Comparative Analysis of the Employee Protection Regulations for Transfer in the European and Romanian Legislation

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Abstract. On the basis of mutual consent, regulating the legal employment relationships, the amendment of the individual employment contract is usually made by agreement of the parties. However, there are situations where the amendment concerning one of the parties of the employment relationship, such as the transfer of the company or part of the company, cause changes on this relationship, without the parties expressing their will in this way.

Keywords: employee protection rights, transfer of the company, automatic employee transfer, information and consultation obligation, collective employment contract

Jel Code: K22

1. Introduction. The legal framework concerned

The Community Charter of Fundamental Social Rights of Workers, adopted on December 9, 1989 ("Social Charter") states, in paragraphs 7, 17 and 18, in particular, that: "the internal market realization must lead to an improvement in the living and employment conditions of employees in the European Community. The improvement must cover, where necessary, the development of certain aspects of employment regulations, such as the procedures for collective redundancies and those regarding bankruptcies. The information, consultation and participation of workers must be developed, in accordance with the appropriate methods, given the practice in force in different Member States. Such information, consultation and participation must be implemented in time, especially on the occasion of the restructuration or merger proceedings affecting the employment of workers."

In order to protect the employees' rights, in the application of the principles enshrined in the Social Charter, the European legislator has adopted several laws.

Thus, in 1977, the Directive 77/187/EEC was adopted to promote the harmonization of the national legislation, which guarantees the safeguarding of employees' rights, and which requires transferors and transferees to inform and consult workers' representatives in good time.

This Directive was subsequently amended by the impact of the internal market, by the law trends of the Member States on the rescue of companies in economic difficulties, by the legal maxim of the Court of Justice of European Communities, by the Council Directive 75/129/EEC of 17 February 1975 on the approximation of the Member States laws relating to collective redundancies and the legislation already in force in most Member States. Upon the adoption of the Directive, it was only the case of Denmark and Belgium where the transfer of the company, the establishment or parts of the establishment were in concern; indeed, the employee was assured that there would be no damage after the changing of the employe[1]. Noting that the economic development attracts, at national and Community level, changes in the structure of the companies, through transfers of companies, units or parts of the companies or units to other employers as a result of transfers or mergers, the European legislator adopted Directive 2001/23/EC of March 12, 2001 on the approximation of the Member States laws relating to the safeguarding of employees' rights in the event of transfer of companies, units or parts of the companies or units. Inspired by the European standards in the field, the Romanian legislator also adopted the appropriate provisions both in Chapter V, entitled "Protection of the employees' rights in case of transfer of the company, unit or parts thereof" of Law no. 53/2003 on the Labor Code[2], which includes, but only

[1] *Costel Gâlcă, Transfer of the company, Journal of Labour Law, no. 4 / 2003, page 45-50*
[2] *Republished in the Official Gazette Romania, Part I, no. 225 of March 31, 2011*

two articles, 174 and 175, and Law no. 67 of 22 March 2006 on the protection of employees' rights in case of transfer of the company, unit or parts thereof, a substance legislative act[3].

2. Scope

According to article 1 Para (1) section a) of the abovementioned Directive is applicable for the transfer or merger through a contract of any company, unit or part thereof. Transfer means, under article 1 Para (1) section b), the situation when an economic unit shall be transferred keeping its identity, which namely will remain such a resource organized group whose purpose is the performance of main or complementary economic activities.

Section c) should be noted as well, according to which the Directive is applicable to any company that is public or private property performing economic activities whether for this company the purpose is gaining profit or not, but it does not apply to public administration bodies.

The Directive applies only to the extent that the company, unit or part thereof is within the scope of the Treaty (referring to the Treaty establishing the E.E.C.), namely on the territory of the Member States. The Directive is applicable in case of the transfer of work relationships between employees and employers. Article 2 Para (1) section d) of the Directive leaves for the national lawmaking authorities the competence to determine the notion of employee, specifying however that Member States may not exclude from the concept of work relationships the atypical work relationships. Among the atypical work relationships there are part-time work relationships, fixed term work relationships, or those by temporary work agent.

Regarding the interpretation of the concept of employee, two important cases may be mentioned in front of the European Court of Justice: the Wendelboe case and the Mikkelsen case:[4].

In the Knud Wendelboe and others versus L. J. Music ApS case, in liquidation[5] the European Court of Justice ruled that the Directive is applicable only to those employees who upon the transfer were in a work relationship. Therefore it was decided that the Member States are not obliged to issue regulations under which the transferee of the company has obligations also towards the employees who in the moment of the transfer were not in a work relationship.

In the Mikkelsen versus Danmols Inventory case[6], Mr. Mikkelsen was in leading position in the transferring company, at the same time he was employed at the transferred company, which has created doubts about the applicability of the Directive in its person. The commission found that the employee's status does not exclude the fact that the employee has a significant participation in the employing company. However, the European Court of Justice outlined the priority of the national law regarding the interpretation of the concept of employee, and the Directive kept this idea until today.

Regarding the concept of employers, during the implementation of the Directive two notions arise: the transferor and the transferee. Article 2 Para (1) section a) and b) of Directive 23/2001 determine these two notions. The transferor is a person or entity that, during the transfer loses, while the transferee is a person or entity that, during the transfer acquires the quality of employer.

Most discussions were held on the scope of the Directive, that is, the determination of the concept of company, unit or parts thereof, since the original Directive did not define these terms[7]. The European Court of Justice found, in many cases, as natural, the performance and the existence of the status quo[8].

As regards the determination of the unit notion, the most important was the Spijkers vs. Benedik case[9]. There were set criteria for determining the transfer of the company, unit or part thereof, which are: the type of company or unit, if the company goods were also delivered, i.e. the buildings and movable property, the value of the intangible assets at the time of assignment, if the new employer took over most of the employees or not, if the customers were transferred or not, to what extent that the activities performed before and after the transfer are similar and, finally, if there was a period when these activities were suspended.

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[3] Published in the Official Gazette Romania, no. 276 of March 28, 2006

[4] A. Popescu, Regulation of labor relationships – European practice, Tribuna Economică Publishing House, Bucharest, 1998, page 189-190

[5] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983CJ0019:EN:HTML, Knud Wendelboe and others v L.J. Music ApS, in liquidation, European Court reports 1985, page 00457, Spanish special edition page 00207,

[6] http://www.dkrnet.de/data/curia/jurispr/84-88/numdoc=61984J0105&lg=EN.htm#I1, Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventals, European Court reports 1985 Page 02639

[7] E.E.C. Directive no. 187/1977, of February 14, 1977

[8] Kiss György, Az Európai Únió munkajoga és a magyar jog a jogközelítés folyamatában, Osiris Publishing House, Budapest, 2003, page 231-232

[9] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0024:EN:HTML, Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV, European Court reports 1986, Page 01119

In the interpretation of the economic unit the Christel Schmidt case meant a turning point[10] that sparked fierce discussions in the European literature of labor law. The European Court of Justice even held in this case that the contractual transfer of the work of cleaning the building in which the company's activity is performed will come within the scope of the Directive. The Court concluded that where a company charges another company to carry out one of its activities, in respect of the employees who worked in the respective department, the legal document that will come within the scope of the Directive. The fact that the activity does not link as a necessity to the scope of the company, that is, it has an accessory character, does not exclude the application of the Directive. In the Court's opinion the fact that the work was performed by a single employee is not relevant.

In this case it is also surprising the fact that none of the criteria stated in the Spijkers case were not met. In addition, with this interpretation the Court has expanded so much the concept of company, unit or part thereof that practically has made a lot of economic activities to be more difficult. Because, for example, in any concession or service provision contract, the concessionaire or the service provider would be required to take over the conceder's or customer's employees that until the conclusion of the contract performed the respective activity.

After the Christel Smidt case, the European Court of Justice has received many cases of cleaning, where generally the things explained in the Christel Schmidt case followed. However in the Ayse Süzen vs. Zehnacker Gebäudereinigung Gmbh Krankenservice case[11], it took back its point of view, stating that the unit cannot be simply interpreted as an activity. The fact of maintaining the identity can be determined based on the other criteria, taking everything into account. So, in fact, the Court returned to the criteria set for the Spijkers case.

According to Article 1 Para (1) section a) the transmission of the unit can be achieved by legal act or merger. The transmission of the unit by legal act applies not only to legal acts relating to the movement of the property, but to any legal document, which can transfer the power of direction and decision from the initial subject to another person or entity. The concept of fusion will mean here not only the merger itself, but all forms of "transformation" of the legal person, including the division of companies.

So, in the opinion of the European Court of Justice, all legal acts that are actually able to transfer the power of direction on the economic unit are within the scope of Directive 23/2001. For example, in the Merckx and Neuhuyds vs. Ford Motors Company case, only the clientele was moved, however, the Court decided that the Directive applies[12]. Or in the Landsorgationen i Danmark for Tjenerforbundet i Danmark vs Ny Molle Kro case[13], where the subject was the rental of a guest house. The Court decided that the lease is as well covered by the Directive, because the purpose of the Directive aims for the employee protection in case of change of the employer. In the case of rental, as well, the person exercising its power of direction over the company also changes, so it would be contrary to the purpose of the Directive, if this hypothesis would be excluded from the scope of the Directive.

If we compare the Romanian legislation with the Directive, we will find that Law no. 67/2006, unlike Article 169 of the Labor Code, also contains the case of merger, which means that from this point of view it is consistent with the Directive.

A question that arises is whether Law 67/2006 applies, like Directive 23/2001 does for companies that are in public ownership. Although the law does not state this explicitly, as results from Article 2, which states that the provisions of this law apply for the transfer of companies, units or parts thereof, located on the Romanian territory, regardless of the social capital.

The Romanian law states that it is applicable whether or not those companies pursue or not a profit, but it does not state, unlike the Directive, that it is not applicable to public administration bodies. However, this omission poses no particular problem, given that in the Romanian legislation it is not understood through the concept of company and public administration bodies.

However, what is problematic is the fact that Law 67/2006 refers to the transfer of ownership, in Article 4 section d), defining the transfer as "the passage from the property of the transferor to the ownership of the transferee of an company, unit or parts thereof", although the Directive does not contain

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[10] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992J0392:EN:HTML, Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen European Court reports 1994 Page I-01311, Swedish special edition Page I-00081, Finnish special edition Page I-00111

[11] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J, Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice, European Court reports 1997 Page I-01259

[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994CJ0171:EN:HTML, Albert Merckx and Patrick Neuhuys v. Ford Motors Company Belgium SA

[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61986J0287:EN:HTML Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, European Court reports 1987 Page 05465, Swedish special edition Page 00279, Finnish special edition Page 00281

the notion of ownership in any of the translations in the official languages[14]. The express keeping of the concept of property in the Romanian law may be also a mistake in the formulation of the law, but in any case it is contrary to the Directive.

In literature, however, only the cases of transfer of ownership are covered by this law, without identifying the discrepancy between this law and the Directive[15]. The Directive does not expressly state that these provisions on the protection of employees are applicable not only in cases of transfer of ownership of the company, establishment or part thereof, but does not expressly mention the word "property", which shows this fact. In addition, as we presented in the first chapter, first subchapter, the European Court of Justice, which has the jurisdiction to interpret the Directive, by several decisions held that the concept of transfer of company includes lease, usufruct, leasing contracts etc.

3. Legal nature of the change of the individual employment contracts

The rules of law in force in Member States, Belgium, Ireland, Denmark, Holland and Britain, had a liberal and civil conception on the employment contract; the operation of automatic transfer of the employment contract, was feasible only in the manner provided by Civil Code, relating to the assignment agreement between the transferor and the transferee, plus the agreement of the employee.

Both at the level of the European Directive and in the Romanian law, the automatic nature of the transfer of the legal work relationship is reflected in the fact that the manifestation of the unilateral or bilateral will of the parties is not necessary, that is, the transfer will occur by operation of law.

The Court, in the Christel Schmidt case[16], showed that the transfer does not mean that the content of the legal relationship cannot change and will not result in a dismissing interdiction.

National regulations may make it possible for the employees to exercise the so-called right to object, i.e. to maintain the work relationship with the previous employer. Furthermore, Member States may provide for the joint liability of the transferor and transferee employers for the obligations arising from a work relationship previous to the transfer[17].

In Romanian law, the rights and obligations arising from individual labor contracts are fully transferred at the time of transfer, under the law, and not because of the manifestation of the will of the parts to the individual employment contract. The employees' employment contracts with the transferor do not terminate because others are concluded, with the transferee. The individual employment contracts are maintained. The only thing that changes is the employer's name.

Changing employment contracts operates lawfully at *negotium* level. In the case of collective transfer it has been shown[18] that it is not necessary to conclude an addendum to the individual employment contract, on the one hand, the changing operated within the law, on the other hand, the collective transfer does not imply the existence of a collective agreement of will between the employer and the employee, but between the transferor and the transferee. In the same way, it has been shown that the transfer from the transferor to the transferee of the rights and obligations arising from a contract or employment relationship existing on the date of transfer is done automatically, by transfer, without having to conclude other legal acts[19].

For *instrumentum* to reflect a changed *negotium* under the power of law, it has to be prepared properly, for reasons of record and registration. The transfer must be recorded as a change in the individual employment contract concerning the employer, eventually concerning the work place as well. The legal basis of this record will be Article 169 of the Labor Code[20].

4. Consequences of transfer of the company: information and consultation

Article 7 Para 1 of the Directive provides that the transferor and the transferee must inform the representatives of the employees affected by the transfer on the following aspects: time of the transfer or the moment proposed for transfer, reasons for the transfer, legal, economic and social consequences of the

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[14] For example, the English version is formulated as follows:..."There is a transfer of an economic entity which retains his identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary"(art. 1 section b.) Or the German version is worded in follows: ... „gilt als Übergang im Sinne dieser Richtlinie der Ubergang einer ihre Identität bewahrenden wirtschaftlichen Einheit im Sinne einer organisierten Zusammenfassung von Ressourcen zur Verfolgung einer wirtschaftlichen Haupt- oder Nebentätigkeit".

[15] Dan Ţop, Marc Rîchevaux, Great principles of community labor law, Bibliotheca Publishing House, Târgovişte, 2006, page 90

[16] Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen

[17] Bankó Zoltan, Berke Gyula, Gyulavari Tamas, Kiss György, Válogatás az Európai Bíróság munkajogi ítéleteiből, A munkavállalók jogai, KJK- KERSZÖV. Publishing House, Budapest, 2005, page 20

[18] Magda Volonciu, Collective transfer (full), in the Romanian Journal of Labor Law no. 2 / 2004, page 45

[19] Costel Gilca, Reorganization of companies. Analysis of the new Labor Code provisions in relation to the European legislation and jurisprudence, Rosetti Publishing House, Bucharest, 2005, page 197

[20] Magda Volonciu, op.cit., page 45

transfer on the employees and the measures planned regarding the employees. The transferor is required to make this information available to the employee representatives within a reasonable time before the time of transfer.

So this obligation of information aims at both the transferor and transferee.

Article 7 Para 2 requires the obligation of consultation to the extent that the transferor or the transferee plans on measures concerning the employees, he / she must consult with the representatives of the employees about these measures, to reach an agreement.

Member States may exempt from the obligation of information and consultation some employers, but only taking into account the number of employees, and no other criteria. The context of this option is that in many Member States, only a certain number of employees are obligated to create the elected bodies of representatives of the employees.

When the legislation of the Member States provides the obligation to choose the representatives of the employees, but they will not be elected as representatives, without any fault of the employees, then this obligation shall be used directly for employees.

It should be noted that the passive subject of the obligation of information and consultation is both the individual employer and the company directing it. So the employer, individual person, cannot be exempted from that requirement invoking the fact that the company failed to inform him / her of its decision on the fate of the company[21].

In the application of the European provisions, the Romanian law provides as term to carry out this information, both for the transferor and for the transferee, 30 days from the date of transfer, which, indeed, is a reasonable time.

The regulations on consultation were also taken over, in Article 11 of the law, which corresponds to Article 7 Para 2 of the Directive, here the term being also 30 days. The law took also the provisions of Article 3 Para 4 of the Directive, which is an important provision, which provides that the obligation of information shall apply whether the decisions resulting from the transfer are taken by the transferee or the company exercising its control on it (Article 12 Para 2).

It may be noted that the Romanian law does not provide exceptions to this obligation to provide information and consultation, as the Directive gives this possibility for companies in which certain national laws did not require the representatives of the employees due to the low number of employees. In Romania, the interest of employees on the employers for which more than 20 employees work, and if none is a union member, their interests can be promoted and defended by their representatives elected for this purpose (Article 224). So, for up to 20 employees, one does not need any representative of the employees, but Law 67/2006 did not do such distinctions, therefore the obligation for information and consultation should be carried out in such situations.

5. Employee protection measures during the transfer

The working conditions established in a collective employment agreement in force at the date of transfer must be respected by the transferee up to the termination of the collective employment agreement or the entry into force of a new collective employment agreement. Member States may limit this term to one year[22].

As regards job protection for the representatives of the personnel, the Directive provides a simple principle: the status and function of the representatives are not influenced by transfer operations, helping for the changes in the composition of the personnel workforce, and thus requiring new elections.

Regarding the protection of other benefits received by employees, in most Member States, the new employer is not responsible for any obligations or responsibilities of its predecessor. Thus, to edict the automatic transfer principle of the employment contract does not solve however the problem of the transmission of the obligations created and assumed before the transfer date, and which, at this time, were not yet met, so that the obligations to this date did not reached yet the term, nor were they paid.

The solution given by the Directive envisages the joint liability issue. Most legal systems of the Member States recognize the principle of the division of "risk", according to which the transferor and the transferee are separately liable for the obligations contracted by the leader also in terms of the employment contract. The date of transfer is then a line for the division of responsibilities and liabilities arising, due and still unpaid before the transfer of the transferor's company, which stay in its sole responsibility.

By European standards, a protection of the "legal environment" of the employment contract is also achieved. The directive determines a broad application of the maintaining of the rights received in a

[21] *Kiss György, op. cit. page 245*
[22] *Bankó Zoltan, idem*

particular hypothesis: the years of service to be recognized under the employment contract or under the company practice.

The right to protection in case of dismissal in the positive law of the national legislation upon the adoption of the Directive differed, as the national systems recognized the transfer by individual employment contract or by transfer of the work relationship operating automatically under the law.

The Directive states unequivocally that "the transfer of the company, establishment or parts of the establishment does not provide itself grounds for dismissal for the transferor or for the transferee".

However, if the transfer of the economic unit in itself cannot be a reason for dismissal, the Directive 23/2001 does not have effect on the possibility of dismissal for other reasons. And nowadays Article 4 Para (2) of the Directive causes problems of interpretation, according to which if the legal relationship is terminated on grounds that the working conditions have changed dramatically following the transfer to the detriment of the employee, it is considered that the work relationship ended on the initiative of the employer, even in case of resignation.

In the Romanian doctrine it is considered that, if the employer considers, after the transfer of the company, dismissals are required, nothing is opposed to taking such action, under the law. The transfer is not a legal issue to prevent the dismissal of employees, pursuant to Article 61 or Article 65 of the Labor Code. In other words, any case of dismissal under the Labor Code may be applied either before or after the transfer, provided that they fulfill the legal contents they govern. It is therefore prohibited, in light of Article 169 Para (3) of the Labor Code, only the dismissal being made on grounds of the transfer[23].

6. Applicability of the Directive in case of insolvency of the employer

The provisions of Directive no. 23/2001 on the protection of employees are not applicable in case of liquidation. However, this exception is limited to cases where the protection of employees is provided by the E.E.C. Directive no. 987/1980 on the insolvency of the employers, or there are collective agreements available on the employees' rights during the liquidation.

But even in these cases the practice of the European Court of Justice – according to the purpose of Directive 23/2001 – chooses for the application of the measures provided for it, on the protection of employees or whenever the maintenance of the activity of the company is possible. But if the insolvency proceedings are aimed at the liquidation of the company, then it does not consider the application of measures on the protection of employees, but the Member States can apply in this case the principles set out in the Directive.

If the transferor is subject to legal reorganization and bankruptcy proceedings, the transfer of rights and obligations of the transferor, arising from the individual employment contracts and the employment agreement, does not operate. (Article 5 Para (1) of law).

The question arises whether this law applies to other provisions, such as information and consultation, in case of bankruptcy and reorganization. Since, as we have shown, art. 5 refers only to the rights and obligations arising from the individual or collective employment contract, *per a contrario* would mean that other provisions of law would apply. Law 85/2006[24], however, on bankruptcy and reorganization contains provisions on this aspect. Article 86 Para (5) of this law states: "An employment or lease contract, as lessee, may be terminated only in accordance with the legal terms of the notice." Para (6) thereof provides: "Notwithstanding the provisions of Law 53/2003 – of the Labor Code, as amended and supplemented, in the simplified procedure, as well as in case of entry into bankruptcy in the general procedure, the termination of the individual employment contracts of the personnel of the debtor shall be made immediately by the liquidator, without having to browse the collective dismissal procedure. The liquidator will provide for the dismissed of the personnel only the 15 working day written notice". These provisions are specific to Law 67/2006, and Law 67/2006 that are not applicable even in terms of the obligation of information and consultation. However, the information or consultation does not really matter in this situation.

The question whether the provisions of this law are applicable in case the bankruptcy proceedings do not end with the liquidation of the company, arises. The Directive, in its turn, still exempts bankruptcy from the scope of this law, but this exception is limited to the situations where the employees' rights are protected by the E.E.C. Directive no. 80/987 on the protection of employees in the event of insolvency of the employer or when the collective employment agreement contains provisions on the employees' rights in bankruptcy proceedings. The E.E.C. Directive no. 80/987, as the law to implement this Directive into the Romanian legislation, Law 200/2006[25] refers to the establishment of a guarantee

[23] *Ion Traian Ștefănescu, Protection of employees' rights in case of transfer of the company, unit or parts thereof, in the light of Law no. 67/2006, in Law no. 9 / 2006, page. 13*
[24] *Published in Official Gazette of Romania no. 359 of 21.04.2006*
[25] *Published in Official Gazette of Romania no. 453 of 25.05.2006, amended by Law 487/2006*

fund for the payment of the wage claims in case of insolvency of the employer and not to other measures to protect the rights, and according to Article 17 of the law, when the closure of the insolvency proceedings occurs, following the recovery of the employers, they are obliged to reimburse the amounts paid from the Guarantee Fund. This means that, in this situation, if the transfer of the company occurs, the employees' rights will be respected according to Law 67/2006, that is, the wage claims or reimburse to be paid by the new employer.

7. Conclusions:

We see, therefore, that Law no. 67/2006 on the protection of the employees' rights in case of transfer of the company, unit or parts thereof makes, in general, a correct and complete transposition of Directive 2001/23/EC. However, few of the requirements of the Directive have been transposed incorrectly or incompletely.

In this situation are the provisions relating to the transfer concept, to the responsibility for the obligations which arose before the date of transfer from a work relationship existing on the date of transfer, to the non-application of protective provisions if the transferor is the subject of bankruptcy proceedings or other analogous insolvency proceedings, instituted for the liquidation of the assets of the transferor.

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13. *For example, the English version is formulated as follows:..."There is a transfer of an economic entity which retains his identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary"(art. 1 section b.) Or the German version is worded in follows: ... „gilt als Übergang im Sinne dieser Richtlinie der Ubergang einer ihre Identität bewahrenden wirtschaftlichen Einheit im Sinne einer organisierten Zusammenfassung von Ressourcen zur Verfolgung einer wirtschaftlichen Haupt- oder Nebentätigkeit".*
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