, in order to protect employees from potential abuses from employers, Article 2(2) of the Directive expressly provides that the national laws shall not exclude from the scope of the directive contracts of employment or employment relationships solely because:

- of the number of working hours performed or to be performed; or
- they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship; or
- they are temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.