

## SUMMARY

# 2011/34 Bulgarian law lists transfer-triggering events exhaustively (BU)

***&lt;p&gt;The Bulgarian Labour Code (&#39;BLC&#39;) provides for the automatic transfer of employees to the transferee, not only upon legal transfer or merger of (a part of) an undertaking, but also upon temporary changes in the ownership of (a part of) an undertaking by virtue of a rental or lease agreement or a concession. Rental agreements, lease agreements and concessions are various legal forms of transfer of the right to use a property and these are regulated by different statutory provisions than those regulating transfers of undertakings the Bulgarian Supreme Court recently provided an interpretative decision to the effect that the Labour Code enumerates exhaustively which events lead to the automatic transfer of employees.&lt;/p&gt;***

### Summary

The Bulgarian Labour Code ('BLC') provides for the automatic transfer of employees to the transferee, not only upon legal transfer or merger of (a part of) an undertaking, but also upon temporary changes in the ownership of (a part of) an undertaking by virtue of a rental or lease agreement or a concession. Rental agreements, lease agreements and concessions are various legal forms of transfer of the right to use a property and these are regulated by different statutory provisions than those regulating transfers of undertakings the Bulgarian Supreme Court recently provided an interpretative decision to the effect that the Labour Code enumerates exhaustively which events lead to the automatic transfer of employees.

### Facts

The BLC has two provisions that deal with the transfer of an undertaking, Article 123 and Article 123a. Article 123 was originally introduced in 1986 and was amended several times in order to make it compliant with Directive 2001/23. It provides that employees transfer from the transferor to the transferee in the event the (part of the) undertaking in which they work is sold or otherwise transferred permanently. Article 123a, on the other hand, was introduced in 2006 to regulate the employment effects of changes in the use of an undertaking, such as when an undertaking is leased or rented out or a concession is granted or when such a lease or rental agreement or concession expires. In other words, Article 123 aims to regulate permanent business transfers whereas Article 123a aims to regulate temporary transfers.

The issue at stake was whether Article 123a enumerates exhaustively the events that lead to the automatic transfer of employment relationships of employees with their former employers, or the application can be broadened to cover events other than lease, rent and concession. There was confusion on this point. This led the Chair of the Bulgarian Supreme Court to request that the general meeting of the court's Civil Chamber adopt an interpretative decision on the matter.

### **Judgment**

The Supreme Court, interpreting Article 123a(1) grammatically, concluded that the linguistic meaning, the legal terms used in the text and the relationships between them were clear and correct. Therefore, the provision should be interpreted and applied strictly.

Further, the Supreme Court remarked that a logical interpretation of the broad meaning of the provision should be grounded in historical, systematic and teleological considerations, as this was the only way to ascertain whether the clear wording of the provision coincides with underlying legal objectives. Automatic transfer of employment relationships upon a change of employer is traditional in Bulgarian legislation and has existed since 1936. This doctrine is based on the general concept of succession in civil and commercial law.

However, Article 123a is quite new. Examination of the legal development of its text indicates that the legislator has gradually broadened the provision's scope. Initially, the provision referred only to leases. The references to rental and concessions were added later. The changes were a result of the economic situation and were also grounded in a legal understanding of automatic transfer of employment relationships upon the passing of an undertaking or a part thereof to another employer by virtue of a rental agreement and its derivatives Ð the lease and concession agreement.

The regulation of automatic transfers of employment protects the rights of employees, who are the weaker party in the employment relationship and aims to ensure protection of

employment and freedom of work. However, as the decision stated, such protection should not be unlimited and the Bulgarian legislator has defined it by introducing a mandatory provision that exhaustively enumerates the events leading to the automatic transfer of the employment relationship.

The Supreme Court also compared the texts of Articles 123(1) and 123a(1) with international law. According to the Supreme Court's decision, Bulgarian employment legislation has achieved the purposes of the Directive by means of Article 123, which stipulates in full detail the events leading to automatic transfer of the employment relationship upon a change of ownership of the undertaking or a part thereof, the transfer of business from one undertaking to another, including the transfer of assets<sup>1</sup>, various types of reorganisation of the undertaking (i.e. by merger, amalgamation, distribution of operations, or the passing of a part of the enterprise to another) and a change to its legal form.

The events referenced in Article 123a(1) fall outside the scope of Article 123(1). The Bulgarian legislator took the decision to regulate on them on the grounds of Article 8 in the Final Provisions of the Directive, which states that the Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions that are more favourable to employees or to promote or permit collective agreements or agreements between social partners that are more favourable to employees.

### **Commentary**

According to the decision of the Supreme Court, Bulgarian employment law provides for more extensive protection of the rights of employees upon a change of employer than that provided for by the Directive. The BLC regulates the automatic transfer of employment relationships to the “new” employer (transferee) not only upon the legal transfer or merger of an undertaking or a part thereof but also upon temporary changes in ownership by virtue of rental, lease or concession of an undertaking or a part of it. The legislator has separated Articles 123(1) and 123a(1) BLC in order to stress that they are different in scope and have different legal consequences, and that upon the events enumerated in Article 123(1), the ownership of the enterprise is transferred to another employer, whereas the events listed in Article 123a(1) concern only temporary changes in ownership of the enterprise. The employment protection given by these provisions has been settled in a mandatory way and can neither be broadened, nor narrowed. It is for the Bulgarian courts to assess whether a rental, lease or concession agreement is in place on a case-by-case basis.

By way of example, if the government owns an airport it may decide to grant company A a concession to operate that airport for a period of five years. At the end of the five years the concession expires and a new concession is granted to company B. At the expiration of the

concession to company A and the (more or less simultaneous) grant of a new concession to company B to operate the airport for the five years to follow, the employees that have transferred automatically from the government to company A on the occasion of the first concession agreement, will transfer again automatically back to the government and thereafter will transfer automatically from the government to company B. On the contrary, a transfer under Article 123 will be only one way, to the new employer without the possibility for the employees to transfer back to the first employer transferor, unless a transfer event under said Article occurs. In all cases of automatic transfer, be it permanent or temporary, the terms of employment of the employees remain unchanged.

In sum Article 123a will not apply if another type of contract (different from rental, lease or concession agreement) granting the temporary right to use an asset is concluded (such as a contract for use of copyright or a licence to use a patent or trademark), i.e. the employees who perform activities in relation to that asset will not transfer to the other party thereto (user).

Two of the judges presented their specific opinions with regard to the decision. Judge Nadezhda Zekova dissented, as she was in favour of an interpretative decision, given that the Bulgarian courts had made no controversial decisions on matters concerning the exhaustiveness or otherwise of Article 123a(1) BLC.

Judge Emanuela Balevska's view was that the decision failed to provide an answer to the basic question at issue, namely which (if any) events have broadened the scope of Article 123a paragraph 1? She was of the view that the decision simply reiterated Article 123a (1) of the BLC without answering the question.

#### **Footnote**

<sup>1</sup> In this event a transfer of undertaking would only occur if the transferred assets continued to be used for production purposes and their usage was connected with employees who were to be transferred together with the assets. Provided that the transferred assets were not used for production purposes and no employees were engaged for that purpose, no transfer of undertaking would occur.

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