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NON-COMPETE AGREEMENT IN UKRAINE: WORLD EXPERIENCE ON A NATIONAL SCALE

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Abstract

A non-competition agreement is a very common way to protect an employer's interests. In many countries there is such a legal instrument as a non-competition clause. On the other hand, the non-competition agreement is a new and unusual phenomenon for Ukraine, so there is a need to study its legal regulation with the experience of foreign countries. The aim of the article is to study the legal regulation of the nature of the non-competition agreement with the experience of different countries in this matter and the feasibility of applying this experience in Ukraine. The study was conducted using such special legal scientific methods, as historical and legal, comparative legal and formal. The article presents the comparative-legal analysis of the practice of conclusion of non-competition agreements in such countries as France, Germany, Italy, China, Great Britain, the USA and Ukraine. On the basis of this analysis, proposals for Ukraine are made. In particular, the article considers the problems of including non-competition provisions in civil legislation. Also analyzed is the judicial practice of violations of the terms of contracts containing non-competition provisions.

Keywords: labor law, labor relations, employer, employment agreement, non-compete clause.

I. INTRODUCTION

Effective functioning of the domestic economy is impossible without the full use of all elements of the market /**1**/. Persistently rapid and significant economic development encourages companies to continuously develop their business and technology for high competitiveness /**2**/. In order to protect not only confidential information, but also information directly or indirectly related to the economic activities of the company, employers are forced to enter into non-compete agreements. Non-compete clauses seek to restrict an employee from working for a competitor upon departure and are carefully scrutinized by courts /**3**/. A non-compete agreement usually has several functions: it protects the employer from possible competition from the employee, who after the end of the cooperation decides to start a business in the same field or in the same territory, to work for a direct competitor; prevents the leakage of unique knowledge, skills, ideas, employer technology, customer contacts, business practices; helps the employer to retain qualified specialists, etc.

At the same time, the terms of the agreement must have reasonable limits and can limit the employee's right only to the extent that it is necessary to protect the legitimate business interests of the employer. Such agreements are widely used by many Western countries and the USA. For, example, recent research suggests that a considerable number of American workers (18 percent of all workers, or nearly 30 million people) are covered by non-compete agreements /**4**/. The laws of countries where non-compete agreements apply provide the employer with the opportunity to hold an employee liable for violation of the terms of the agreement. It should be noted that today there is no single position on the application of the non-compete agreement. Some believe that this protects the employer, while others, on the contrary, come to the conclusion that this negatively affects the free development of the market and the economy as a whole, as well as it violates the rights of the employees. For example, in some states of the USA exists the blue-pencil doctrine. This doctrine prevails in some states and requires that courts delete provisions of a non-compete contract that render it overbroad or otherwise defective, retaining the enforceable subset of the contract /**5**/.

Today, in an environment where competition in the marketplace is becoming increasingly fierce, every employer wonders how to prevent a customer base or a unique manufacturing technology (know-how) developed over the years or a patented business model from becoming known to a potential competitor. The resolution of this issue is important when hiring an employee, because such information can become known to him, moreover, in the future he can use the skills and knowledge he gains both in working for a competitor and in creating his own business. All this has a potential risk for the employer.

Because of this, labor law in many Western countries (Belgium, France, Great Britain and the United States) already includes the institution of non-competition agreements with the employee. As a rule, such agreements are concluded with employees who are engaged in activities in areas where competition is very high, including IT, development, commerce and marketing. The essence of this agreement is that the employee is obliged not to cause competition to the employer during the performance of labor duties, as well as for a certain period after the termination of the employment relationship. At the same time, the scope of duties imposed on the employee under such an arrangement varies and depends on the scope of work of the employer or the position the employee holds or the function he or she performs.

The employee may be obliged, in particular, during the term of the employment contract and for a certain period of time after the end of the employment relationship:

- not to perform activities analogous to those of the employing company.

At first glance, these non-competition clauses are highly interfering with the employee's rights to free choice of employment and fair working conditions, and are clearly not compatible with the interests of the employer. However, the legislation of EU countries establishes the conditions for the validity of such agreements /**6**/. In this regard, making a research on non-compete agreement in Canada N. Shapiro mentions that whether a restrictive covenant is enforceable depends on the reasonableness of the clause. A balance must be struck between discouraging unnecessary restraint of trade and respecting the freedom to contract. A restrictive covenant is prima facie void on the grounds that it is a restraint on trade and contrary to public policy. The onus falls on the employer to justify the reasonableness and necessity of the covenant in question. As a result, the courts have been very cautious in enforcing post-termination restrictions /**7**/.

Exacerbation of competition and decrease of competitiveness of domestic enterprises necessitate their innovative development /**8**/. This

necessitates the reform of labor legislation and the invention of new provisions governing competition. It should be noted that O. Yaroshenko, A. Sliusar, O. Sereda, and V. Zakrynytska /**9**/, M. Dei /**10**/, K. Tomashevski /**11**/, T. Kortukova /**12**/ and others studied the problems of labor legislation reform comprehensively. O. Rym /**13**/ studied the consequences of invalidating agreements on non-compete in labor relations. S. Vavzhenchuk /**14**/ studied the types and criteria of validity of non-compete agreements.

Kiselyov /**15**/, analyzing foreign experience, notes that the "non-compete agreement" binds the employee to certain obligations to the employer not only during the employment contract, but also after its termination, and these responsibilities are broader than disclosure trade secret. These include a ban for some time after dismissal (in different countries from 1 year to 5 years) to hire a similar company, create a similar company, have business relationships with clients of the previous employer and disclose information related to past work /**16**/. The general purpose of a non-compete clause is to prevent unscrupulous employees from appropriating confidential trade information and customer relationships for their own benefit, so that employers can invest optimally in research, employee training, improvement of business methods, and client relationships without fearing that their investments will be lost /**17**/.

II. MATERIALS AND METHODS

The study of non-compete agreement in Ukraine was implemented by performing the following steps. First of all, the relevant legislation was regulated to regulate non-compete agreements in such countries as Germany, France, USA, Great Britain, Italy, China, Ukraine. Based on the study of the above, a comparative analysis of the practice of different countries on this topic was conducted. At the end, general conclusions were made, as well as perspectives and recommendations were presented. Materials and methods of research were chosen taking into account the goals and objectives set in the article. In addition, the work used a set of regulatory principles, techniques and methods by which knowledge was gained about the specifics of the practice of non-compete agreement in the world. To conduct the study in the article, a number of methods were used, as well as various materials were used.

In particular, the author used a number of general scientific and special legal scientific methods. It should be noted that the following methods were used in the work: discourse and content analysis, system analysis method, induction and deduction method. In addition, the article used such special legal scientific methods as historical and legal, comparative law and formal law. The historical and legal method was used to study the history of the institution of non-competition. In this case, the study is based on the laws and principles of dialectics, which contribute to the study of the peculiarities of practice. The methodological significance of the dialectical method in the study of non-compete agreement is that it serves as a means of finding new results, a method of moving from the already known to the unknown and new.

The comparative law method was used to compare the practice of non-compete agreements in different countries of the Civil law legal system and the Anglo-American legal system, namely in countries such as France, Germany, Italy, China, Great Britain, Ukraine. The formal-legal method is used for generalization, classification and systematization of research results, as well as for the correct presentation of these results. It should also be noted that modern domestic legal scholars have turned to the analysis of the corresponding problem, since it is at the present stage that the specified problem of prohibition of competition has become relevant. In addition, the study contains an analysis of foreign legal regulation of the prohibition of competition between a manager and an employee. The subject of the research is domestic and foreign legislation, law enforcement practice and doctrinal research, mainly in the field of civil law and labor law on the issue of an agreement on the prohibition of

competition in relations between a manager and an employee.

III. RESULTS

The Institution of Non-Compete Agreement: World Practice

The prohibition of competition has long been known to the world legal order and is actively used to this day. Non-compete clauses have existed since at least the early fifteenth century. In 1415, in England, the first case dealing with a non-compete clause struck the clause down. The institution of non-compete agreement today has become widespread in the legal order of such countries as Germany, France, USA, Great Britain, Italy, Canada, China and in most other countries of the world. For example, in Anglo-Saxon law, in order to avoid situations where a manager starts competing with his own employer, it is common to conclude so-called non-compete clause. The essence of such agreements is that the executive employee undertakes not to work for a certain period after dismissal in the field of activity of his employer in exchange for a large monetary compensation upon dismissal, usually equivalent to the salary of such an employee for the period while he refrains from working in favour of competitors.

During the proceedings in Dyson Technology Ltd v. Strutt /**18**/, The High Court approved the non-compete clause due to the fact that it was logically needed to protect the employer's confidential information. Thus, the English courts have confirmed that they are ready to enforce non-compete obligations. The most interesting and recent case law in the UK in the context of the prohibition of competition is case between Caroline Tillman and Egon Zehnder Ltd. Among other things, the non-compete clauses contained in the employment contract between the said parties provided that within six months from the date of termination of the employment relationship, Caroline Tillman is not entitled to participate directly or indirectly in any business that is competitive with the business of her former employer or his affiliated companies /**19**/. In the United States, a non-compete agreement is also widely used between an employer and an employee, which is usually a separate document or one of the conditions in an employment contract. The essence of this agreement is to deny competition, i.e. the employee undertakes, during hiring and (or) for a certain period after dismissal, not to cooperate with competitors of the employer and not compete with him.

The conclusion of such an agreement is possible both upon hiring and in the process of working in the company, as well as upon dismissal. An employee, who has signed such an agreement, thereby undertakes the obligation not to compete with his employer, doing business in the same or similar field, both as an employee and as an entrepreneur. Such an agreement can significantly limit the field of activity of the employee, even if he does not work directly for a competitor of his employer. As one would expect, the Canadian approach to the enforcement of non-competition covenants is rooted in English common law, which begins with the view that any agreement in restraint of trade is per se illegal /**20**/. For example, in Canada in RBC Dominion Securities v. Merrill Lynch, the Supreme Court was clear that while the common law does prohibit an employee from competing with his or her employer during the course of the employment relationship, once the relationship is terminated, employees are free, at common law, to compete with their former employer. The use of non-competition clauses was further restricted in the employment context as a result of Friesen v. Mackague /**21**/.

Typically, the non-compete agreement includes the following basic conditions: the employee has no right to disclose confidential information, trade secrets and customer lists of the company or to benefit from this; all inventions of an employee, discoveries or improvements belong to the company, if in one way or another relate to the sphere of its activity, regardless of whether they were made during working hours, with or without the use of the employer's property. There are also rules on non-compete in the legislation of the continental states of the European Union. For

instance, in France, the general duty of loyalty prohibits employee to compete during the term of employment (article L. 1222-1 of the Labor Code of France) /**22**/. In France, the statute does not control non-compete clauses. The case-law established key conditions for the validity of non-compete clauses in order to ensure the fundamental principle of freedom of occupation. For instance, the non-compete clause must be significant to protect legitimate interests of the company and limited of duration and geographically. Moreover, it is important to consider characteristics of the employee duties and to guarantee a relevant financial compensation.

As regards the application of the non-competition agreement, Belgian legislation is unique. Thus, according to article 65 of the Belgian Federal Law "On Labor Relations" /**23**/, the non-competition agreement means that the employee, once the employment relationship with the company is over, is prohibited from carrying out similar activities, both when managing the company, and working on the terms of employment with another employer, who is a competitor for the first one, using both for himself and for the benefit of the competitor the specific knowledge that he has acquired.

Thus, there are three conditions, the presence of at least one of which indicates a violation of the agreement:

- performance of the very same activities as those performed by the previous employer and use of these activities in one's own business, or on the terms of employment with another employer.

- Such activity should result in a real profit for the primary employer. This provision does not apply to companies for which bankruptcy proceedings have been initiated or which are at the stage of liquidation

- The employee must acquire specific knowledge and use it in the industrial sector or trade.

It is also important that the law provides for the possibility of applying the agreement regardless of the level of wages. In particular, according to Part 2 Art. 65 of the Federal Law of Belgium "On Labor Relations" /**24**/:

- the non-competition agreement shall be deemed inadmissible for employment contracts in which the annual salary does not exceed the amount of 33,221.00 thousand euros per year.

- the non-competition agreement can be applied if the salary is set at the level of 33,221.00 to 66,441.00 thousand euros. euros - only for the employees performing a particular category of duties specified by the collective agreement approved by the Joint Appeal Chamber (or in their absence - by the agreement signed by the employer and the trade union organization)

- The non-competition agreement is valid if the employee's salary exceeds the amount of 66,441.00 euros, Except for employees performing functions expressly excluded by the collective labor agreement approved by the Appellate Chamber (or, in the absence thereof, by the agreement signed between the employer and the trade union organization).

Germany is one of those countries where the possibility of using the non-compete clause is expressly provided for by law. In Germany, article 60 of the Commercial Code /**25**/, which initially applied to «commercial employees», provides a non-compete principle that was extended to all kinds of employees. Non-compete clauses are regulated for all employees by articles 74 of the Commercial Code. It should be noted, that non-compete obligations after the employment contract must meet the following conditions: be in writing; be provided to the employee; serve legitimate business interest of the employer; not exceed 2 years; provide for financial compensation for the agreement. It should be noted that sufficient compensation for the employee for the relevant restrictions is a very important aspect, because without mutual benefit, the non-compete can be considered to put

the parties in an unequal position. That is, the condition of validity of the contract is its mutual benefit.

In Italy, the duty of loyalty established by Article 2105 of the Civil Code of Italy /**26**/ hinders the employee from competing against its employer during the term of the employment as well. Under Article 2125 of the Civil Code of Italy /**27**/, the non-compete covenant must be presented in written form; be limited to certain activity, geographically, in duration; and to ensure a financial compensation.

In China the Law as enacted adopts a more liberal approach to non-compete clauses in three respects. Since the Law appears to permit an employer to include in the labour contract of any employee confidentiality clauses pertaining to the business secrets and intellectual property of the employer, all employees could potentially be subject to a confidentiality obligation. The amount of compensation for an employee subject to a non-compete clause may now be less than originally contemplated. All that is now required is «financial compensation on a monthly basis», rather than one year's salary. The geographic restriction on competition and the reference to an «actual competitive relationship» has been dropped, although the two-year temporal restriction remains. The Law simply provides that the «scope, territory and duration» of the restriction is a matter for agreement between the parties, although the wording of the provision suggests that the clause must at least relate to competition in the same line of products or businesses /**28**/.

The recent dispute before Judge Senan Allen in the High Court between Ryanair DAC and their former Chief Operating Officer (COO), Mr Peter Bellew, highlights the limitations of restrictive covenants in employment contracts. Ryanair lost a case in the Irish High Court trying to force Mr Bellew to comply with restrictive covenants in his employment contract. The court had to assess whether Ryanair's restrictions on Mr Bellew were objectively justified to protect the company's business without disadvantaging the man's legitimate desire for career advancement. Peter Bellew clearly understood the restrictive covenants to which he had agreed at the start of his employment with Ryanair and the company, in turn, had a legitimate interest in protecting valuable confidential operational and financial information that became known to Mr Bellew during the course of his employment with the company. After examining the breadth of the restrictions in the contract and the types of prohibited roles, including a role in any capacity with a budget airline at any level of management, the court found that restricting Mr Bellew's employment with any airline in any capacity was outside Ryanair's legitimate interests /**29**/.

In restraining Mr Bellew from seeking alternative employment, it was necessary to restrict him to a role in which there was a likelihood of disclosure or use of Ryanair's confidential commercial information. If the restriction applied only to senior management positions at budget airlines, it would be more likely to be enforceable. The restrictive covenant clause would need to be tailored to each specific role, taking into account the real business risks that could arise if an employee left that role and moved into a similar business.

The case was based on the Court's view that the restraints on Mr Bellew went further than was necessary to legitimately protect Ryanair's interests. The applicable test testing whether, in all the circumstances, both the nature of the restriction and its extent were reasonable to protect Ryanair's business reputation was not met /**30**/.

There is no place for a "standard" standard restrictive covenant clause in an employment contract if the employer wishes to be assured of enforceability. A restrictive covenant clause should be tailored to each individual role, taking into account the very real commercial risks it could pose to the business if the incumbent left the role and moved into another similar business. This could be monitored at each annual review

and at all stages of progression, and updated as necessary for the business to take account of pay rises, improvements in terms and conditions or promotions.

This could be monitored at each annual forum and at all stages of progression, and updated as necessary for the business to take account of pay rises, improvements in conditions or promotions. Companies should draft restrictive covenants carefully and, where possible, tailor them to the role of the individual employee to ensure that restrictions are rational and strictly required to secure the employer's legitimate business interests.

The Institution of Non-Compete Agreement in Ukraine

In Ukraine, the non-compete agreement does not have sufficient legal regulation. Especially many questions arise in the case of concluding a non-compete agreement between the employee and the employer. For example, Article 43 of the Constitution of Ukraine /**31**/ states that every person has the right to work, which includes the opportunity to earn a living at work that one freely chooses. That is, on the one hand, this means that everyone has the right to freely dispose of their abilities for work, to choose their type of activity and profession. In the meantime, the rights and freedoms of a person can be restricted by the state only to the extent necessary in order to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of others, to ensure the country's defence and state security. Comparing the legislation of foreign countries and Ukrainian legislation, it should be noted, that the labor legislation of Ukraine does not provide for a prohibition on the employment of an employee with another employer, including if such actions may lead to adverse consequences for the current employer. This means that limiting a person's right to dispose of his personal abilities, professional experience, skills, and freedom to choose a profession may infringe on the fundamental constitutional rights of a person and citizen.

On the other hand, the foreign experience analyzed in this article allows us to conclude that the design of the prohibition of competition is quite capable of coexisting together with the generally recognized principles and norms of international law, within the framework of a reasonable concession to the needs of modern society, expressed in the possibility for legal entities to also demand protection of rights and legitimate interests. This is partly due to the fact that citizens and legal entities are free to conclude a contract. The freedom of contract is expressed in the possibility of independent determination of the terms of the contract. It is the parties to the agreement that develop its terms, filling it with specific content. It should be noted that Ukrainian courts are beginning to hear cases of recovery of funds for non-compliance with the terms of non-compete agreements concluded between the employer and the employee. In this case, the courts analyze: the nature of the work performed; how long the employee has worked for the company; whether the employer provided special training, education to the employee; whether the employee had access to commercial, confidential information of the employer, which could significantly affect the rights and interests of the company if such information is used by a competitor; whether the information held by the employee is the employer's confidential or commercial information; whether the employee's knowledge is unique to the employer or is of a general nature, for example, general experience of selling goods/services.

A striking example is the decision of the Shevchenkivsky District Court in Kyiv No. 761/15245/18. The Shevchenkivskyi District Court in Kyiv /**32**/, having considered a civil case on recovery of funds in an open court session in the courtroom according to the rules of general claim proceedings, decided to collect money from the employee in favor of the employer under a non-compete agreement dated February 1, 2017 in the amount of about 9,000 thousand euros. In case No. 6-35747sk14, in which the High Specialized Court for the Consideration of Civil and Criminal Cases /**33**/ upheld the position of the

Dnipropetrovsk Region Court of Appeal set out in the decision of August 18, 2014. In particular, the appellate court indicated that the terms of the employment contract in terms of prohibiting the employee for three years after termination or expiration of the employment contract for any reason, directly or indirectly, engage in any activity similar to that of the plaintiff or competing with him, in the form of an independent activity or as a member of any partnership or legal entity, consultant, shareholder, investor, employee, employee or director of any corporation or other legal entity, as well as the recovery of a fine for such actions, violate the rights of the defendant and contradict current legislation.

The similar is also the case No. 2-397/09, in which the plaintiff filed a lawsuit to recover from the defendant the damage caused to the company as a result of the defendant's breach of employment obligations specified in the contracts /**34**/. According to the contracts, the defendant was hired as the head of the regional branch of Ukrainian Courier LLC. The plaintiff believes that the defendant violated the terms of the employment contract, which prohibits the defendant and her relatives during the term of the contract and for three years after its expiration (1) to be owners or employees of other media, (2) directly or indirectly delivery of advertising, information and other materials, as well as (3) the issuance of free distributed advertising and information publications, and (4) the obligation of the head to maintain trade secrets. As a result, the Court concludes that the plaintiff did not provide the court with evidence of the defendant's illegal use of the enterprise's «special address program» database, which was allegedly a plaintiff's trade secret, evidence of the program's existence. The plaintiff has not proved and documented what material resources and in what amount (the amount of payment for the work of couriers, managers, sorters, the amount of transport costs, the amount of other costs) were used by the defendant to distribute magazines and newspapers.

In the case No. 6-35747sk14, the court guided by the provisions of Article 43 of the Constitution of Ukraine /**35**/ and Article 9 of the Labor Code of Ukraine /**36**/, concluded that the terms of the employment contract to prohibit the employee for three years after termination or expiration of the employment contract for any reason, directly or indirectly engage in any activity similar to that carried out by the employee, violates the rights of the worker and contradicts the current legislation /**37**/. To conclude, it should be noted that, while in Europe and the United States non-compete is a common and effective tool, in Ukraine it does not work. Analyzing the case law of Ukraine, it also should be noted that non-compete agreements are such that restrict both the constitutional rights of employees and competition in the market of relevant services. It is noteworthy that the non-compete agreement is perceived not as a manifestation of the freedom of contract, but rather as a restriction of this fundamental principle in its broadest sense.

Despite the difficulty of proving an employee's breach and the causal link between the breach and the damage caused to the employer, there is still positive case law in our country on non-disclosure agreements for companies. It should be noted that the Draft Labour Code expressly provides for the possibility of imposing non-disclosure obligations on employees (Articles 41, 92) which would result in an increase in both the number of court cases and the percentage of positive case law for employers.

Unfortunately, the concept of duty of loyalty, prevalent in many jurisdictions, under which an employee is obliged not to disclose information even if no separate agreement has been concluded between employer and employee, was not supported by representatives of the Ministry of Social Policy and the Federation of Trade Unions of Ukraine and therefore was not included in the Draft Labour Code. Non-solicitation and non-competition agreements are in fact contrary to the right to work guaranteed by the Constitution of Ukraine and therefore, court disputes are not in favour of the employer. For the

same reason, the concepts were not supported by the social dialogue parties mentioned above and were not included in the draft code. Most European Union countries use a mechanism to balance the interests of both parties in the employment relationship by paying the employee monetary compensation for each year of compliance with the restrictions.

Non-Competition of Employees as A Matter of Fairness

Organisational justice research focuses on perceptions and reactions to business decisions and categorises the fairness of outcomes, processes, interpersonal reactions and information /**38**/. The first two categories are perhaps best known and are referred to as distributive justice (fair outcomes) and procedural justice (fair process). A key step in determining the ethics of non-competition is whether the negotiation between the firm and the employee leads to a fair outcome, or, to put it another way, whether the outcome is consistent with the principles of distributive justice. An additional requirement for a fair outcome in an employee non-competition case must be that the firm recognises - and therefore waives - any "rights to general training or education that the employee already had" before entering into the employment relationship /**39**/. This requirement may not even be present in an executive's employment contract, since the executive comes to the firm with a stock of general human capital that he or she should be free to use outside the firm. These issues raise real questions about how a non-compete agreement can be recognised as fair. One guiding principle may be the requirement of reasonableness, often used by courts to enforce the non-compete clause for employees discussed earlier. Thus, a non-compete agreement that is overbroad in nature, vague in terms or otherwise manifestly unenforceable if brought before the courts does not meet this fairness requirement. Similarly, at an organisational level, the non-compete terms should be adjusted to reflect the realities of the employee's role and access to confidential information. In no case should a manager have a less restrictive non-competition regime than any other rank-and-file employee.

In any non-competition agreement, the most important thing will always remain the purpose of the agreement. If the purpose is to keep the employee - then he or she will revert to thinking about the fear of losing their qualifications and a nice bonus to their salary every time they think about quitting. If the aim is to protect its business assets - then a tailored NCA, together with a moderate and calculated access to trade secrets policy, will only further confirm the seriousness of the company's intention to act decisively when the need arises. A non-compete agreement is always based on mutual respect of the parties and their willingness to honour their promises. That is why a properly drafted deal will not only protect yourself, but also preserve the loyalty of a former employee or counterparty for the unlikely event that their particular expertise or talents are vital to the continued growth of the business. Responsible planning and preparation for such an agreement will assure both parties of mutual respect and can significantly strengthen the professional relationship.

IV. DISCUSSION

Nowadays, in many competitive economies, many companies are faced with such a problem as leaving the company of valuable employees who have no less valuable skills, customer connections and information about the secrets of the company. It should be noted, that the research of the non-compete agreement conducted some foreign and national scientists. For example, E. Levitt and C. Finkelstein /**40**/ analized non-compete agreements in a Canadian context. Y. Sofer /**41**/ made a research on the issue of the effects non-compete agreement enforceability has on entrepreneurship in the United States. J. Carosa /**42**/ considered non-compete agreements as contracts, made between an employer and employee that restrict the employee's postemployment opportunities. M. Marx's /**43**/ research provides insight into interests of

workers, existing firms and entrepreneurs, claiming that non-competes discourage flexibility and depress the rate of salaries among employees. At the same time, it promotes stock market performance among publicly traded companies. Non-competes complicate the process of creating new companies and also to inhibit their performance by making it more difficult to engage experienced workers.

However, conducting our research, we came to the conclusion that on the one hand, according to Ukrainian legislation, no one has the right to restrict a person's freedom to find employment anywhere, if such employment is not prohibited by law. The non-compete agreement is intended to protect the rights of the employer and the company's competitiveness in the market, but at the same time it is in a certain way discriminatory towards the hired employee, because it is customary to include the following obligations of the employee: not to disclose confidential information obtained in the course of work in the company; observe loyalty to the company; not to spread negative information about the company, within a certain period; not to get a similar position; not practice your own practice in this area. All these conditions are a significant limitation of the employee's legal capacity, inter alia the right to work and free choice of profession, to carry out entrepreneurial activity.

On the other hand, an employer really needs a non-compete agreement. This is how he protects his business from competitors. That is, the contract prohibits the employee from performing actions that may harm the employer. Such clauses are very popular in developed countries, they are either included in employment contracts between the employer and the relevant employee, or are formed in a separate agreement/contracts, for example, a separate non-disclosure agreement and non-compete agreement). In the Ukrainian legislation, at this time, the question of the form in which a non-compete agreement should be concluded remains not entirely clear. For example, should it be concluded separately from the employment contract, i.e., be a specific type of contracts in employment legal relations, or whether it can be a clause of the general employment contract.

Prerequisites to be specified in the non-compete agreement are: detailed scope of the non-compete obligation; restrictions on the territory covered by the ban on competition; indicate the term of the non-compete condition; determine sufficient compensation for the employee for the relevant restrictions. The non-compete agreement must also specify restrictions and prohibitions on actions that may harm the employer. Examples of such restrictions may be: prohibiting an employee from using the employer's opportunities and resources or allowing them to be used for purposes other than activities aimed at developing the employer. In addition, the employee may be prohibited from holding paid positions in organizations other than those approved by the employer; establish or participate in organizations that compete with the employer; be a representative in cases of third parties related to the employer; receive from third parties any remuneration for activities included in the subject of the employer's activities or competing with his activities in addition to the salary established by the contract, etc.

In general, for the successful enforcement of non-compete agreements in court, their provisions should be as clear as possible. Agreements should not contain direct restrictions on work in the same position and in the same specialty, since the courts consider such obligations as violating the employee's right to work and do not consider the very fact of such employment as a violation of the terms of the non-compete agreement. The prohibition of working for a competitor should be formulated as clearly as possible, for example, indicate the industry, type of activity, etc. In addition, to confirm the violation of the provisions of the contract, the presence of damage caused to the former employer by the actions of the employee, the connection of such damage with the employee's new job, and also to confirm the damage caused, the evidence base is very important.

V. CONCLUSION

In the modern world, the problem of leaving the company of valuable employees with valuable skills, client connections and information about the secrets of the company is gaining more and more popularity for many companies. That is why it is quite common to conclude an agreement on non-compete between an employee and an employer at the time of signing an employment contract, which is valid after its termination. The non-compete agreement is used in many foreign countries mainly as one of the means of maintaining trade secrets of the organization and protecting the employer's business from possible unfair competition from employees. This agreement binds the employee with certain obligations towards the employer, not only for the duration of the employment contract, but also after its termination.

In a non-compete agreement, as a rule, we are talking about confidential information, such as business methods, communication with clients, data on technical secrets that have not yet received the status of protected results of intellectual activity. The conclusion of such an agreement allows you to limit competition from the employee or prevent it for a certain period of time. The agreement may also reflect questions about the professional knowledge, skills and abilities of the employee received from the employer and allowing him to be competitive in the competition with him. It should be noted, that important points to consider when signing an non-compete agreement are: its validity period; a field of activity in which employment/entrepreneurial activity is restricted or prohibited; the territory in which employment is prohibited, sanctions for violation of the non-compete agreement conditions, which must be acceptable and in accordance with modern practice of prosecution; what guarantees/compensation the employee receives in response to the restriction of his rights.

Thus, in order to ensure a balance of interests of both employers and employees, in the field of increasing the competitiveness of campaigns in the conditions of market relations, it is necessary to develop and improve the institution of non-compete agreements within the framework of labor law. Despite the relevance of this topic in many countries, the signing of the non-compete agreement in Ukrainian conditions, as a rule, is considered as a violation of the right to freedom of labor and choice of profession, provided for by the Constitution of Ukraine and the Labor Code of Ukraine. In this regard, it should be noted that the labor legislation of Ukraine in the context of the implementation of the agreement on non-compete requires changes and additions. Moreover, given Ukraine's European integration aspirations, it is important to commit to bringing its national competition law into line with EU law.

That's why, the legislator of Ukraine needs to pay attention to such proposals. First, the non-compete agreement must be a separate agreement, not an element of the employment contract. Because of this, the relationship will not be considered as employment one and such contract may be valid even after the termination of the employment contract, and Article 9 of the Labor Code will not apply. However, such an agreement should contain the following provisions: the scope and type of restrictions; interpretation of "confidential information"; time to limit; restriction area; encouragement to the executor, that is "mutual benefit", which is a condition of the validity of this contract, as well as the sanctions for non-performance of the contract. To conclude, it should be noted that non-compete agreements can become a valid instrument for protecting the commercial interests of employers.

Now, analysing the court practice, we can confidently say that non-competition agreements are such that they interfere with both the constitutional rights of employees and competition in the market of relevant services, in view of which they are inappropriate. Notably, the non-compete clause is not perceived as a manifestation of freedom of contract, but rather

as a restriction of this fundamental principle in its broadest sense. Nevertheless, although judicial practice today does not speak in favour of such arrangements, the importance of their application cannot be underestimated. At least in view of the fact that the Non-compete remains a valid psychological instrument in relations between the parties. Whether the Non-compete gains legal status in Ukraine is only a matter of time. Ensuring the same rules for all participants of the global market of services is an integral aspect of globalization, which is not inevitable for Ukraine.

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