

THE TRANSFER OF BUSINESS IN ROMANIA*

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Abstract:

In the specialty literature, the topic of transfer of business was approached tangentially, either from a fiscal perspective, either in the context of the insolvency procedure, as a restructuring method or method to capitalize on the assets of the insolvent debtor, or through its connection with the rights of employees from transferred undertakings.

In this context, we have proposed a complete analysis of this legal concept, namely from the perspective of its meaning and scope, the legal and fiscal advantages it provides, and the existing relation between transfer of business and company restructuring.

Keywords: transfer of business, transfer of assets, goodwill, assignment of activity, transfer of undertaking, fiduciary agreement.

I. Introduction

1. Within the European Union, the matter of business transfer is of particular interest, from the perspective of economic growth and jobs, which is why policies are being promoted for stimulating business continuity through transfer, as an alternative to business liquidation or incorporation, regardless of the business organization form, yet providing a particular attention to enterprise transfer¹.

Economic operators use the transfer of business in various forms, both as a tool for adapting enterprises to the market status and requirements, and for consolidating or expanding the businesses.

The transfer of business is not acknowledged by the Romanian legislation through this designation, but by taking over the essence of the operations through

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¹ See: European Commission Recommendation no. 1069 of 7 December 1994 on the transfer of small and medium sized enterprises and the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 March 2006 – Implementing of the Community Lisbon Programme for Growth and Jobs – Transfer of Businesses: Continuity through a new beginning [COM (2006) 117 final – not published in the Official Journal].

which a transfer of business is performed, regardless of the actual designation, the doctrine and jurisprudence constantly identify them as "transfer of business"².

In the specialty literature, the topic of business transfer was approached tangentially, either from a fiscal perspective, either in the context of the insolvency procedure, as a restructuring method or method to capitalize on the assets of the insolvent debtor, either through its connection with the rights of employees from transferred enterprises.

In this context, we have proposed a complete analysis of this legal concept, namely from the perspective of its meaning and scope, the legal and fiscal advantages it provides, and the existing relation between transfer of business and company restructuring.

Our starting point is represented by the legal texts, directly or indirectly related to the transfer of business, regardless of the actual designation used to describe this operation.

Their use will allow us to prove that the transfer of business can be achieved through extremely diverse legal operations, such as: succession, sale or transfer of assets, transfer or sale of goodwill, respectively transfer of activity, assignment of activity, transfer of undertakings³, contribution to the share capital, merger, division and business lease⁴, through the transfer of the patrimony of affectation or through the transfer of the fiduciary assets and liabilities through the fiduciary agreement.

Additionally, from the analysis of the transfer of businesses methods, we shall remove the common elements of these operations and, through this, the definition and identification criteria for the transfer of businesses.

II. Transfer of assets

2. The most well-known regulation regarding the transfer of business is the one established by the Fiscal Code, as transfer of assets, in the sections dedicated to (non)taxable operations, from the perspective of the profit tax and the value added tax.

² See H.C.C.J., Fiscal and Administrative Contentious Section, Decision no. 2748/15 March 2013: "Even though the fiscal legislation does not refer to the notion of "transfer of business", as such an expression is not legislatively established, still, it refers to the alienation of a part of the activity, through the transfer of the assets used within that activity (...)"

³ Related to this, please see: Bucharest Court of Appeal, VII-th Civil Matters and Cases of Labor Disputes Section, Civil Decision no. 3951 of 12 June 2012, submitted, as summary and with approving comment, by Judge Romeo Glodeanu, Romanian Jurisprudence Magazine no. 5/2012, on-line, available on www.idrept.ro.

⁴ The French Labor Code also applies (art. L 1224-1); for the option of qualification a business lease as transfer of business in the French law, see: Francis Kessler, Niloufar Gholami – Babil, *Succession and transfer of businesses in France*, IUSLabor 1/2015, p. 15., on-line, available on: https://www.upf.edu/iuslabor/_pdf/2015-1/CLLD_TRANSFER_OF_BUSINESSES.pdf.

The notion was taken over in the fiscal law from the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax (hereinafter referred to as the Sixth Directive), currently Council Directive 2006/112/EC⁵ on the common system of value added tax of the EU.

For this purpose, in the interpretation of the “transfer” notion from art. 5 par. (8) from the Sixth Directive, the Court of Justice of the European Union (hereinafter referred to as CJEU) determines that it also includes the concept of “transfer of business” in the English variant⁶, respectively “goodwill” in the French variant (CJEU Resolution of 27 November 2003, Zita Modes, C- 497/01, item 40).

The Fiscal Code defines the ***transfer of assets*** as *the operation through which a company transfers, without being dissolved, the totality or one or several branches of its activity to another company, in exchange for a transfer of the equity interests representing the capital of the beneficiary company*⁷.

In order to determine the actual sphere of legal operations through which a ***transfer*** of assets can be performed, we shall use the fiscal meaning of transfer, namely: *the sale, assignment or alienation of the ownership right, the exchange of an ownership right for services or another ownership right and the transfer of the fiduciary assets and liabilities within the fiduciary operation* according to the Civil Code⁸.

The essential distinction that exists between a regular transfer and a transfer of assets/business is provided by their subject matter, ***the subject matter of the transfer of assets being the branch of activity***, namely *the totality of assets and liabilities of within a division of a company which, from an organizational perspective, represents an independent activity, meaning an entity capable of operating through its own means*⁹.

Thus, an economic activity represents a branch of activity, meaning a division of a company which can be subject to a transfer of assets, if it is characterized by its independence in relation to the transferor company and “the cumulative fulfilment of certain conditions related to: (i) the existence of that branch of activity as an organizational structure separate from other organizational divisions/branches of activities of the transferor company; (ii) the operation of the branch of activity as an independent unit, in normal condition for its related

⁵ Directive 2006/112/EC, on the common system of value added tax, OJ L 347, 11.12.2006, p.1.

⁶ “Having regard to this purpose, the concept of ‘a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof’ must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking”.

⁷ Art. 32 par. (1) letter d) Fiscal Code

⁸ Art. 7 item 42 Fiscal Code

⁹ Art. 32 par. (2) letter g) Fiscal Code

economic sector of activity. For this purpose, it is necessary to check the existence of an own clientele, own tangible and intangible assets, own stocks, own personnel, along with other assets and liabilities indirectly related to the transferred branch. The branch of activity could also include own administrative services; (iii) the actual performance of the activity at the time of approval of the transfer operation by the General Assemblies of the two companies, the transferor and the beneficiary, or the effective date of the operation, if they differ”¹⁰.

Through the regulation of these requirements in determining the independent nature of the transferred economic activity, the Fiscal Code has taken over the CJEU jurisprudence created in the interpretation of the notion of transfer of assets or business regulated by art. 5 par. (8) first thesis from the Sixth Directive (currently art. 19 first thesis from Directive 2006/112/EC, n.a.), and the notion of transfer of undertakings (we shall return to this in a later section), debating autonomous legal notions of the European Union, which have to be interpreted in a cohesive manner throughout the EU (Schiever Decision, C-444/10, item 22).

Thus, the concept of transfer of assets or part thereof was interpreted by the CJEU “meaning that it includes the transfer of goodwill or an autonomous part of an undertaking, containing tangible and, if applicable, intangible items, which, together, form an undertaking or a part of an undertaking, susceptible of performing an autonomous economic activity, however, it does not include the simple assignment of goods, such as the sale of a stock of products” (see the Zita Modes Decision, C-497/01, item 40, the SKF Decision, item 37, and the Schriever Decision, item 24).

The transfer of assets can be total, in which case the subject matter of the transfer being all of the transferor’s branches of activity, *or partial*, the partial transfer of assets meaning the transfer of all assets or a part of the assets invested in a branch of the economic activity, if they technically form an independent structure, capable of performing separate economic activities.

Thus, the *transfer of assets is not merely a transfer of goods or of a collection of rights and obligations (assets and liabilities)*. Due to its defining characteristics, the transfer of assets (of business) is a ***universal total or partial transfer of goods*** which are ***not approached individually, but as a unit representing an independent business***, for the transferor taxable person, and, subsequently, for the transferee, regardless if the transfer of assets/business is a total or partial transfer.

¹⁰ Art. 34 from the **Methodological Norms of 2016** for the application of Law no. 227/2015 regarding the Fiscal Code, approved through G.D. no. 1/2016 published in the Off. J. no. 22 from 13 January 2016 (hereinafter referred to as Methodological Norms 2016).

It is essential that the set of transferred items or assets is enough to allow the continuity of the economic activity performed through those assets. For this purpose, it could not be relevant whether the transferee of the transfer was to operate (part of) the taken over branch independently or as part of a broader economic activity.

We do not believe that the use of the phrase: “universal transfer of goods and/or services” [art. 270 par. (7) from the Fiscal Code] for defining the transfer of assets/business: total or partial universality of goods/branch of activity/division is the most fortunate option of the Romanian legislator. The taking over of the phrasing from the European legislation is flawed, as the Sixth Directive uses the phrasing: “total or partial universality of goods” in all language versions of the Member States familiar with the notion of patrimony and universal law.

In essence, CJEU has determined the need to examine globally the *de facto* circumstances defining an operation subject to analysis, in order to determine whether or not it can be included in the scope of transfer of assets/business, for the purposes of the fiscal legislation¹¹.

Another important aspect clarified through the CJEU jurisprudence, taken over by the Romanian legislation, is related to the transfer of ownership over the trading estates affected by the performance of the economic activity subject to the transfer of assets. In this direction, in order to classify an operation as transfer of assets or of business, it is not necessary for the trading estate where the economic activity is conducted to be transferred along with that branch of activity or part of a branch of activity; in the cases where the trading estate/real estate property is required for the continuation of the economic activity, it can be leased to the transferee/purchaser/beneficiary from the transfer of assets/business.

Thus, the “transfer of real assets is not a determining factor for classifying an operation as transfer of all assets” (Schriever Decision, quoted above, item 35).

An example of transfer of assets through a sale of business, respectively of a part of a certain branch of activity, without the sale of the real estate properties related to the transferred economic activity, is the operation through which, in August 2015, SC Mega Image SRL acquired total control over certain assets belonging to SC General Nic Import Export SRL.

“SC Mega Image SRL (“Mega Image”) is owned with a 100% share by Delhaize the Lion Nederland BV2, member of the Delhaize Group. The Delhaize Group operates on Romanian territory exclusively through SC Mega Image SRL¹².

¹¹ See the Schriever Decision, quoted above, item 32.

¹² S.C. Mega Image SRL is a Romanian legal entity, having as main object of activity the retail sale in non-specialized stores, with the predominant sale of foods, beverages and tobacco - NACE code 4711.

The Delhaize Group is an international group, present in the US, Indonesia and Europe (Belgium, Greece and Romania) and, along with the Royal Ahold Group, it has published in June 2015 a common press release, revealing to the public its intention to engage in a merger procedure to be completed mid-2016.

The purchased asset item were the following: 1. Cotroceni 2 Store. Dorobanți Store. These stores are assets from the patrimony of the undertaking SC General Nic Import Export SRL which has 3 stores in Bucharest, namely Nic Dorobanți, Nic Cotroceni and Nic Amzei. Mega Image purchases the stores Nic Cotroceni and Nic Dorobanți, while the store Nic Amzei remains under the ownership of SC General Nic Import Export SRL (“Nic”).

Objectively, the subject matter of the agreement consists of the *clientele and good custom, employees, equipment, use of trading estates related to the two Nic stores*, meaning that the trading estates related to the two locations would remain under the ownership of the Nic company, but would be subject to a long term lease to Mega Image¹³.

Also, in classifying an operation as transfer of assets, it is irrelevant whether the receiver of the assets is authorized or not to perform the transferred economic activity or whether it has in the object of activity the activity being subject to the transfer of assets at the date of the transfer or the effective date of the transfer.

3. In the fiscal area of the law, a distinction is made between the transfer of assets and other company reorganization operations, on one hand, and (total or partial) merger and division, on the other hand, although, from a taxation point of view, they are handled as transfers of assets, if they meet the conditions of the law.

A first explanation for the management identity can be removed from the meaning of transfer of assets found in the content of partial company division, distinctly regulated through letter c) of the same article 32 par. (1) Fiscal Code.

We are taking into account the fact that, from a fiscal perspective, *the partial division* of the legal entity is the operation through which a company *transfers*, without being dissolved, one or several *branches of activity*, to one or several existing or newly incorporated companies, leaving at least one branch of activity within the transferor company, in exchange for the issuing of equity interests to its participants, representing the capital of the beneficiary companies and, if applicable, of the amount, in cash, of up to 10% of the nominal value, or, in absence of a nominal value, of the equivalent accounting nominal value of the equity interests.

Thus, *according to the Fiscal Code, in a partial division, assets and liabilities form a division within the company's patrimony, namely an economic activity, an independent business*. The common definition of the assets and

¹³Decision no. 48/20.10.2015 of the Competition Council, on-line, available <http://www.consiliulconcurentei.ro>.

liabilities subject to the transfer of assets does not have the potential of leading us to a different conclusion¹⁴.

Thus, from a general perspective, comparing the various legal meanings of the partial division of a legal entity, we can see that, unlike the definition of the partial division of legal entities from the Civil Code¹⁵, namely from Law no. 31/1990¹⁶, the Fiscal Code refers to the transfer of one or several branches of activity, and not to the transfer of a part of the transferor company's patrimony.

And last but not least, as we have shown before, due to the goal pursued by all reorganization operations, according to the law, merger and division are always considered, through themselves, without meeting any additional conditions, transfers of assets (of business), according to the provisions of art. 7 par. (8) final thesis of the Methodological Norms 2016.

4. On the other hand, the transfer of assets, as a method to perform the transfer of business, does not involve in all cases a change in the shareholding of the beneficiary company/companies, respectively an increase in its/their share capital and the transfer of equity interests representing the capital of the transferor company.

We appreciate that when the transfer of assets is performed through the sale of assets/business, according to the general rules in the area of sales, this would be done in exchange for a price, unlike other forms of the transfer of assets, achieved in exchange for equity interests to the beneficiary company.

¹⁴ Art. 32 par. (2) letter e) from the Fiscal Code: (...) *"the transferred assets and liabilities - the assets and liabilities of the transferor company which, following the merger, total division or partial division, are transferred to the beneficiary company and which contribute to the generation of profit or loss, taken into account for determining the taxation base for the beneficiary company"*.

¹⁵ Art. 236 par. (3) Civil Code: Partial division consists of the detachment of a part of a legal entity's patrimony, which continues to exist, in spite of the assignment of this part to one or several legal entities, existing or incorporated in this manner.

¹⁶ Art. 238 par. (2) from Law no. 31/1990: Division is the operation through which: a) a company, after being dissolved without entering liquidation, transfers to several companies the totality of its patrimony, in exchange for the distribution to the shareholders of the divided company of shares to the beneficiary companies and potentially for a cash payment of up to 10% of the nominal value of the shares distributed in this manner; b) a company, after being dissolved without entering liquidation, transfers the totality of its patrimony to several newly incorporated companies, in exchange for the distribution to the shareholders of the divided company of shares to the newly incorporated companies and potentially a cash payment of up to 10% of the nominal value of the shares distributed in this manner.

In the case of partial division, a part of a company's patrimony is detached and transferred as a whole to one or several existing companies or companies incorporated in this manner, in exchange for the assignment of shares or equity interests in the beneficiary companies to: a) The shareholders or partners of the company transferring the assets (detachment for the interest of shareholders or partners); b) the company transferring the assets (detachment for the interest of the company) [art. 250 ¹ from Law no. 31/1990].

III. Transfer of undertaking

5. The transfer of undertaking is the only method to perform the transfer of business specific to the labour legislation, specifically the regulations having the purpose of maintaining employees' rights in the case of a transfer of undertakings from one employer to another.

We can also find isolated notes on the transfer of undertaking in the legislation dedicated to economic competition.

The frequency of the transfer of enterprises in these fields has determined the creation of an interesting European and national jurisprudence, used by the Romanian legislator in determining the identification criteria for the transfer of business, particularly as transfer of assets.

At a European level, Directive 23/2001/EC¹⁷ classifies as ***transfer of undertaking*** any transfer of an undertaking, unit or part of an undertaking or unit (to another employer), as a result of a conventional assignment or a merger.

A transfer, for the purposes of this directive, is considered the *transfer of a unit maintaining its identity, understood as an overall organized collection of assets, having the purpose of performing an economic activity, regardless whether that activity is central or auxiliary* [art. 1 par. 1 letter b) from Directive 23/2001/EC].

In essence, we find under transfer of undertaking the most important characteristics of the transfer of assets, namely those related to the subject matter of the transfer, because the undertaking is any *"organized economic entity, respectively an organized assembly of persons and items which allow the performance of an economic activity following an independent objective and having sufficient structure and autonomy"* (The CJEU Decision from 6 March 2014, C-458/12, Lorenzo Amatori, item 9 and the jurisprudence quoted therein).

A decisive criterion for the classification of an operation as transfer of undertaking, for the purposes of article 1 paragraph (1) from Directive 2001/23/EC, is that of the entity in question maintaining its identity after being taken over by the new employer¹⁸ (see the Decision from 6 September 2011, Scattolon, C-108/10, Rep., p. I-7491, item 60 and the quoted jurisprudence).

The fulfilment of the condition of the undertaking maintaining its identity is related to the items transferred within the unit/undertaking, the tangible and intangible assets, their importance in the performance of the economic activity,

¹⁷ Directive 23/2001/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, published in the EC OJ special edition no. 0 from 1 January 2007.

¹⁸ A.M. Laurențiu, A.S. Răzoare, I.R. Laurențiu, *Challenges related to the application of the employees' rights legislation in the case of a transfer of undertaking, unit or part of the undertaking or unit*, in RRDA no. 8/2011, item 3.1.1., on-line, available at: www.idrept.ro (last seen on 8 March 2016).

highlighting the importance of the transfer of clientele and personnel, the actual performance of the post-transfer activity, etc.

On the other hand, the use of the words: “maintaining” or “keeping” the identity of the transferred entity would involve an entity existing before the transfer.

However, CJEU has indicated that the European legislation [Directive 23/2001/EC] does not oppose to a national regulation classifying as transfer of a part of an undertaking, when this part of an undertaking does not represent an autonomous economic entity, from a functional point of view, existing before its transfer¹⁹.

Thus, there shall be a transfer of a part of the undertaking, understood as an autonomous structure, from a functional perspective, of an organized economic activity, including when this is identified as such by the transferor and the transferee at the time of its transfer.

In Law no. 67/2006 regarding the protection of employees’ rights in the case of a transfer of undertaking, unit or parts of the undertaking or unit²⁰, transposing, at a national level, Directive 2001/23/EC, the **transfer of undertaking** is defined in a general, but adequate manner, namely as *the transition from the ownership of the transferor to the ownership of the transferee of an undertaking, unit or parts of them, having as purpose the continuity of the main or secondary activity, whether or not the goal is to obtain profit or not [art. 4 letter d)], when the transfer of undertaking is performed through merger or conventional assignment [art.1 from Law no. 67/2006]*.

Thus, the transfer of undertaking is performed through assignment or merger, in the conditions of the law.

Certainly, the assignment, as a method for a transfer of undertaking, cannot be interpreted restrictively or limited to shares or equity interests assignment contracts.

Thus, *the type of the agreement or measure through which the transfer is performed is not important*, and we shall include in the scope of assignment the transfer (sale) of assets²¹, the transfer of goodwill or the transfer of activity²², along with the beneficial interest or lease of an undertaking²³.

¹⁹ See item 42 from the CJEU Decision issued in the case of Telecom Italy, op. cit.

²⁰ Law no. 67 from 22 March 2006 regarding the protection of employees’ rights in the case of a transfer of undertaking, unit or parts of the undertaking or unit, published in the Official Gazette no. 276/28 March 2006.

²¹ Related to this, please see: Decision no. 944/R – CM from 15 May 2009, Pitești Court of Appeal, Civil Division, for matters related to labor disputes and social insurances and cases with minors and family, on-line, available on www.idrept.ro (last seen on 7 March 2016).

²² For the classification as partial transfer of undertaking of a contract having as object the outsourcing of the distribution services for the transferor’s products, respectively the transfer of a branch of activity, see **Civil Decision no. 6246/R** from 04.11.2009, **Bucharest Court of Appeal**,

The same provisions are included in the jurisprudence of the Court of Justice of the European Union, which has constantly determined that the scope of the transfer of undertaking, for the purposes of Directive 2001/23/EC includes *”in the context of contractual relations, there is a change in the legal or moral person who is responsible for carrying on the undertaking and who incurs the obligations of an employer towards employees of the undertaking”* (see the Decision 20 January 2011, CLECE, C-463/09, Rep., p. I-95, item 30 and the jurisprudence quoted therein)²⁴.

Thus, CJEU does not consider the (actual) transfer of ownership over the economic entity classified as undertaking.

6. As we have shown previously, the legislation on economic competition also contains (marginal) references regarding the transfer of undertaking. We are considering the Instructions of the Competition Council from 2010 regarding the restrictions directly related to and required for the application of economic clusters²⁵.

It is relevant that, also in this area of the law, the total or partial transfer of undertaking is classified as a transfer of business, respectively as a transfer of a (branch) of the autonomous economic activity, including the tangible and intangible assets required for the performance of the economic activity, such as the accumulated goodwill or the know-how developed by the seller.

IV. The transfer of activity or assignment of an activity

7. The secondary legislation dedicated to commercial competition also establishes different forms of the transfer of business, namely the assignment of activity and the transfer of activity.

Thus, the Instructions of the Competition Council from 2010 regarding the commitments in the matter of economic clusters²⁶ regulate the assignment of a viable and competitive activity as a tool (commitment) through which an economic operator can eliminate the risk that an economic cluster raises obstacles against actual competition.

VIIIth civil and for matters related to labor disputes and social insurances division, on-line, available on www.idrept.ro (last seen on 7 March 2016).

²³ See art. 2112 par. (5) from the Italian Civil Code, acknowledged in the CJEU Decision from 6 March 2014, C-458/12, Lorenzo Amatori, item 9.

²⁴ Item 29 from the Decision issued by CJEU on 6 March 2014 in the case C-458/12 Telecom Italy, on-line, available on: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=148743&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=828187> (last seen on 7 March 2016).

²⁵ The Instructions of the Competition Council from 2010 regarding the restrictions directly related to and required for the application of economic clusters, approved through Order no. 387/2010, published in the Official Gazette no. **553 from 05-Aug-2010**.

²⁶ Chapter 1. “The assignment of an activity to a proper purchaser” from the Instructions of the Competition Council from 2010 regarding the commitments in the matter of economic clusters, published in the Official Gazette no. 1/3.01.2011.

The assignment of activity, by one of the parties within an economic cluster, can be achieved through two methods: by creating a new competing entity or by consolidating the existing competitors.

Basically, the **assignment of activity** is performed: (i) through the sale of a viable and competitive economic activity to a (proper) purchaser or (ii) through contribution to the establishing of a beneficiary company's capital.

The viability of the assigned activity is determined in relation to its autonomy, namely its capacity to operate autonomous from the entire activity of the transferor.

Additionally, according to the aforementioned CJEU jurisprudence, both an economic activity having an autonomy existing before the assignment and an economic activity with an autonomy created at the conclusion date of the assignment contract can be subject to a transfer, as the Instructions of the Competition Council from 2010 regarding the commitments in the matter of economic clusters indirectly authorize both possibilities²⁷.

Certainly, the economic activity being subject to the transfer can take the form of an existing undertaking or a group of existing undertakings or an activity within an undertaking.

In order to avoid any issues in determining the nature of the transfer and viability, meaning the autonomy of the sold economic activity, the assignment contract must include all tangible and intangible assets required for its viable operation, along with the employed personnel related to such activity.

For this purpose, according to item 27 from the Instructions from 2010 regarding the commitments in the matter of economic clusters, in order to achieve the purpose for which the assignment of activity is performed, the assignment contracts must include an accurate description of the characteristics of the transferred activity and of all the elements which are part of such activity.

For instance, "activities related to research & development, manufacture, distribution, sales and marketing, intangible assets, such as intellectual property rights, know-how and goodwill; licenses, permits and authorizations granted for the activity in question by certain bodies; contracts, lease contracts and commitments, such as agreements with the suppliers and clients, for the benefits of the activity intended for assignment; client, credit and other types of files shall be indicated. In the description of the activity, the parties must include, generally, the staff they intend to transfer, including the seconded staff and temporary employees, and provide a list of the main staff, respectively the staff that is critical for the viability of that activity"²⁸.

In practice, the most frequent transfers of businesses through the assignment of the activity occur on the retail market of current consumption food and non-

²⁷ "It is recommended that the activity intended for assignment is an existing autonomous activity" – 2nd thesis of item 32 from the Instructions from 2010 of the Competition Council.

²⁸ Item 27 from the Instructions from 2010 regarding the commitments in the matter of economic clusters.

food products through hyper/supermarkets, discounters and other similar stores.

We can mention the taking over of Billa Romania by the Carrefour Group, operation through which the Carrefour Group takes control over the retail activity operated in Romania under the “Billa” brand of the Rewe Group consisting of Billa România SRL and Billa Invest Construct SRL²⁹. After this taking over, the Rewe Group will also conduct other retail activities in Romania, namely through its discounter stores.

The Competition Council has authorized the economic cluster subject to the compliance with the commitments voluntarily undertaken by Carrefour. “Thus, Carrefour undertook to assign three active supermarkets from the Brăila market, namely two Carrefour Market stores and one Billa store. Also, Carrefour undertook to refrain from any involvement in the assigned activities for a significant period, of at least 10 years. The assignment shall be performed as a *continuous transfer of activity* without the suspension of the activity, for each individual store or for all of the stores together. Also, on a best effort basis, Carrefour shall maintain the economic viability and competitiveness of the activity intended for assignment”³⁰.

The transfers of businesses through the assignment of activity are regular operations on the market for financial services. For this purpose, Banca Comercială Română, member of the Erste Group, also took over the Romanian businesses of its branch, Anglo-Romanian Bank Ltd (ARBL). The transfer of undertaking (based on the continuity of the activity) from ARBL to BCR was performed during the year 2011 and has involved the “taking over by BCR of the ARBL businesses/activity, assets, liabilities, clients, performed through the Bucharest branches and the agencies from Constanța, Timișoara and Sibiu. BCR also took over ARBL’s intangible assets, along with the operational infrastructure, including the software”³¹.

Objectively, in this case, the transfer of business was performed through a *business activity transfer agreement*, signed on 30 March 2011; on the grounds of this agreement, ARBL transferred all its banking and auxiliary activities, along with the non-banking activities in Romania, to BCR SA³².

²⁹Source: Competition Council, Press release, on-line, available on: <http://www.consiliulconcurentei.ro/ro/docs/26/decizii-die/page3.html>.

³⁰Excerpt from the decision of the Competition Council available online at: http://www.consiliulconcurentei.ro/uploads/docs/items/id11193/angaj_carrefour_billaiun_2016.pdf.

³¹<http://www.zf.ro/banci-si-asigurari/finalul-anglo-romanian-bank-erste-preia-afacerile-din-londra-bcr-pe-cele-din-romania-8280779>.

³² The Civil Decision no. 1577/R from 13.03.2014, Bucharest Court of Appeal, VII-th Civil Matters and Cases of Labor Disputes and Social Insurances Section, selection made and commented by Judge Petrică Arbănaș, RRDM no. 8/2014, on-line, available on: www.idrept.ro.

This final case reveals the difficulty of distinguishing the transfer of undertaking and the assignment or transfer of activity, as both are actual methods for performing a transfer of business.

It is worth recalling that, from a fiscal perspective, regardless of the classification provided to the previously analysed operation, these represent a transfer of assets.

V. Transfer of goodwill

8. Another method to perform a transfer of business is the *sale of goodwill*³³.

Frequent references to the transfer of an undertaking's entire goodwill or only a part of it are included in the legislation on commercial competition.

From this perspective, *goodwill* is not *just a collection of tangible and intangible assets*, but, *more accurately, it is a commercial activity present on the market that can be related to a turnover*³⁴.

Certainly, we shall be able to identify the goodwill with the branch of activity from the fiscal legal area; in both cases, the subject matter of the transfer is an independent economic activity.

The operation can be exemplified through a transfer of goodwill in the field of pharmaceutical products. Thus, in 2012, SC Sensiblu SRL, pharmaceutical chain in Bucharest (hereinafter referred to as Sensiblu) announced "the acquiring of the direct unique control over the goodwill related to a number of 90 pharmacies belonging to SC News Quality Pharma SRL (hereinafter referred to as "News Quality").

The direct control over Sensiblu is held by A&D Pharma Holdings N.V., with registered office in Delft, the Netherlands, and the Company News Quality Pharma S.R.L. was incorporated on 24.11.2011, upon the division of S.C. Hermes Pharma S.R.L.

The transfer of business was performed through a *sale and purchase agreement* having as subject matter the purchasing by Sensiblu of the *goodwill* related to a number of 90 City Pharma pharmacies belonging to News Quality Pharma.

The goodwill refers to the activity, assets and certain liabilities of the Seller related to the pharmacies, which includes the pharmacies (locations), permits, fixed assets, stocks, good custom and clientele, including the database of clients holding loyalty cards, the taking over of certain company debts, within the

³³ Paris Court of Cassation, Social Division from 20 January 1998, n° 95-40.812, apud. Francis Kessler, Niloufar Gholami – Babil, *Succession and transfer of businesses in France*, IUSLabor 1/2015, p. 16, op. cit..

³⁴ Item 21 from the Instructions of the Competition Council from 2010 regarding the concepts of economic clustering, involved undertaking, complete operation and turnover, published in the Official Gazette no. 553 bis from 05 August 2010.

thresholds of the value of the taken over stocks and the transfer of employees from the taken over pharmacies, the know-how and the brands.

News Quality Pharma did not cease to exist following this transfer of business, initiating software (sale/licensing) solutions supply activities related to the retail of pharmaceutical and/or cosmetic products, through pharmacies and drug stores³⁵.

VI. Transfer of patrimonies of affectation. Fiduciary agreement.

9. The transfer or alienation of the patrimonies of affectation (universal law), as a method to perform a transfer of business, is of particular interest, especially through the (relatively) new nature of the operation.

As an affected division of the general patrimony, the patrimony of affectation can be regarded as a business, as a branch of activity, respectively as an autonomous economic activity, including the assets and liabilities related to that particular activity, and which can be subject to a transfer (of business), *when the patrimony of affectation pre-exists the transfer and also when it is created at the time of the transfer of business.*

We have supported and analysed the option of transferring patrimonies of affectation through deeds inter vivos³⁶, considering the fact that, in essence, the patrimony of affectation is an alienable good.

However, through the definition provided to the concept of transfer, the Fiscal Code only introduces in the scope of this operation the *"transfer of the fiduciary assets and liabilities within the fiduciary operation* according to the Civil Code" (art. 7 item 42 from the Fiscal Code).

The classification of the fiduciary assets and liabilities as a transfer of assets is explained through the characteristics of the fiduciary assets and liabilities, which can represent an independent economic activity, a branch of activity or a part of a branch of activity, and its transfer, a transfer of business. However, unlike the transfer of patrimonies of affectation, *only the assets, and not the liabilities, can be transferred through the fiduciary agreement.*

VII. Transfer of business. Notion and characteristics.

10. According to what we have indicated in the beginning of this study, analysing the actual methods for performing a transfer of business allows us to determine the meaning and characteristics of this legal operation.

³⁵ The information was taken over from Decision no. 17/24.04.2012 of the Competition Council, on-line, available on <http://www.consiliulconcurentei.ro>.

³⁶ Luminița Tulească, *Patrimonies by Appropriation and the Personalist Theory of Patrimony*, Romanian Private Law Magazine no. 5/2015, p. 180 et seq.; Luminița Tulească, *The patrimony by appropriation - An instrument in business operation*, in the Romanian Business Law Magazine no. 6/2014, pp. 44 – 59.

The boundary between the main methods to perform a transfer of businesses through operations other than merger and division is exceptionally flexible, their essence being shared by all of its actual forms of manifestation.

In all legal operations analysed in this study, through which a transfer of business is performed, we can find the following common elements:

(i) the subject matter of the transfer is an organized, autonomous or independent economic activity representing a branch of activity or a part of a branch of activity.

(ii) after the transfer of business, the transferor undertaking/company continues to exist as a legal person and/or entity and to conduct an economic activity (usually a different one than the transferred activity/activities);

(iii) the transfer of business does not always involve a change in the share capital structure of the transfer of business beneficiary company, purchaser or transferee of the business;

(iv) the ownership/control over the business is taken over by the transferee/purchaser or beneficiary of the transfer.

In conclusion, *the transfer of business is the operation through which one or several branches of activity, respectively organized and independent activities is/are transferred between two companies/entities independent from a legal perspective, regardless of the type of agreement or the designation used by the parties to the agreement: transfer of undertaking, transfer of assets, transfer/assignment of activity, beneficial interest or lease of an undertaking, sale/transfer of goodwill, transfer of patrimony of affectation, fiduciary agreement, merger, division, etc.*

This is the reason why total mergers and divisions shall always include a transfer of business, while atypical or partial divisions, only at the extent at which the transferred assets or part of the patrimony represent(s) an organized and autonomous economic activity.

According to this perspective, the fiscal authorities have classified as transfer of business or of assets the passing of certain assets from the divided company to the beneficiary company within a partial division³⁷.

Certainly, in order to benefit from the fiscal advantages of the transfer of business, the additional conditions determined through the fiscal legislation must be met.

VIII. Fiscal advantages of the transfer of business

11. According to the law, all actual methods to perform a transfer of business represent a transfer of assets and benefit from fiscal advantages from a

³⁷ Related to this, please see: Alin Negrescu, Romana Schuster, *Transfer of business and deduction right for "illegitimately collected" VAT*, Bulletin for International Taxation no. 8/31 August 2010, on-line, available on www.idrept.ro

double perspective: that of the profit tax and of the value added tax, in the conditions of the Romanian law and the European legislation.

For this purpose, it is essential to correctly classify a legal and economic operation as a non-taxable transfer of assets, namely one that is not within the scope of the value added tax.

12. From the perspective of the scope of the value added tax, art. 5 par. (8) first thesis from the Sixth Directive, currently art. 19 first thesis of Directive 112/2006, states that Member States may consider that, in the case of the transfer of all company assets or part of them, regardless whether or not this is done for good and valuable consideration, or as a contribution to a company, no deliveries of goods took place and that the person to whom the goods are transferred is the transferor's successor.

In the interpretation of art. 5 par. (8) first thesis from the Sixth Directive, CJEU determined that "when a Member State has used this option, the transfer of all assets or a part of them, this is not considered a delivery of goods and thus, it is not subject to VAT, on grounds of art. 2 from this directive"³⁸ [art. 1 par. (2) paragraphs 1, 2 and 3 from Directive 112/2006 n.a.].

Thus, the transfer of assets is not considered a delivery of goods and so it is not an operation included in the scope of the value added tax, if the special conditions of the Fiscal Code are met cumulatively.

First of all, the legal operation must meet all the characteristics of a transfer of assets or business, characteristics previously analysed, in item 2 of this study, which is why we shall not return to this matter.

In essence, the subject matter of the transfer of assets is represented by one or several branches of activity or a part of a branch of activity, respectively an independent economic activity.

Additionally, in order to classify an operation as transfer of assets not included in the scope of the value added tax, *the receiver of the assets (business) must prove its intention to perform the economic activity or the part of the economic activity transferred to it*, and not to liquidate that activity immediately and, according to the case, to sell the potential stocks (Schriever Decision, quoted above, item 37, Zita Modes Decision, quoted above, item 44).

The receiver of the assets has the liability to send the transferor an affidavit proving the compliance with this conditions³⁹; however, this statement is only useful

³⁸ The Schriever Decision, quoted above, item 20; see also the mentioned CJEU jurisprudence: Decision from 22 February 2001, Abbey National, C – 408/98, Rec., p. I-1361, item 30; Decision from 27 November 2003, Zita Modes, C-497/01, item 29; Decision from 29 October 2009, SKF, C-29/08, Rep., p. I -10413, item 36.

³⁹ Item 7 par. (8) from the Methodological Norms from 2016 for the application of the Fiscal Code.

for the transferor/seller from the transfer of assets/business. From the perspective of the beneficiary or purchaser of the transfer of assets/business, the intention to continue the purchased activity must be supported by objective elements.

In the operation of determining the transfer of assets, it is irrelevant whether the receiver of assets is authorized to perform the transferred activity or if it has that activity within its object of activity.

These conditions being met, according to the Romanian law, which has used the option provided by art. 5 par. (8) first thesis from the Sixth Directive, the transfer of all assets or part of the assets performed as an effect of a transfer of assets, except for those occurring as an effect of merger or division, does not constitute a delivery of goods, if the receiver of the assets is a taxable person in Romania.

Unlike other methods for performing the transfer of business, the company division and merger operation is always a transfer of assets, regardless of the compliance with certain additional conditions, and does not constitute a delivery of goods, if the receiver of the assets is a taxable person in Romania⁴⁰.

Thus, when the transfer of business constitutes a transfer of assets from a fiscal perspective, we are not in the presence of a delivery of goods, the operation is not subject to value added tax, and the receiver of the assets is considered the transferor's successor regarding the adjustment of the deduction right provided by the law.

13. Regarding the *profit tax*, the transfer of business performed through divisions, mergers, transfer of assets and purchases of equity interests, performed by Romanian legal entities, is handled as *non-taxable transfer, for the difference between the market price of the transferred assets/liabilities and its fiscal value*⁴¹.

We reiterate the fact that, from the perspective of the profit tax, classifying an operation as a transfer of business, respectively a transfer of assets, is exclusively related to the subject matter of such a transfer: one or several branches of activity or a part of a branch of activity, respectively an independent economic activity, the aforementioned special conditions (item 12) being applicable only for determining the scope of the value added tax.

14. The transfer of business (assets) performed as a transfer of fiduciary assets and liabilities occurring through a fiduciary agreement shall benefit from all the fiscal advantages granted by the Fiscal Code from a double perspective, namely from the perspective of the profit tax or income tax applicable to the fiduciary agreement, and the perspective of the value added tax, as the transfer of the fiduciary assets and liabilities can be classified as a transfer of assets and is

⁴⁰ Art. 270 par. (7) Fiscal Code corroborated with art. 7 par. (8) final thesis from the Methodological Norms 2016.

⁴¹ Art. 32 par. (3) Fiscal Code

not within the scope of the tax, in the conditions of art. 270 par. (7) from the Fiscal Code.

Thus, the transfer of the fiduciary assets and liabilities from the founder to the trustee is a transfer subject to profit tax if the founder is also the beneficiary [art. 30 par. (1) letter a) from the Fiscal Code.]. Otherwise, if the beneficiary is the trustee or a third party, the transfer shall be classified as a transfer subject to profit tax.

When the transfer of the fiduciary assets and liabilities occurs between natural persons, the transfer does not generate taxable incomes for the founder and the trustee, the operation is not subject to income tax regarding such parties, if they are taxpayers for the purposes of art. 58 Fiscal Code. The incomes obtained from the transfer of the fiduciary assets and liabilities shall be subject to income tax for the beneficiary, unless the beneficiary is also the founder, in which case those incomes are not subject to taxation⁴².

IX. Transfer of business and insolvency procedure

15. The transfer of business may occur at any time during the company's existence, including within the insolvency procedure, the reorganization procedure or bankruptcy procedure.

In the reorganization procedure, the transfer of business for restructuring purposes is performed through the (pre-packed) sale of profitable assets and secured receivables⁴³ *which are transferred as a business to the so-called SPVs (Special Purpose Vehicles)*.

The operation is expressly allowed by Law 85/2014 regarding the procedures for preventing insolvency and insolvency⁴⁴ (hereinafter referred to as the Insolvency Law), meaning that the reorganization may indicate as a proper measure for its application the "transfer of all or certain assets from the debtor's estate to one or several natural persons or legal entities, incorporated before or after the confirmation of the plan"⁴⁵.

We believe that this transfer of business shall be performed for a price determined in money, unlike the debtor's merger or division, which may occur in this phase, but shall generate the transfer of shares or equity interests in the absorbing or beneficiary company, to the creditors of the transferor debtor company.

Additionally, the doctrine has also provided as a method for performing a transfer of business, profitable for the estate of the insolvent debtor, the lease of

⁴² Art. 63 par. (1) and par. (4) thesis I and II Fiscal Code.

⁴³ See M. Iovu, *Expectations of the business environment from the Insolvency Code*, RRDA no. 9/2014, on-line, available on www.idrept.ro.

⁴⁴ Law 85/2014 regarding the procedures for preventing insolvency and insolvency, published in the Official Gazette no. 466 from 25 June 2014.

⁴⁵ Art. 133 par. (5) letter C from the Insolvency Law.

the business with put option (i.e. after 2 years) or the conclusion of a business transfer agreement with condition precedent⁴⁶.

Also, the sale of the functional subunit⁴⁷, as an independent economic activity, could be assimilated in the transfer of business, and is used both within the company reorganization procedure and in the company bankruptcy procedure.

In this legal area, it is interesting and useful to turn to the legislation of other states and, for instance, in the area of transfer of undertaking, the French law also allows the transfer of business when the (commercial) company is subject to an insolvency procedure. Certainly, in this phase of the company's existence, the transfer of business benefits from a special regime. Thus, through art. L. 1224-2 from the French Labour Code, it is determined that, when the transfer of business occurs during the safeguarding, reorganization or liquidation procedure, the transferor new employer, beneficiary of the transfer of business, is not bound by the liabilities that the old employer had towards its employees.

Also, in Spain [art. 146 bis from the Insolvency Law no. 22/9 July 2009 (Concursal)] and in Italy, the transfer of business is also allowed during bankruptcy or insolvency procedures and, in order to facilitate this type of operation, the law allows the partial transfer of employees⁴⁸.

X. Transfer of business and (commercial) company restructuring

16. In the area of company restructuring, the temptation is that of limiting the scope of this notion to the natural person's reorganization institution⁴⁹ in the definition established through art. 232 Civil Code⁵⁰ and the reorganization methods regulated by art. 233 par. (1) from the Civil Code, namely merger, division and transformation.

However, company restructuring is also performed through operations other than those established through the Civil Code.

In the fiscal area, the notion of reorganization includes the transfer of assets, in all its forms, along with the total or partial merger and division of the legal entity⁵¹.

⁴⁶ Radu Bufan, *Transfer of business. Fiscal Effects*, RRDA no. 3/2015, on-line, available on www.idrept.ro.

⁴⁷ "The functional subunit is a group of assets belonging to the debtor which insures the generation of an independent finished product or allows the performance of an independent activity" – art. 5 item 65 from Law no. 85/2014.

⁴⁸ Vincenzo Ferrante, *Succession and transfer of businesses in Italy*, IUSLabor 1/2015, p. 28., on-line, available on: https://www.upf.edu/iuslabor/pdf/2015-1/CLLD_TRANSFER_OF_BUSINESSES.pdf

⁴⁹ Titus Prescure, *Reorganization of the legal entity from the perspective of the new Civil Code*, RRDA no. 7/2015.

⁵⁰ "The reorganization of the legal entity is the legal operation that can involve one or several legal entities and has the effects of their incorporation, amendment or termination" – art. 232 Civil Code.

⁵¹ Art. 32 par. (3) Fiscal Code: "The transfer of assets and liabilities, performed within the reorganization operations provided under par. (1) ... [art. 32 par. (1) Fiscal Code]; Art. 32 par. (6)

We find this vision in the Insolvency Law, which includes in the field of the (judicial) reorganization of the legal entity debtor all the restructuring types, namely operational and/or financial restructuring of the debtor and corporate restructuring, by changing the structure of the share capital⁵².

On the other hand, even mergers and divisions, classic company reorganizations, have the purpose of resettling the business' financial and operational structure, respectively the corporate and operational restructuring of the participating companies. For instance, in all cases, merger also involves the transfer of one or several businesses. Also, total or partial division may also include the transfer of business. For this purpose, the jurisprudence acknowledges by analysing the cause of a partial division project that "the purpose of (the partial A/N) division, inserted in the project, was that the company can transfer without being dissolved two branches of activity, to the four newly incorporated companies."⁵³

Thus, the transfer of business, regardless of its actual execution method, represents, in all case, an operational restructuring of businesses and, in certain cases, a corporate restructuring, through a change in the structure of the share capital of the companies involved in the operation, particularly the beneficiary companies of the transferred business.

XI. Conclusions

17. In conclusion, we shall witness a transfer of business when one or several branches of activity or a part of a branch of activity, respectively organized and independent economic activities, is/are transferred between two companies/entities independent from a legal perspective, regardless of the type of agreement or designation used by the parties of the agreement: transfer of undertaking, transfer of assets, transfer/assignment of activity, beneficial interest or lease of an undertaking, sale/transfer of goodwill, transfer of patrimony of affectation, transfer of fiduciary assets and liabilities, merger, division, etc.

At the extent at which the transfer of business also complies with the additional conditions enforced by the fiscal legislation, it shall also be classified as a transfer of assets, with the consequence of the application of the related fiscal advantages.

Last but not least, the transfer of business, regardless of its actual execution method, represents, in all case, an operational restructuring of businesses and, in

Fiscal Code: In the case of the reorganization operations provided under par. (1) [art. 32 par. (1) Fiscal Code] the following rules apply (...)

⁵² See art. 5 item 54 from the Insolvency Law.

⁵³ The High Court of Cassation and Justice, Commercial Division, Decision no. 162 from 18 January 2011, published in RRJ no. 4/2011, on-line, available on www.idrept.ro.

certain cases, a corporate restructuring, through a change in the structure of the share capital of the companies involved in the operation.

De lege ferenda, Law no. 31/1990, along with GEO no. 44/2008 regarding the performance of economic activities by registered sole traders, sole partnerships and family owned businesses, should regulate in an adequate manner the transfer of activity or business, in order to eliminate any difficulties in classifying such operations, but particularly as an incentive for small business transfers.