Reductions in employment in joint ventures by competitors

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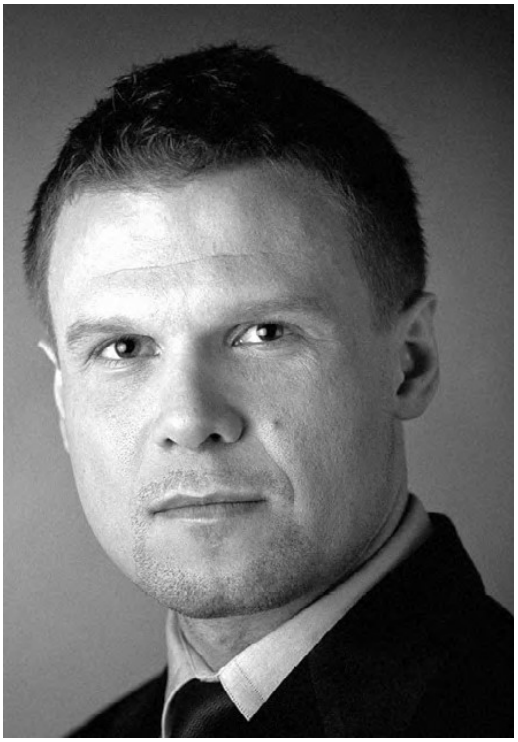

In today's knowledge-based economy, consolidations of enterprises are common—sometimes even between competitors. Employment reductions are a natural part of any consolidation, but are a source of legal risks for merging competitors. Such risks are hard to eliminate, but does it have to end in stalemate?

Imagine a joint venture planned between enterprises that have so far been competitors. In numerous jurisdictions, including Poland, each company plans to consolidate its main line of business with similar activity conducted by a competing firm.

It may come as a surprise to many people to learn that in such a case, the most interesting and most problematic issues may not lie in the field of competition law, but in the field of employment law. This occurs particularly when at the level of the holding companies whose subsidiaries are creating the joint venture a global transaction framework agreement is entered into specifying such items as the maximum number of employees from each of the entities who can join the newly created joint entity in each country covered by the agreement. In the case of our hypothetical client, let us suppose that this number is smaller than the number of persons currently working at the Polish subsidiary. The fate of the rest of the workers is then pretty much sealed.

What is allowed before consolidation?

The hypothetical fact situation described raises a number of questions. The most important of them is whether such a global agreement can effectively define the number of employees who will be "transferred" (whether automatically, i.e. under Polish law pursuant to Art. 23^1 of the Labour Code, or on the basis of offers of employment presented and accepted, which in practice results in dissolution of their employment relationship by agreement of the parties in connection with receiving an offer of employment from a new employer).

The answer to this question is generally negative. Pursuant to the established case law of the Supreme Court of Poland under Labour Code Art. 23^1 and of the Court of Justice of the European Union under the Transfers of Undertakings Directive (2001/23/EC), contractual specification or modification of the number of employees subject, in this case, to transfer by operation of law to the newly established employer should be regarded as ineffective against the employees. In Poland, conducting layoffs of employees under these conditions will carry a high risk of violation of Labour Code Art. 23^1 §6, under

which transfer of the workplace or part of the workplace cannot provide grounds justifying termination of employment by the employer.

Nonetheless, the business and operational purposes of the newly established joint venture typically require conclusion of an agreement structured in this way. This is because the optimal business operations of the newly established entity will require a certain number of people employed at specific positions, and not one person more.

Risk reflected in costs

So is there any room for manoeuvring? Certainly. One avenue to consider is termination of employment e.g. by agreement of the parties, ideally at the request of the employee (which typically requires additional financial incentives). Even that is not a risk-free approach, however (for reasons that go beyond the scope of this article).

The stated grounds for termination could be entirely unrelated to transfer of the workplace or part of the workplace, but if the employee appeals to the labour court it may be difficult indeed for the employer to defend these grounds.

Even lawyers with many years of practice can be surprised at their clients' willingness to accept a high level of risk in this respect. They treat the risk as entirely secondary to the business targets of the transaction. This clearly depicts the demands and realities of the contemporary economy.

Traps in selection of employees

The next question we must ask under these hypothetical facts is whether, prior to establishment of the joint-venture company, each of the existing employers can select which of its own employees will be laid off (including through group layoffs) based on specified "business and operational needs," that is, using criteria determined independently by each of the employers.

The answer is not obvious, and the problems only escalate. We should bear in mind that competing entities are involved, which means that difficulties in communicating should be expected, as well as a lack of trust and a disinclination or inability to share employment procedures (e.g. in terms of the employee evaluation systems applied by the employers). On top of that, the systems and criteria for employee evaluation applied in the past by each group may be entirely incompatible.

Lawyer and HR consultant

So the situation does seem to be heading toward stalemate. Even the most skilfully conducted process for establishing the criteria for selecting employees to move to the newly created employer (which for the staff not chosen will mean de facto group layoffs) will be subject to a substantial risk of being found to be illusory, because the only authentic criterion would be the business and operational needs of the newly created company, not those of the existing employers.

Here an additional challenge arises for legal advisers involved in such transactions. They need to balance the risks that have been signalled with the proposal (if possible) of innovative and creative solutions enabling the client to implement its ultimate business model. Such measures often extend beyond the traditional understanding of legal advice and shade more into the field of HR consulting. But lawyers handling employment matters must have this knowhow in order to meet the demands of today's clients.

So what options are there? Either conducting layoffs before establishment of the joint-venture company, but based on uniform and consistent selection criteria established by all of the employers, or conducting such layoffs after creation of the new employer (the longer after it is created the better), only after all of the staff of the existing employers become employees of the new company. The latter solution is optimal in terms of the ability to make an objective comparison of the usefulness of the employees for the company that is now in operation, considering the synergies as well as any problems connected with combining several groups of staff in a new entity.

Permissible external support

It should be borne in mind here that an employer conducting layoffs for economic reasons (not attributable to the employees), and thus for example in the case of a merger of the operations of companies through creation of a joint-venture company, must be able to prove that it applied fair and objective criteria in selecting staff for layoffs and considered all employees affected by the reasons forcing it to terminate employment. If rules for proceeding are established, particularly criteria for selecting staff to be laid off, they should also be applied consistently to all employees. Any departures from the adopted rules require strong and persuasive justification.

Particularly interesting and helpful in this context is the judgment of the Supreme Court of Poland of 1 June 2012 (Case II PK 258/11) concerning the employer's right to establish criteria for selection of employees for termination in group layoffs.

This ruling was issued in a situation where, in connection with a planned reorganisation and consolidation of the sales departments of two companies, an evaluation of the competencies of the employees of the two companies was conducted for the purpose of selecting staff to be laid off. In the area analysed by the court, there were three sales reps working for each of the consolidating companies. The consolidation resulted in duplication of coverage of their regions, requiring a reduction in the number of sales reps accordingly. The evaluation programme was conducted by an outside firm, which prepared the methodology for assessment of the employees based on its own knowhow in this field. The external advisers decided to use an assessment centre approach.

The court permitted the employer to use as the sole criterion for selection of staff to be laid off an assessment of the employees' competencies that were relevant from the point of view of the employer, ignoring other criteria deemed less important, such as their previous career path, length of employment, professional experience or formal qualifications (education).

This means that an employer is entitled to establish criteria for selecting staff to be let go in group layoffs so that the employees possessing the characteristics (competencies, attitudes and skills) most desired by the employer under the new, post-consolidation circumstances are retained.

The court's positive assessment of the role of external firms in this process is hugely important in practice, particularly when it comes to external firms offering services such as assessment centre, enabling a comprehensive and objective evaluation of employees and selection of staff for layoffs in a manner that is uniform across both of the merging entities. Based on this ruling, an employer choosing staff to be laid off may rely if it wishes exclusively on an assessment by professional advisers specialising in evaluation of employees' competencies and capable of conducting an objective evaluation based on a developed methodology.

An additional advantage of this approach is the confidentiality offered by an outside service provider—essential when the new employer is being established by companies who are currently strong competitors on the same market. The employers involved would naturally expect the external advisers to sign a strongly worded non-disclosure agreement.

Practice will show whether the use of assessment centre services gains in popularity in such cases. As the reader may surmise, the considerations are not entirely theoretical.

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