**When does an employer change occur?**

*On 20 Oct this year, Andrey Alexandrov received his Phd in Labour and social law from Sofia University St.Kliment Ohridski, with a dissertation called 'Legal consequences of shifting employers'. We bring to your attention one of the dissertation thesis regarding the different ways of changing an employer under Bulgarian legislation. According to the author, cases of shifting between employers are not thoroughly regulated within the Labour Code, leaving uncovered hypotheses with solid practical significance (for instance an apportionment of a company in a commercial entity, conclusion of certain lease contracts, outsourcing, etc.). In addition to that, ways of shifting that are explicitly provided for are not always clearly defined, which suggests significant difficulties regarding the application of the whole regimen.*

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Bulgarian Labour legislation, like all EU member-states' legal systems, ensures the preservation of employment relations following the shifting of employers, which generally means change in the proprietorship or use of a definite company: for instance a sale of a commercial entity, its reorganization, its granting on lease, etc. These hypotheses are regulated under article 123 and 123a of the Labour code, where legal consequences for employees and employers have been provided for. The regulation aims at preserving the employment conditions for the people involved, avoiding discontinuance of job positions, decrease in social benefits, etc. The point is that personnel are not to deal with the negative consequences of executive decisions, adopted on economic grounds. Therefore, at the very least, the law guarantees preservation of the status quo.

Deals for the assignment of proprietorship or for the use of separate assets/the entire company, are regulated within civil and commercial legislation. For Labour law to be applied to the affected personnel there has to be evidence of some form of transformation of a commercial company. However, when the respective alteration is not indicated within Labour legislation in a way directly corresponding to civil and commercial legal regulation, it is of utmost significance to firstly clarify whether shifting of the employer is happening, so that legal consequences could occur. For instance, is an outsourcing contract to be qualified as "remising and assigning of an activity" under article 123, paragraph 1, section 7 of the Labour Code? In general, the answer is yes.

An essential question as to the legislation in force is whether through the adoption of such a detailed regulation, the Bulgarian legislator has completed his obligations, stemming from Council Directive 2001/23/EC of 12 March 2001 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? What procedure is to be adopted regarding cases approximate to the legally regulated ones, but not included in article 123 and article 123a of the Labour Code; isn't safeguarding to be applied to these employees as well?

An explicit answer to these questions is difficult to give, but one thing is certain: there is a risk of gaps occurring when enumerating different forms of employer shifting within a legal document. For instance, within the apportioning of an entity into a commercial company, uncertainties and disagreements arise, since this type of shifting is not explicitly provided for in the Labour Code (west European legal theory indicates this hypothesis as a form of employer shifting under Directive 20012/23/EC). Obviously, if employers in hypothesis like this are left with no legally regulated safeguarding, this would be a social injustice. In addition to that, it could represent groundings for indicting the state dew to its failure to implement the Directive standard in domestic legislation.

In order to prevent legislative voids, analogy is to be applied. For instance, it is to be assumed that if regulation under article 123a of the Labour Code is applied regarding lease contracts, it is to be also applied regarding a company's subleasing. In this case, Labour relations transfer from the tenant to the subtenant. Same groundings could be used to justify application of the regimen regarding leasing contracts, etc.

As logical as it appears though, the Supreme Court of Cassation denies this conclusion with its Interpretative decision № 2/2010 of 23.03.2011. It states that *"article 123a of the Labour Code thoroughly regulates the preservation of Labour relations in the event of transfers of undertakings or parts of undertakings".* As is well-known, explicit regulations cannot be applied as analogy. Therefore, without any reasonable cause, the SCC leaves approximate hypothesis out of the coverage of article 123a of the Labour Code.

Since it only affects hypotheses within article 123a of the Labour Code, the Interpretative decision is not broadly applied in practice. At the same time though, it raises the question whether the SCC will also define as explicit the hypotheses under article 123, paragraph 1 of the Labour Code. This will be as unacceptable as is the notion of article 123a being explicit. However, it would create greater practical inconveniences. A decision of the sort will represent serious disregard of Labour safeguarding, introduced by the Directive.

These difficulties could have been avoided if (like certain west European legislation, such as the German one) Bulgarian legislation presented hypotheses for shifting in a more generalized formula, such as "employment is sustained when proprietorship or temporary use of a company is transferred".

No doubt the regulation in force has not at all managed to shed light and bring consistency to practice. This puts to question its existence in the current state. On the other hand, such a radical change in provisions supposes in-depth knowledge of the European Court's case law, since it serves as a guide as to which hypotheses for employer shifting are to be related to legal consequences in Directive 2001/23/EC. Therefore, at this point the reasonable thing to do is preserve the enumeration of hypotheses, but explicitly state its limited nature. In this way, enumeration would serve as a display of the most frequently occurring forms of employer shifting.

Anyways, every alteration of the matter is to be coordinated with the actual state of the legislation in other branches (civil, commercial, contract law, etc.), as well as the rest of the labour legislation, so as to avoid vagueness and contradictions. Although during the last few years the regulation has been gradually modernized and amplified, this process often appears chaotic, or a product of political campaigning. It lacks a clear vision as to the final result which makes it rather unlikely to achieve optimal effects.