Employment

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Guidebook

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Contents

This guidebook is intended as an instrument to help employers deal with legal matters related to labour and avoid disputes with employees.

The aim of this guidebook is not, however, to give a comprehensive account of the Romanian legal framework and practice in the labour field, but rather to outline the most frequently arising employment issues on which employers need to focus.

Consequently, the information and opinions contained in this guidebook should be treated neither as a comprehensive study nor as a substitute for specific advice concerning actual situations.

This guidebook addresses the system in place at the time of publication and does not reflect any changes in Romanian law or practice after that date.

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Introduction

Traditionally, access to cheap and skilled workers has been among the most important assets used by developing countries in attracting investments. This was also the case in Romania, where decades of central planning and state intervention left the economy in ruins and in desperate need of capital, entrepreneurial expertise and competitiveness. Fortunately, highly educated workers were available in various sectors and provided the authorities with arguments to convince investors to come to Romania.

The legal framework covering the labour market was updated to reflect the new situation. The Labour Code adopted in 2003 gathered under a single legal umbrella the most important rules applicable to employment relationships between employers and employees.Beside the Labour Code, secondary legislation covered important aspects related to employment, such as health and safety in the workplace, unions and social dialogue, labour conflicts and disputes. Collective bargaining agreements were also recognised under the new legislation as containing additional rules and obligations to be complied with by employers – an approach commonly found in other EU countries.

Romania is now facing the challenges of the global economic and financial crisis. Now more than ever, flexible public policies and an adequate legal framework have a vital role in keeping investors in the country and alleviating unemployment. Recently, Romania took a significant step forward in loosening some restrictive legislation to bring about a competitive labour market. The latest changes to the main regulations in the field of employment have been welcomed by investors and are expected to bring more flexibility to labour relations.

Individual Employment Agreements

Employers' Obligation to Conclude Individual Employment Agreements

Pursuant to the provisions of the Labour Code, employers are obliged to conclude individual employment agreements with their employees, prior to the latter's commencement of work.

Individual employment agreements must be in written form and in the Romanian language. Failure to observe the written form requirement can result in the administrative liability of both the employer and the employee and even the criminal liability of the employer if more than five employees are put to work without the concluding of employment agreements. It should be noted that the absence of a written employment agreement does not prevent employees from claiming their rights under the law and the applicable collective bargaining agreements, corresponding to the work performed for the benefit of the employer.

Content

As a matter of principle, individual employment agreements have to be in line with at least the minimum content required in accordance with Order No. 64/2003 issued by the Ministry of Labour, which mainly covers topics such as the duration of employment, job type and position, work schedule, leave, salary rights, and the general rights and obligations of the parties.

Pursuant to the latest amendments to the Labour Code, individual employment agreements also need to include the criteria based on which the employee's professional performance is to be appraised.

Pursuant to the same amendments, the job description should be attached as part of the employment agreement.

Any amendment of the employment terms stipulated in the individual employment agreements requires the consent of the employee.

Employees' Rights Under Individual Employment Agreements

Although the rights and obligations of the parties stipulated in the individual employment agreements are commonly limited to those established as standard by Order No. 64/2003, employers are bound to observe all the other rights and benefits to which employees are entitled by law or according to the applicable collective bargaining agreements.

Any provisions aiming to limit the rights of the employees recognised under the law will be deemed null and void, even if the employee expressly consents to the mentioned provisions under the individual employment agreements or by any other further statements or agreements.

Salary Related Rights

Employees may not be paid less than the minimum nationwide gross salary, as determined by Government Decision from time to time.

Bonus schemes or additional allowances set out by collective bargaining agreements also have to be observed by employers, irrespective of whether such bonuses or allowances are transposed into or referred to in the individual employment agreement.

Any other salary-related rights granted to employees cannot fall below the level established by the labour legislation or by the applicable collective bargaining agreement.

Special Clauses

In addition to the minimum content to be observed pursuant to Order No. 64/2003, the parties may agree upon certain special clauses to be included in the individual employment agreement.

For example, non-compete clauses can be included in individual employment agreements. They will become applicable after the termination of the individual employment agreement and can remain valid for a period of up to two years after termination. A monthly indemnification shall be granted by the employer to the employee throughout the entire non-compete period. The indemnification cannot be less than 50% of the employee's average gross salary from his/her last six months of employment. The non-compete clause will join the general loyalty obligation incumbent upon employees in accordance with the provisions of the Labour Code, which prevents them from competing against their employer throughout the duration of employment. No special clause needs to be inserted in an individual employment agreement in order to secure such loyalty obligation and no indemnification has to be paid to employees in this respect.

Besides the non-compete clause, other special clauses may be agreed upon by the parties and included in individual employment agreements, such as those covering mobility or confidentiality.

Special Forms of Employment

Fixed-term employment
The concept of "fixed-term employment" covers employment relationships entered into between employer and employee where the end of the validity period of the individual employment agreement is expressly determined, pursuant to certain objective grounds provided by law. According to the Labour Code, individual employment agreements can be concluded for a fixed term only in the following cases:

- The replacement of another employee whose individual employment agreement is suspended, except when such employee is on strike;
- A temporary increase and/or change in the employer's activity[1];
- The carrying out of certain seasonal activities[2];
- If concluded based on certain legal provisions issued to favour certain categories of unemployed people, on a temporary basis;
- The hiring of workers who, five years after the hiring date, reach retirement age;

1 A temporary increase of the employer's activity may result from special market requests, irregular distinct activities or certain urgent works imposed by security threats.
2 Seasonal activities may include cyclical works which repeat themselves at relatively fixed periods of time for climatic, leisure, social or cultural reasons.

- If an eligible position is filled within trade unions' bodies, employers' organisations or nongovernmental organisations, for the duration of the term of office;
- The hiring of retired employees who are allowed to cumulate pension and salary, according to the law;
- In other cases expressly provided by special laws[3] or with a view to carrying out works, projects, and programs.

The duration of fixed-term individual employment agreements can be fixed with reference to a certain period or to the expiry date[4]. According to the Labour Code, employers are allowed to conclude fixed-term individual employment agreements for up to 36 months[5], unless the agreements are concluded for carrying out works, projects, and programs.

Part-time employment

From a legal perspective, "part-time employment" covers employees whose normal working hours calculated on a weekly basis or as a monthly average is less than the normal working time of comparable full time employees (i.e. full time employees having the same type of employment and carrying out the same or similar activities)[6]. Pursuant to the provisions of the Labour Code, employers can hire part-time employees for either permanent or fixed-term employment.

Part-time individual employment agreements shall provide:

- The duration of work and work schedule;
- The terms under which the work schedule may be modified;
- The interdiction to work extra hours, except in the instance of a force majeure event or other urgent works meant to prevent accidents or to alleviate the consequences thereof.

If the above elements are not applicable, agreements shall be deemed as concluded for full-time employment.

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3 Such as in the case of substitute teachers, sailing personnel etc.

4 If the fixed-term individual employment agreements are concluded with a view to replacing employees whose individual employment agreements are suspended, the duration will relate to the date when the reasons for suspension will have ceased to exist.

5 Successive agreements can however be concluded within the 36-month period.

6 Other comparison criteria, including seniority and qualifications/skills, will also be considered. If no comparable full-time employees are employed by the same company, the comparison shall be made with reference to the applicable collective bargaining agreements or to the legal provisions in force.

Termination

Termination by mutual consent
Individual employment agreements can be terminated by the mutual consent of the parties. In such cases, the parties shall agree upon the termination terms, such as those referring to the rights and obligations each party has until and after termination, the effective termination date and the exit compensation to be received by the employee.

Nevertheless, even in the event of the mutual termination of employment, employees are not allowed to waive any of their rights recognised under the law. Such a waiver shall be deemed null and void if it is included in the termination agreement.

Termination by mutual consent proves to be, in many cases, the most advantageous termination option for both employers and employees. Employers thus avoid the complications associated with dismissal proceedings and are better protected against further disputes with employees, while the latter receive financial compensation in exchange for their consent to termination.

Termination at employee's initiative
Individual employment agreements may be unilaterally terminated by employees, by way of resignation. Pursuant to the Labour Code employers should be given notice of the resignation that cannot exceed 20 business days, in the case of employees holding non-management positions, and 45 business days, in the case of employees holding management positions.

The resignation notice cannot be extended under individual employment agreements, collective bargaining agreements or other agreements entered into between employers and employees.

The employer may fully or partially waive the prior notice benefit and opt for immediate or earlier termination of the employment.

Termination at employer's initiative
General considerations
Individual employment agreements can be unilaterally terminated by employers only in those circumstances expressly mentioned by the Labour Code and by fully observing the procedural requirements stated therein.

Termination may be for reasons not related to the employee's performance or conduct (i.e. dismissal without cause) or for reasons related to the employee (i.e. dismissal for cause), as follows: (i) the employee is guilty of serious misconduct or repeated misconduct breaching workplace regulations; (ii) the employee has been held in police custody for a period exceeding 30 days, in accordance with the Criminal Procedure Code; (iii) the competent medical examination authorities rules the employee physically and/or mentally incapable of performing his/her work duties; (iv) the employee is not professionally fit for his/her job or position.

Employers cannot dismiss employees under any of the following circumstances:

- During a period of temporary disability for the employee, confirmed by medical certificate;
- During quarantine leave;
- While a female employee is pregnant, provided that the employer had knowledge of the pregnancy before informing the employee of her dismissal;
- During maternity leave;
- During parental leave for raising a child up to the age of two, or, in the case of a disabled child, up to the age of three;
- During leave to look after a sick child up to the age of seven or, in the case of a disabled child for inter-current diseases up to the age of 18;
- During a mandate of service on a trade union, except when the dismissal is for disciplinary reasons;
- During rest leave.

Termination for reasons not related to the employee (i.e. dismissal without cause)
Employers can proceed with terminating individual employment agreements if the jobs held by the employees are being abolished.

Dismissal without cause can be carried out according to Article 65 of the Labour Code pursuant to "*one or several reasons which are not related to the employee*", under the condition that abolishing the employee's job is "*effective*" and "*has a real and serious cause*".

Jobs are usually cut for economic and strategic reasons, including reduction, reorganisation or reorientation of activities, implementation of new management concepts, new technologies or products etc.

There are, in principle, no limitations or constraints on the reasons for dismissal, provided that the employer can prove that such reasons are genuine and that the dismissed employee's job is effectively being cut, *i.e.* no vacancy appears as a result of the dismissal.

Employees dismissed for reasons not related to their conduct shall be entitled to severance payments, if regulated under the applicable collective bargaining agreements.

Termination for reasons related to the employee (i.e. dismissal for cause)
Among the reasons stipulated by the Labour Code for dismissal for cause, the most common are those relating to poor performance (professional unfitness) and the breaching of disciplinary conduct rules.

Termination for professional unfitness
Employers can unilaterally terminate individual employment agreements if it is proved that the employees are not professionally fit for their jobs.

Professional unfitness means the inability of the employee to perform his/her work duties in accordance with the job description due to a lack of necessary skills or professional knowledge. Professional unfitness excludes breach of discipline by the employee.

Notification of dismissal must be made within 30 days of professional unfitness having been assessed by the employer.

Before announcing the dismissal, an appraisal procedure has to be followed. The procedure has to be expressly provided by the employer's internal regulations. Employers are, in principle, free to establish their own performance management system, including the abovementioned appraisal procedure, as well as the criteria to be applied in assessing employee performance. As a matter of best practice, the appraisal procedure should allow the employee to be informed of his/her appraisal results and ultimately challenge them.

Termination for disciplinary reasons
Termination for disciplinary reasons is the most severe sanction that employers are entitled to unilaterally apply to employees in the event of misconduct. Any disciplinary action against an employee must be taken within 30 days of the employer becoming aware of the disciplinary breach and no later than six months after the breach occurred.

A preliminary investigation procedure has to be followed in accordance with the mandatory provisions of the Labour Code. The termination of an individual employment agreement will be deemed null and void if the employer fails to comply with any of these provisions.

During the preliminary investigation, employees must be given the opportunity to defend themselves by producing evidence and providing all the explanations they deem necessary, as well as the right to be assisted by representatives of the trade unions of which they are members.

If, following the preliminary investigation, the employer decides to terminate an individual employment agreement on disciplinary grounds, an individual dismissal notice must be issued and delivered to the dismissed employee, to include the following:

- A description of facts/misconduct;
- The provisions stated in the internal regulations or applicable collective bargaining agreement breached by the employee;
- The reasons the defending arguments given by the employee during the preliminary investigation were rejected;
- The legal grounds for termination;
- The term limit and the competent court through which the employee may challenge the dismissal decision.

Collective Dismisals

Legal Background

The legal provisions regulating collective dismissals will become applicable in case of dismissals carried out by employers within a period of 30 days, for one or more reasons not pertaining to the concerned employees, where the number of redundancies is:

- At least 10 employees, if the employer carrying out the dismissals has more than 20 and fewer than 100 employees;
- At least 10% of the employees, if the employer carrying out the dismissals has at least 100, but fewer than 300 employees;
- At least 30 employees, if the employer carrying out the dismissals has at least 300 employees.

Stages

The Labour Code sets out certain mandatory stages to be followed for the termination of individual employment agreements to take place.

Stage 1
The employer has to initiate consultations with the trade unions or, as the case may be, with the employees' representatives. The consultation agenda should cover ways to avoid or reduce the number of dismissals, as well as means for mitigating the consequences of the collective dismissals.

In order to give employees the chance to make their own proposals, the Labour Code requires the employer to provide the trade unions, or, as the case may be, the employees' representatives, with relevant information regarding the dismissals.

The information provided by the notification shall cover at least the following:

- Total number and categories of employees employed on the date of the notification;

- Reasons for the planned redundancies;
- Number and categories of employees to be made redundant;
- Timeline over which the planned redundancies are to be made;
- Criteria contemplated with a view to establishing the sequence of dismissals, according to the labour legislation and the applicable collective bargaining agreements;
- Measures which could be taken to reduce the number of dismissed employees;
- Measures aimed at mitigating the consequences of the dismissals and the severance payments to be granted to the dismissed employees, according to labour legislation and the applicable collective bargaining agreements;
- The term within which the trade unions/employees' representatives may submit proposals for avoiding the dismissals or reducing the number of dismissed employees.

Copies of the notification shall be submitted to the Territorial Labour Inspectorate as well as to the Territorial Labour Agency.

Stage 2
The trade unions or, as the case may be, the employees' representatives will have ten days from the receipt date of the notification to analyse the information received and the technical and economic justification of the planned dismissals and to submit to the employer any proposals they deem appropriate in order to avoid the dismissals or to reduce the number of dismissed employees.

The employer is obliged to reply in writing, within a maximum of five days, outlining the reason for rejecting any such proposals.

Stage 3
After completing consultations with the trade unions/the employees' representatives, if the employers decide to proceed with collective dismissals, they will issue a second notification which shall reiterate all the elements included in the first notification, as well as the outcome of the consultations with the trade unions/the employees' representatives.

This second notification shall be submitted to the Territorial Labour Inspectorate and the Territorial Labour Agency, at least 30 days prior to the date the individual dismissal notifications are to be issued. A copy of this document shall also be sent to the trade unions/employees' representatives within the term previously mentioned.

Stage 4
The employer will issue individual dismissal notifications for each of the dismissed employees. Each dismissal decision will include the mandatory items provided by the Labour Code including: (i) the reasons for the dismissal; (ii) the notice period; (iii) the dismissal sequence followed by the employer. The dismissal decisions shall become effective as of the date they are communicated to the employees.

Stage 5
The employees to be dismissed are entitled to 20 business days' notice. Once the notice period expires, the employment relationship between the employer and the employees who were subject to the collective dismissal procedure shall cease.

Minimal Criteria

Certain selection criteria have to be observed by employers when choosing which employees from those holding similar positions to dismiss. Pursuant to the Labour Code, the selection criteria seem to be applicable only to collective dismissals. However, as a matter of best practice the provisions regarding the selection criteria should be applicable also to individual dismissals for the same rationale.

The first criterion that employers must respect when selecting which employees to dismiss is the professional performance of these employees, based on a professional appraisal conducted by the employer. If applying the professional criterion proves insufficient to determine the employees to be dismissed, other criteria provided by the applicable collective bargaining agreements can be used.

In practice, the subsequent criteria usually applied by employers to select which employees to dismiss are related to the social and financial constraints of the employees, such as:

- If two spouses working for the same company are being considered for dismissal, the spouse with the lowest income shall be dismissed first;
- First to be dismissed shall be employees without dependent children;
- Last to be dismissed shall be women with dependent children, widowers or divorced men with dependent children, single people with dependent children, and employees of either gender within three years of the optional retirement age.

Constraints

If employers who make collective dismissals subsequently decide to hire personnel for the positions formerly held by the dismissed employees or for similar newly created positions, within 45 days of the date of the collective dismissals, these positions have to be offered to the dismissed employees.

If the previously dismissed employees decline the offer, the employer is entitled to hire new personnel.

Collective Bargaining Agreements

Legal Background

Collective bargaining plays a key role in dealing with human resources and employment matters in most EU member states, although national systems differ quite widely in terms of the level, coverage, content and nature of bargaining. Romania is among the states with a developed collective bargaining system, especially in the traditionally strong branches of industry, where very influential unions are active.

The execution, content and effects of collective bargaining agreements are regulated by Law No. 62/2011 on social dialogue.

Conclusion

The negotiation of collective bargaining agreements is compulsory for companies employing more than 21 employees. Collective negotiation is to be carried out either with the representative union or, if no such union is active, with the employees' representatives. It is worth mentioning that it is only the negotiation that is mandatory and not the conclusion of a collective bargaining agreement. The employer is obliged to initiate the negotiation. The collective bargaining agreement will be concluded only if both parties agree on the content thereof. Collective bargaining agreements can be concluded for between 12 and 24 months.

Employers' failure to meet their obligation to initiate collective negotiations with a view to concluding collective bargaining agreements is punishable with a fine ranging from RON 5,000 to RON 10,000[7]. Collective bargaining agreements can also be concluded at the level of groups of companies and industry sectors.

7 Moreover, pursuant to the provisions set forth under Law No. 108/1999 on establishing and organizing the Labour Inspection, labour inspectors have the authority to order employers to take measures in order to remedy any non-compliance with the legal provisions in force. Failure to comply with such remedies is punishable with a fine ranging from RON 5,000 to RON 10,000.

Content

As a matter of principle, there are no legal constraints on the content of collective bargaining agreements.

Usually, such agreements cover issues such as employment benefits and remuneration, leave entitlement and days off, severance pay, professional training, health and labour security, etc.

A collective bargaining agreement concluded at an inferior level cannot include provisions establishing rights below the limits resulting from the applicable collective bargaining agreements concluded at superior levels.

Similarly, individual employment agreements cannot provide rights below the limits stipulated by the applicable collective bargaining agreements.

All employees' rights set out by legal provisions or by the applicable collective bargaining agreements concluded at superior levels have to be considered minimal, a level from which negotiations for a collective bargaining agreement to be concluded at an inferior level usually start.

Effects

The provisions set forth in collective bargaining agreements are compulsory for the parties and will apply to all the employees of a company or group of companies, irrespective of union membership.

A collective bargaining agreement concluded at industry sector level shall be applicable to all employers who are members of the employers' organisation participating in the collective negotiation.

The application of the collective agreement can be extended to the entire industry sector, if certain conditions are met.

Employers shall be considered part of an industry sector depending on their main object of activity stated in their registration documents.

Collective bargaining agreements will be considered the "law of the parties" and will be applied accordingly, to the extent that they are in compliance with the requirements of the law.

Labour Conflicts

General Considerations

Labour conflicts are defined as disputes between employees and their employers concerning professional, social or economic interests, or rights resulting from employment relations.

Labour conflicts were previously classified as conflicts of interest or conflicts of rights. The new law on social dialogue amended this classification, which now covers collective and individual disputes. As a consequence, dispute resolution alternatives, either mandatory measures or those left to the discretion of the parties involved, shall also apply according to the new classification, as further detailed below.

Collective Disputes

Collective labour conflicts may only be initiated with a view to protecting the professional, social or economic interests of the employees and supporting their claims during the negotiation of the collective bargaining agreements. A collective conflict may be initiated where the parties have failed to conclude a collective bargaining agreement further to the employer's refusal to accept the employees' claims. If the conflict relates to an employer's breach of the provisions set out in a collective bargaining agreement already in force, it can only be of an individual nature (irrespective of the number of employees affected) and it must be dealt with according to the dispute resolution rules applicable to individual conflicts.

Legal requirements and limitations
The initiation of a collective conflict shall be subject to legal requirements and limitations. Failure to comply with the specific requirements and limitations may render the employees' action invalid and even trigger sanctions on grounds of breach of discipline, as well as payment of potential damages resulting from an unlawful strike.

The collective conflict is validly initiated if the representative trade unions or, as the case may be, the employees' representatives, give the employer written notification stating their claims, the grounds for such claims and the proposals for appropriate solutions.

Limitations to the initiation of collective disputes include:
- The interdiction to initiate collective conflicts related to demands that require the issuance of a normative act;
- The interdiction to initiate collective conflicts after the conclusion or during the existence of a collective bargaining agreement;
- Requirements concerning the parties involved (i.e. the employees shall be legally represented by the labour union at unit level or, where the case, by the employees' representatives).

Dispute resolution
The parties are bound to seek an amicable settlement to the conflict. The dispute resolution methods applicable to collective labour conflicts are conciliation, mediation and arbitration.

All three alternatives involve the intervention of a third party and, aside from the compulsory/voluntary character thereof, it is the degree of intervention that differentiates one from the other.

Thus, where the conciliator neither makes a judgement nor suggests a solution but works with the applicant and the employer to find an acceptable outcome, and the mediator helps the opposing parties to attempt to reach an agreement, in the case of arbitration the third party hears the "case" presented by each party and makes a binding ruling on the outcome. Note, however, that only conciliation is a mandatory requirement for the parties while mediation and arbitration are optional (they shall be made us of only if both parties consent).

From a procedural perspective conciliation involves the observance of certain legal formalities and steps, as follows:
- The issuance of a written conciliation notice to the Labour Inspectorate;
- The appointment by the Labour Inspectorate of a conciliator;
- The establishing by the conciliator of a hearing date no later than seven days from the appointment;
- The hearings;
- The conclusion of the dispute outcome minutes.

According to Law No. 62/2011, where conciliation fails to resolve a collective dispute, the parties may voluntarily resort to mediation and/or arbitration. Arbitration can be resorted to at any moment during the collective dispute.

As mentioned hereinabove, the ruling of the relevant arbitration body shall be legally binding from when it is issued. Moreover, it shall also complete the provisions of the collective bargaining contracts.

It should also be underlined that, where prior to going on strike or during a strike, the parties expressly agree to adopt either of the two dispute resolution methods, such choice shall be deemed mandatory.

Strike action
As regards employees' lawful right to collectively and voluntarily cease work, i.e. take strike action, the law regulates this ultimate stage of collective conflict through very strict legal requirements, of which it is worth mentioning:

- A strike may only be declared in relation to the professional, social or economic interests of the employees within the context of a conflict of interest, provided the mandatory amicable dispute settlement methods have been exhausted;
- If as a result of negotiations the parties reach an agreement, the collective labour conflict shall be deemed at an end and the strike shall cease.

Also, according to the law, there are three types of strike: warning, regular and solidarity.

Individual Disputes

Individual labour conflicts refer to disputes concerning:

- An employer's unilateral decision as regards the conclusion, implementation, change, suspension or termination of individual employment agreements and the disciplinary sanctioning of employees;
- The implementation of collective bargaining agreements;
- The payment of damages to cover the losses to parties caused by the non-fulfilment or poor fulfilment of the obligations set out in individual employment contracts;
- The annulment or cessation of application of individual employment agreements or collective bargaining agreements, wholly or in part.

Dispute resolution
Individual disputes shall be settled by the competent courts in accordance with the Romanian Civil Procedure Code.

An individual labour dispute shall be filed with the competent court from the plaintiff's domicile or workplace and shall be dealt with, in the first instance, by the county courts (rom. *tribunale*).

Specific features of the court procedures that deal with labour disputes include the following:

- The celerity of judicial proceedings;
- The burden of proof shall be borne by the employer;
- The first instance court's ruling shall be deemed definitive and only be subject to recourse;
- Labour-related claims shall be exempted from judicial stamp duty.

Transfers of Business

Legal Background

Several legal provisions are currently in place with respect to the rights of employees in the event of changes at the level of the employers.

The Labour Code includes several protective rules if a "*transfer of a company, unit or parts thereof (…) to another employer, under the law*" occurs. The rules included in the Labour Code refer to the transfer between companies of assets and activities, and of the employees who carry out work in relation to such assets and activities. Special regulations on employees' rights in relation to a transfer of business are also provided by Law No. 67/2006 regarding the protection of employees' rights in the event of a transfer of an undertaking, business, or part of an undertaking. Law No. 67/2006 was enacted with a view to implementing Council Directive No. 2001/23/CE[8] and came into force on the date Romania joined the European Union, namely 1 January 2007.

Rights of the Employees

The transferor employer is under the obligation to inform and consult the employees' representatives (including trade unions, as the case may be) as regards the legal, economic and social consequences on the employees resulting from the transfer of business. The obligation to consult the employees' representatives should not be construed as the need to obtain the employees' agreement with respect to the measures to be undertaken in relation to the transfer of business, although the consultation procedures have to be followed with the purpose of reaching such an agreement.

8 Council Directive No. 2001/23/CE 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 was published in the Official Journal of the European Communities No. 82 of 22 of March 2001.

Law No. 67/2006 recognises the right of the employees, both of the transferor and of the transferee, to be informed in the event of a transfer of undertaking, at least 30 days prior to the transfer, with respect to the following: (i) the (proposed) transfer date; (ii) the reasons for the transfer; (iii) the legal, economic and social consequences of the transfer on the employees; (iv) "*the measures*" to be taken with respect to the employees; and (v) work conditions offered by the transferee.

Transfer of Business Implementation

Automatic transfer of employees
The employees are to be transferred to the transferee, by the operation of law, from the date the transfer of business occurs. With regard to this issue the practice of territorial labour inspectorates has fluctuated over time[9].

Various alternatives have been adopted, such as: (i) terminating individual employment agreements by mutual consent and concluding new agreements with the transferee; (ii) concluding new individual employment agreements directly with the transferee, the previous agreements being deemed terminated by the operation of law as of the transfer date; (iii) concluding an addenda to the individual employment agreements executed between the transferred employees and the transferee; (iv) concluding tripartite agreements between the transferor, the employees and the transferee. It may be noted that all such alternatives involve the employees' consent to being transferred which is not in line with one of the principles that governs the transfer of business – i.e. that the transfer operates by law/automatically.

Even though the application continues to be inconstant, recent practice has seen the transferor and the transferee conclude mere transfer notes, without such being accompanied by the employees' consent to the transfer, a solution that is compliant with the principle of automatic transfer/transfer by the operation of law. This solution is not, however, applicable to practical situations when the transfer is accompanied by changes of one or several of the employment elements, other than the "employer" (for instance the company), when the employees' consent is required according to the law.

9 The role of the Territorial Labour Inspectorate was to register the transfer in the employees' employment records, which is now annulled by the recent amendments to the Labour Code. Nevertheless, the body continues to play a significant part given its duty to monitor that labor law is complied with, and its right to apply sanctions in the event of failure to do so.

Employees' refusal to be transferred
In practice, there are cases when employees refuse to be transferred. In such cases, the following alternatives could be considered:

- The employees are deemed transferred by the operation of law and, depending on their conduct, the transferee may thereafter take appropriate measures (i.e. disciplinary dismissal or adoption of other disciplinary sanctions);
- The employees are not deemed transferred and the transferor will take the necessary measures, as the case may be.

The first alternative is based on the principle that the transfer of the employees operates by law/is automatic.

Nevertheless, one should not overlook the fact that the transfer to the transferee is a social protection measure beneficial to the employees and that it may be thus claimed that the employees could waive such benefit and therefore refuse the transfer.

Unfortunately, neither Law No. 67/2006 nor the practice of the Romanian courts offers a consistent approach to the consequences of such a refusal.

Obviously, the employees cannot be forced to work for an employer against their will and, in the event of refusal, they can always resign.

As for the alternative involving transfer by the operation of law/automatic transfer, it results that, where an employee refuses to be transferred, he/she could do so by resigning from the transferee.

With the second alternative, if employees refuse to be transferred to the transferee, the transferor may dismiss them pursuant to the provisions of Article 65 of the Labour Code (i.e. dismissal for reasons not related to the employee).

Such a measure would not conflict with the interdiction provided by Law No. 67/2006 on performing dismissals further to the transfer of the undertaking.

The said interdiction is a measure intended to protect the employees and shall not be applicable if the employees themselves refuse to benefit from it.

Restrictions
Both the Labour Code and Law No. 67/2006 establish a protection regime applicable to the employees transferred to the transferee employer.

Pursuant to the provisions of the said legal enactments, the transferee employer is bound to observe the rights of the employees under the initial individual employment agreements and the collective bargaining agreement applicable to the transferor employer.

The transferred employees cannot be granted rights that are inferior to those they had under the collective bargaining agreement with the transferor employer.

Any modifications of the labour conditions (type of work, position, salary, benefits, etc.) are subject to prior approval by the employees and must be expressly stated in the new individual employment agreements concluded with the transferee employer.

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