abroad. It is also useful to prove in which Member State the social contributions for posted worker are being paid.

Before starting to provide services in Slovenia, foreign employers are required to register with the Employment Service of Slovenia and are required to guarantee rights to their workers for the duration of their posting in Slovenia. Such rights must be in line with Slovenian regulations and the provisions of the applicable branch collective agreements regulating working hours, breaks and rest, night work, minimum annual leave, salary, health and safety at work, special protection for workers, and equality guarantees, if Slovenian legislation is more favorable for the worker than the rights guaranteed by the Member State of Employment.

The Act also includes provisions on special subsidiary liability. If a foreign temporary employment agency does not pay wages or social contributions to its workers posted in Slovenia, then the Slovenian user is liable for these payments. Moreover, in the construction sector, if a Foreign Employer that is a direct subcontractor of a Slovenian construction company does not pay wages to its workers posted in Slovenia, then his Slovenian contractor becomes liable for the payment of the wages.

To conclude, the new Act will likely have an impact on many foreign and domestic companies which post workers to and from Slovenia. Such companies should take steps to ensure compliance with the new law.

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BULGARIA

Bulgaria's Application of the ECJ's Rules for Keeping Employment Relationships in Transfers of Undertakings


Maria Drenska

Employment relationships require special protection both at European and national levels. Although largely enshrined in European legislation, those protections remain subject to modifications to ensure efficiency and security of the employment process.

In addition to discrepancies existing between the European and national systems, ambiguities in the application of national legal norms may arise due to their non-compliance with EU legislation.

The EU Approach

The European Court of Justice (the "Court") has developed case law involving the application of Directive 2001/23/EC (and the consolidated Directives 77/187/EEC and 98/57/EC), which regulates the preservation of employment relationships in cases of transfer of activities and tangible assets.

The Directive covers all cases of legal transfer (including mergers) of enterprises or business activities, or distinct parts thereof. The Directive applies to any transfers where an entity retains its identity.

In Abels, 135/83, the Court held that since the Member States have differences in their national legal systems about the scope of the "legal transfer" concept, the Court's analysis cannot be confined to the literal understanding of the text. A transfer can be based on a contract, a unilateral act, a court decision, or a law, and in some cases there is no direct contractual relationship between the transferor and the transferee.

The Court has established criteria for determining when there is a transfer of a business entity which retains its identity and when the employment relationships are being preserved. Thus, national courts are required to make a comprehensive examination in each case as to whether the following criteria are present: (i) the type of business or activity; (ii) whether tangible assets are transferred; (iii) the value of the intangible assets at the time of transfer; (iv) whether the majority of staff is taken over by the new employer; (v) whether the customers are transferred; (vi) the degree of similarity between the activities carried out before and after the transfer; and (vii) the discontinuation of the activities.

Applying the Directive is of major importance for public procurement, outsourcing, and other cases where one contractor of a service is replaced by another, yet the Court has applied its criteria inconsistently. Thus, in Abler C-340/01, it confirmed the transfer of staff between employers without a direct contractual relationship. Overall, the Court has ruled that existing employment relationships should be taken over by the purchaser of a tangible asset or activity.

Keeping Employment Relationships According to the Practice of the Bulgarian Supreme Court

The Bulgarian Labor Code regulates the preservation of employment relations, especially where the employer is changed because of a transfer of the "aggregates" of activities, personnel, and assets. In two of its interpretative decisions, the Bulgarian Supreme Court (BSC) has confirmed that the list of retained employment relationships in the law is exclusive and has held that the protection of Bulgarian law is more extensive than that provided in the Directive. Furthermore, the BSC has held that the existing legislative approach protects the interests of each party to the employment relationship and that the legislative balance must not be violated by interpretation in favor of either side. The BSC stated that "protection is established in imperative order and it can neither be expanded nor narrowed."

It is not clear whether the European Court of Justicse's criteria in favor of better protection for employees are applied by the Bulgarian courts. However, the BSC generally preserves em-

ployment relations in cases of change of contractor in public procurement contracts when the original contractor has ceased operations. The BSC also accepts that the application of the provision of the Bulgarian Labor Code involving transfer of part of an activity or of tangible assets does not require the existence of a contract with specific clauses between the two enterprises. The BSC accepts that the transfer of activity and the preservation of the employment relationships exists when a law abolishes the existence of an administrative body and another body undertakes its functions.

The Expectations

Implementing Directive 2001/23/EC and the European Court of Justice's case law in the national legislation of the Member States is an ongoing process and remains subject to disagreement. A synchronization at the European level as well as future engagement of the Bulgarian courts to create specific rules will ensure a proper balance in the country's legal system and better protection of employment relationships in the country.

Maria Drenska, Head of Employment, CMS Bulgaria

ROMANIA

Non-Competition Clauses: How to Prevent Former Employees from Working for the Competition


Andreea Suciu

In the present economical context, which often favors the migration of the employees from one company to another, the only tool left for employers seeking to prevent em-ployees from working for competitors after leaving their companies is to include non-competition clauses in employment contracts.

Pursuant to the Romanian Labor Code, parties may negotiate and include a non-competition clause into an employment contract expressly stating that the employee is precluded from competing against his/her employer for a maximum period of two years after the termination of the employment contract. In return for this obligation, the em-ployer shall pay a monthly compensation to the employee throughout the non-compete period.

General Conditions of Validity

In order to be valid and have the desired effect, a non-competition clause has to be in-cluded in the employment contract by agreement of the parties, either at the conclusion of the contract or at a later date by means of an addendum.

Furthermore, non-competition clauses are effective provided that the following elements are included: a) Activities prohibited to the employee. The non-competition clause should establish specific prohibited activities rather than completely prohibiting the employee from exercising his/her profession or specialization (as such so-called "exclusivity claus-es" are prohibited under Romanian law); b) The period during which the non-competition clause takes effect. The maximum period that a non-competition clause may be effective is two years from the date of termination of the employment contract; c) Specific third parties for which the employee may not work. The rule requiring that specific third parties be named proves to be difficult in a market economy in which economic agents come and go with relatively high frequency. Therefore, the doc-trine allows third parties be listed as a category of employers (such as, for exam-ple, travel agencies, car manufacturers, etc.), in addition to the identification of primary competitors on the market; d) The applicable geographic area. As a rule, the geographic area may not include the entire country, which would be in fact an impermissible general comprehensive ban on exercising one's profession/trade; e) The amount of non-competition indemnity. Under the Romanian Labor Code, the monthly non-competition indemnity is negotiable – and must be at least 50% of the average gross salary of the employee in the six months prior to the date of em-ployment termination.

In the case of unfair terms, the employee may refer the matter to the competent court, which can cancel the clause totally or partially, decreasing the effects of the non-competition clause within the legal limits allowed. Therefore, as they limit the freedom to work (i.e., the right to work), care should be taken to draft non-competition clauses in full compliance with both the law and court practice in order to ensure the desired ef-fects.

Amending the Non-Competition Clause

Since the employment contract is the law of the parties, consent must be given not only when the contract is entered into but also for any modification or termination thereof. Competent courts have consistently ruled that the employer does not have a unilateral right to waive a non-competition clause, unless agreed-upon by both parties in writing in advance.

Legal Liability

Employees who breach a non-competition clause may be obliged to reimburse the in-demnity paid by the employer. A claim for additional damages may be filed by the em-ployer provided that it can prove damages suffered as a result of the competitive acts of the employee. Penalty clauses are strictly forbidden and therefore void under employ-ment law.

Conclusion

Non-competition clauses seem to have a rather low practical relevance for the employer, as the immediate effect of breaches is only the recovery of indemnities paid by the em-ployer. Nevertheless, the psychological impact of such clauses often prevents employees from competing with their employer's business during their effective period.

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