La Kanzlei

The post-contractual non-compete obligation applies irrespective of a mobility clause

Arbeitsrecht

Béatrice-Anne Kintzinger

A non-competition clause stipulated in an employment agreement affects the free exercise of a professional activity, its validity is subject to the following conditions:

- The prohibition must be essential to protect the legitimate interests of the company;
- it must be geographical and
- be limited in time,
- take into account the specifics of the employee's position, and
- provides a financial compensation in favour of the employee.

If these criteria are met (taking into account the potential provisions of the collective agreement on the amount of the compensation), the question arises whether the validity of the non-competition clause may be challenged by other clauses in the employment contract, such as a mobility clause.

In a decision of 26 September 2018 (no. 17-16.020), the Court of Cassation answered this question with a clear "no":

In the present case, a CEO had terminated his employment contract at the beginning of 2014. He considered that the post-contractual non-competition clause in his employment contract was null and void because, although the prohibition was geographically limited (to a few explicitly listed regions of France and to the regions where the employee had worked for the previous employer), the employment contract also contained a mobility clause under which the employee could theoretically have been deployed throughout France.

This view was shared by the Court of Appeal, which held that the non-competition clause was null and void, as it had de facto no geographical limitation in view of the mobility clause.

The Court of Cassation, however, assessed the contractual situation differently and found the non-competition clause valid ("the non-competition clause was limited in time and space").

Thus, the non-compete and mobility clauses are contractually independent of each other.

Practical advice:
A post-contractual non-compete clause makes sense not only de facto, but also legally rather with employees in "higher", more technical positions (keyword: legitimacy of the prohibition).

If the question of mobility during the fulfilment of the contract and the post-contractual non-competition clause are to be treated separately, it may also be appropriate to set in advance a suitable geographical distribution: To which cities/regions is the employee likely to be transferred during the contract period and in which cities/regions could he/she take up a job that would harm the legitimate interests of the company?

Even if the Court of Cassation considers that the mobility clause and the non-competition clause must be analysed separately, both clauses must be limited to a given geographically zone. This is not only a prerequisite for the validity of the clauses, but also provides more certainty in case the employee tries to challenge the validity of one of the clauses with regard to the possible invalidity or unenforceability of the other. We are happy to help with the formulation of such clauses!

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Qivive
Rechtsanwalts GmbH

qivive.com

Köln[D]
Konrad-Adenauer-Ufer 71
D – 50668 Köln
T + 49 (0) 221 139 96 96 - 0
F + 49 (0) 221 139 96 96 - 69
koeln@qivive.com

Paris[F]
50 avenue Marceau
F – 75008 Paris
T + 33 (0) 1 81 51 65 58
F + 33 (0) 1 81 51 65 59
paris@qivive.com

Lyon[F]
10 –12 boulevard Vivier Merle
F – 69003 Lyon
T + 33 (0) 4 27 46 51 50
F + 33 (0) 4 27 46 51 51
lyon@qivive.com