

SUMMARY

2017/19 Sureties for alleged breaches of the Austrian Anti-Wage and Social Dumping Law (AT)

<p>A surety can be imposed on an Austrian contractor retaining the services of a foreign company, if the foreign company is accused of breaching the Austrian Anti-Wage and Social Dumping Law and if the enforcement of a penalty outside Austria would be extremely difficult or impossible. Any risk assessment of this should be based on not only what law is in place but whether it is routinely being applied. The Austrian Supreme Administrative Court (Verwaltungsgerichtshof) ruled that a surety should be imposed on a domestic contractor in relation to violations by a Hungarian suspect, even though law enforcement regulations are in place between Austria and Hungary (but just not applied in practice).</p>

Summary

A surety can be imposed on an Austrian contractor retaining the services of a foreign company, if the foreign company is accused of breaching the Austrian Anti-Wage and Social Dumping Law and if the enforcement of a penalty outside Austria would be extremely difficult or impossible. Any risk assessment of this should be based on not only what law is in place but whether it is routinely being applied. The Austrian Supreme Administrative Court (Verwaltungsgerichtshof) ruled that a surety should be imposed on a domestic contractor in relation to violations by a Hungarian suspect, even though law enforcement regulations are in place between Austria and Hungary (but just not applied in practice).

Facts

An Austrian company (the ‘user enterprise’) had leased eight construction workers from a Hungarian company (the ‘leasing agency’) to deploy them at a construction site in Austria. The arrangement fell within the ambit of the Posted Workers Directive.

The Austrian Financial Police (Finanzpolizei) inspected the construction site and found that the Austrian user enterprise was unable to provide wage documents (e.g. employment contracts and pay-slips) for the eight leased workers.

Pursuant to section 7d(2) of the Act on the Adjustment of Labour Law (Arbeitsvertragsrechts-Anpassungsgesetz, the ‘AVRAG’) a foreign leasing agency must provide the Austrian user enterprise with the wage documents relating to all employees leased from abroad into Austria. The Austrian user enterprise must then keep these files at the workplace. A breach of this obligation can be dealt with as a part of an administrative criminal law procedure. The published decision in this case does not say whether any such separate procedure was initiated against the user enterprise.

However, breaches by the Austrian user enterprise are not directly related to the procedure against the Hungarian leasing agency or the procedure necessary to stop payments and impose a surety.

As the Austrian user enterprise was not able to provide any wage documents, the Financial Police had reasonable suspicion of a breach of the obligation on the Hungarian leasing agency to provide those documents to the Austrian user enterprise. Based on its suspicions, the Financial Police imposed a payment stop (Zahlungsstopp) on the Austrian user enterprise under section 7m AVRAG with regard to the outstanding pay for leasing the workers. The payment stop was intended to prevent the Austrian user enterprise from making any further payments to the Hungarian leasing agency up to the amount of the payment stop. Any payments made in spite of the payment stop would be regarded as not having been made if a surety was imposed.

Later the Financial Police requested the District Administrative Authority (Bezirkshauptmannschaft) to impose a surety on the Austrian user enterprise – as a guarantee of payment of any fine that might be imposed on the Hungarian leasing agency – in the amount of the outstanding contractual remuneration for the leased workers. The Financial Police argued that the defendant company (the Hungarian leasing agency) has its seat in Hungary and based on practical experience in Hungary, it would be difficult, if not impossible, to enforce a fine in Austria against a Hungarian offender in Hungary. Moreover, the surety could not be collected directly from the Hungarian leasing agency during the inspection, as there was neither cash nor other assets belonging to the leasing agency at the construction site

in Austria.

The District Administrative Authority decided that a surety of € 10,000, which would cover all outstanding contractual remuneration, was required to be paid by the Austrian user enterprise. The Authority justified this by the fact that the leasing agency and the leased workers had left the construction site in Austria within a few days of the inspection and the Hungarian leasing agency had terminated the leasing contract with the Austrian user enterprise. Moreover, the managing director of the leasing agency had stated during his interview with the Authority that the leasing agency paid tax neither in Hungary nor in Austria.

This could have been an indication that there was no money and that the leasing agency was not a real company. This was also a reason for imposing a surety on the Austrian user enterprise. The Supreme Administrative Court did not elaborate on these matters and this seems to have been because the fact that enforcement would have been impossible in Hungary was already sufficient reason and so there was no need to elaborate further. Nevertheless, these facts illustrate the difficulties Austrian companies can face when unfinished contractual relationships are terminated.

The Austrian user enterprise, on which the surety was imposed, appealed against this decision. The Regional Administrative Court of Vorarlberg (Landesverwaltungsgericht Vorarlberg) granted the appeal and revoked the decision of the District Administrative Authority. The court noted that the Convention concerning Mutual Assistance in Criminal Matters between the Member States (Council Act of 29 May 2000) applies to Austria and Hungary, as does Council Framework Decision 2005/214/JHA of 24 February 2005 on the Application of the Principle of Mutual Recognition of Financial Penalties. The court was satisfied that these provided a mechanism for ensuring collection of the fine, meaning that there was no need for a surety.

The Financial Police appealed against this decision, arguing that the law enforcement treaties would only be effective if Hungary actually applied them.

Judgment

The Supreme Administrative Court reversed the decision of the Regional Administrative Court and declared the imposition of a surety justified. It ruled that a surety could only be imposed if collection of the fine would be extremely difficult or impossible under the Anti-Wage and Social Dumping Law. However, neither the Law nor its preparatory materials define what is meant by extremely difficult or impossible in this context. The preparatory materials do state that a surety under the Anti-Wage and Social Dumping Law must be interpreted in

accordance with the general provisions about the enforcement of monetary fines imposed under the Administrative Penal Act (Verwaltungsstrafgesetz the 'VStG').

According to case law regarding these provisions, whether enforcement is extremely difficult or impossible must be assessed on the facts, rather than on the regulatory framework. This meant that whether the law enforcement regulations were implemented smoothly in practice in a given country should be taken into account.

The Regional Administrative Court stated that the Convention concerning Mutual Assistance in Criminal Matters between the Member States (Council Act of 29 May 2000) and Council Framework Decision 2005/214/JHA of 24 February 2005 on the Application of the Principle of Mutual Recognition of Financial Penalties are in place between Austria and Hungary. However, as the Austrian Federal Chancellery stressed in a circular dated 9 February 2015, Hungary systematically refuses to enforce monetary fines imposed by the Austrian authorities.

The Supreme Administrative Court was of the view that this failure to comply with the enforcement regulations had to be taken into account. It ruled that a surety could be imposed despite the existence of the law enforcement regulations.

The Court argued that this was in line with Directive 96/71/EC, as Member States are entitled to apply appropriate measures to ensure compliance with minimum wage legislation in the case of posted workers in their territory.

Commentary

Austria enacted an Anti-Wage and Social Dumping Law in 2011. The provisions were originally incorporated in the AVRAG but since 1 January 2017 the law has been codified and is known as the Anti-Wage and Social Dumping Act (Lohn- und Sozialdumping-Bekämpfungsgesetz, 'LSD-BG').

The new LSD-BG codification provides in section 34 for the imposition of a payment stop and a surety payment on an Austrian contractor or user enterprise if enforcement against a foreign offender would be extremely difficult or impossible. The surety payment is capped in two ways. First, it is capped at the amount of the outstanding remuneration owed by the Austrian contractor or user enterprise to the foreign company. Second, it must not exceed the amount of any possible monetary fines applicable to the case.

Note that the leasing agency or foreign employer cannot demand payment. However, as in the present case, foreign employers and leasing agencies tend to stop fulfilling their contract once a surety has been imposed. Thus, sureties can have a negative effect on Austrian contractors

or user enterprises if the contract has not already been fulfilled.

From a legal perspective however, the foreign employer or leasing agency is still obliged to perform its contractual obligations and has no grounds to claim payment of the surety from the Austrian contractor.

By contrast, the LSD-BG, which implements the Posted Workers Directive, provides employees posted and leased to Austria with a legal basis for claiming minimum wage, holiday entitlement and other employment rights. It also sets out comprehensive legal obligations on employers from EU and EEA Member States and Switzerland in relation to the posting or leasing of employees to Austria. A posting or leasing to Austria must be notified electronically to the Austrian authorities before its commencement. Social security form A1 (or E101) must be obtained before the posting or lease begins. For the duration of the posting or leasing, proof of notification of the Austrian authorities, the social security form, a work permit for the employee, if applicable, and all wage documents must be kept by the foreign employer or, in the case of a cross-border leasing of employees by the Austrian recipient of the labour, at the place of work in Austria.

The wage documents consist of the employment contract or a written record of the content of the employment contract; payslips; proof of payment or bank transfer statements; wage records; and documents relating to pay categorisation. The documents must be drafted in German, with the sole exception of the employment contract, which may also be drafted in English. In the case of a cross-border leasing, the foreign leasing agency must also prove that the Austrian user enterprise has been provided with the wage documents of the leased employees.

Further, the foreign employer or leasing agency must pay the posted or leased employee at least the minimum wage that the employee or similar employees are entitled to by law, regulation or collective bargaining agreement.

For breaches of each of these obligations, the authority can impose fines of up to € 50,000 (in the case of recurrence and if more than three employees are affected) per employee per breach. Thus, the posting or leasing of only a few employees to Austria can result in serious fines. In addition, breaches are registered in Austria and must be taken into account in public tenders. Further, an offender in Austria may be prohibited under certain circumstances from providing services for a minimum of one year and maximum five (based on the number of employees affected, whether there have been previous breaches etc.).

By Austrian law, an Austrian contractor can also be fined in relation to a cross-border leasing. However, the obligations on an Austrian user enterprise are different from those on a foreign

leasing agency. In case of a cross-border posting, the Austrian contractor cannot be fined, but a payment stop and surety may also be imposed on it in relation to foreign employees.

In future, for cases concerning Enforcement Directive 2014/67 with regard to the cross-border enforcement of financial administrative penalties and/or fines in the case of cross-border postings and the lease of employees, must be taken into account determining whether a surety may lawfully be imposed.

According to the Supreme Administrative Court the imposition of a surety is in line with EU law and complies with Directive 96/71, as it provides for appropriate measures to ensure compliance with the statutory minimum wage in Austria.

However, recently a request for a preliminary ruling by the European Court of Justice was lodged by an Austrian court concerning the imposition of a payment stop and a surety under the Austrian Anti-Wage and Social Dumping Law (ECJ C-33/17, Čepelnik d.o.o.). The Austrian court questioned whether the Austrian law on imposing payment stops and sureties was in compliance with the fundamental freedom to provide services enshrined in Article 56 TFEU and Enforcement Directive 2014/67. The Austrian court therefore asked whether the payment stop and surety imposed on a domestic customer served to secure a possible fine, which might be imposed in a separate procedure against a service provider established in another Member State, was in line with European Union law. It questioned their legality, given that the service provider established in another Member State had no legal remedy against the imposition of the payment stop and surety and that the appeal by the domestic customer had no suspensory effect. Further, the court asked whether it was lawful to impose a payment stop and surety on a domestic customer solely because the service provider was established in another Member State. Finally, the court asked if it would make a difference if the contractual remuneration (which limits the amount of the surety), was not actually due and the amount of the final fee had not yet been determined (on account of counter claims and retentions rights).

Separately, more than 130 companies from Slovenia filed a complaint with the EU Commission against the LSD-BG in December 2016.

The pending ECJ case and the complaint with the EU Commission may clarify, at least to some extent, whether the LSD-BG complies with EU law. In the meantime, the comprehensive obligations and substantial fines provided for by the LSD-BG must be taken into account by all (foreign) employers before and during posting or leasing employees in Austria.

Subject: Minimum wage/social dumping, Posted Workers Directive

Parties: unknown

Court: Verwaltungsgerichtshof (Austrian Supreme Administrative Court)

Date: 15 December 2016

Case number: Ra 2016/11/0122

Internet publication: www.ris.bka.gv.at -> go to "Judikatur" -> go to "Verwaltungsgerichtshof (VwGH)" -> click on the empty box for "Entscheidungstexte (TE)" -> insert case number in "Geschäftszahl" -> finally click on "Suche starten".

Creator: Verwaltungsgerichtshof (Austrian Supreme Administrative Court)

Verdict at: 2016-12-15

Case number: Ra 2016/11/0122