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Review article

NON-COMPETE CLAUSE IN BULGARIAN LABOUR LAW

Maria Radeva, Ph.D., Assistant Professor
University of Ruse "Angel Kanchev", Faculty of Law
Studentska str. 8, Ruse, Bulgaria
mradeva@uni-ruse.bg

Vanya Panteleeva, Ph.D., Assistant Professor
University of Ruse "Angel Kanchev", Faculty of Law
Studentska str. 8, Ruse, Bulgaria
vpanteleeva@uni-ruse.bg

Abstract

Work is inherent in every person. Thanks to the exercise of active, purposeful efforts, a person acquires funds not only for their physical survival, but also for their development and growth as a person. Recognition of the possibility of employment is proclaimed to be a fundamental human right. The right to work is recognised and protected in a number of international instruments and national legislations. The right to work is also guaranteed in the Constitution of the Republic of Bulgaria. Citizens shall have the right to work and every citizen shall be free to choose an occupation and a place of work.

Traditionally, it is an understanding that the employer is the economically stronger party in the employment relationship. The means of production he possesses (buildings, machinery, technology, commercial relations, etc.) give him an economic advantage over the worker, who possesses only his workforce — physical strength, knowledge, skills.

From the economic position held, the employer can apply different approaches to retain and limit the mobility of his employees. Without neglecting the employer's right to protect its economic interest, the conclusion of the non-compete agreement must guarantee the rights of the worker and comply with the law of competition in labour market.

The aim of the research is to present the regulation of the non-compete clause in Bulgarian labour Law and the relevant case law.

Faced with the need to conclude an employment contract or to maintain their employment relationship, workers often do not understand or ignore included non-compete clauses. Knowledge of the legal framework is an indispensable step towards protecting labour rights. In this regard, the first research purpose is to make an overview of the relevant Bulgarian legislation.

The study of case law is essential for legal science. On the one hand, case law gives the understanding of the institute concerned, concept, legal order. On the other hand, case law provides

an opportunity to analyse how the law established by the legislature operates in practice and whether the relevant objective has been achieved. Summarizing the principled understandings of the Bulgarian courts on non-compete clauses is the second research purpose.

Knowledge of the peculiarities of the non-compete agreement matters for both theory and practice. Bulgaria is part of the EU labour market. Knowledge of national legislation will assist foreign researchers in developing relatively empty research.

Bulgaria guarantees the right to free movement by workers who are nationals of another Member State of the European Union. Knowledge of national legislation is also relevant in cases of labour mobility.

Both general and special methods of scientific knowledge were used in the conduct of this study. The two main approaches also applied to the present study are deduction and induction. The application of the comparative-historical method allows to trace the development of legislation and case law on non-compete clause, the changes that have occurred and possibly to forecast development trends.

***Key words**: labour law, non-compete clause, labour mobility, competition in labour market*

1. INTRODUCTION

The main objective of EU competition law is to create conditions for the proper functioning of the internal market. Competition policy is a key tool for achieving a free, dynamic, and functioning internal market and for promoting overall economic welfare. Competition enables businesses to compete on equal terms, while also encouraging them to offer the best products at the lowest prices for consumers. This stimulates innovation and boosts long-term economic growth. Articles 101-109 of the TFEU, as well as Protocol No. 27 on the internal market and competition[1], indicate that a system of fair competition is an essential part of the internal market. Competition policy has a direct impact on people's lives, with one of its key features being the promotion of open markets so that everyone — businesses and citizens — can receive a fair share of the benefits of economic growth.

While competition policy alone cannot create a fairer economy, it plays a pivotal role in achieving this goal. The enforcement of competition law safeguards consumer rights. Competition policy contributes to building a society that offers choices to consumers, stimulates innovation, and prevents abuses by dominant market players. The interaction between EU competition law and EU consumer law is a key aspect of the Union's legal framework. It aims to ensure fair and effective protection of consumers while promoting competition in the internal market.

The interaction between EU competition law and EU consumer law can be considered from several aspects. Some anti-competitive practices can directly nega-

[1] Official Journal of the European Union C 202/308

tively impact consumers, limiting their choice or raising prices. In such cases, sanctioning such practices through competition law serves to protect consumers. Competition law can support the protection of consumer rights by encouraging innovation and market efficiency. When companies are encouraged to compete with each other, they are more likely to offer new and better products and services, which benefits consumers. Consumer law can influence competition law by setting minimum standards for company behavior toward consumers.

Non-compete clauses, a unique aspect of EU competition law, can significantly impact consumers. These clauses are typically included in employment contracts and prohibit employees from working for competing companies after the termination of their employment relationship. While their aim is to protect the employer's trade secrets and know-how, they can restrict labor mobility and reduce competition in the labor market. From the consumer perspective, reduced competition can lead to less choice and higher prices. Therefore, it is important for EU legislation to balance the interests of employers and employees, ensuring that non-compete clauses do not violate competition law and protect consumers.

2. THE BALANCE BETWEEN THE EMPLOYER'S INTERESTS AND THE PROTECTION OF THE EMPLOYEE'S RIGHTS

The employment contract is a bilateral agreement because each party – employee and employer – assumes reciprocal rights and obligations. The employee provides their labour force for the employer's use. In doing so, the employee alienates a portion of their personal freedom, which places them in a subordinate position under the control and instructions of the employer, which they are obliged to follow[2]. As a result, the employee becomes legally dependent on the employer.

Traditionally, it is understood that the employer is the economically stronger party in the employment relationship. The employer's ownership of means of production (buildings, machinery, technology, business relations, etc.) gives them an economic advantage over the employee, who possesses only their labour force – physical strength, knowledge, skills, and professional qualifications. Within the framework of labour legislation, the employer has numerous legal means related to the internal work organization, the way production is arranged, the distribution of working time, and so on. This is what constitutes employer authority – the employer's right to direct and control the work of their employees, including the imposition of disciplinary sanctions.

[2] Mrachkov, V., *Labour Law*, Sibi Publishing House, Sofia, 2015, pp. 201 - 202

In some respects, employers also rely on their employees. Without their skills and labour, the enterprise could not function effectively. Employees create products, provide services, and interact with clients, which directly impacts the company's reputation and success. However, in fulfilling their work duties, employees may gain access to important information for the employer – production technology, market policies and mechanisms, client and supplier lists, etc. The disclosure of such information by employees could be used by competing companies and put the employer in a vulnerable position. Hence, the employer's desire to limit employees' interactions with competitors is understandable, with the goal of protecting trade secrets and confidential information.

3. NO-POACH AGREEMENTS IN BULGARIAN COMPETITION LAW

The Commission on Protection of Competition (CPC) is an independent specialized government body. The CPC serves as Bulgaria's national authority for enforcing EU competition law.

The main task of the CPC is to ensure the application of rules that promote and enforce competition in both the public and private sectors, applying the principles of a market economy and free competition. In carrying out this task, the CPC's actions support the level of competition in the Bulgarian economy, which leads to improvements in the quality and price of available goods and services and strengthens the internal market, which is a core value of European integration. In this way, the national competition authority's main mission is fulfilled: to create conditions in which markets deliver more benefits to consumers, businesses, and society as a whole.

Each year, following an analysis of the results achieved during the previous period, the CPC sets its future priorities. These priorities are based on the institutional experience of the organization and take into account economic trends. The establishment of new goals also reflects the need for the direct application of European legislation, as well as the changes in markets and business models resulting from new technologies. The CPC primarily focuses its work on combating prohibited agreements, preventing collusive market practices, terminating unfair trading practices, and more.

For the first time, the priorities and objectives of the "Antitrust" activity for 2023[3] explicitly state that the CPC will monitor the promotion and preservation of an

[3] See: Annual Report on the activities of the Commission on Protection of Competition, 2022, [https://www.cpc.bg/media/about-kzk/annual-reports/KZK2022.pdf], Accessed 29 September 2024

open and competitive labour market. To fulfil this priority goal, the CPC must pay particular attention to agreements between competitors in the labour market, which can emerge in any sector of activity. The agreements between employers and/or competitors in the labour market that may potentially restrict competition are the so-called "no-poach agreements", whose aim is to refrain from attracting and/or hiring each other's workers. The trend of competition authorities reviewing such anti-competitive agreements is gaining momentum worldwide, especially following the Covid-19 pandemic and the changed working conditions in almost every economic sector. This is expected to continue in the future, especially considering the increasing number of such agreements as a standard practice in human resources across various industries. In this context, it is of utmost importance to ensure direct, effective, and fair competition between employers, because the labour market directly or indirectly affects many related markets, which in turn indirectly impacts the overall economic well-being, promotes innovation and growth, and is key to all processes related to overcoming the economic crisis brought on by the pandemic.

The CPC's 2023 Annual Report[4] states that in the area of antitrust, the Commission has achieved its primary goals of enhancing the effectiveness of countering prohibited agreements and abuses of monopoly or dominant positions, with the aim of ensuring the free functioning of markets in the interest of consumers and the economy in Bulgaria. However, aside from this general statement, there is a lack of specific data on identified practices or violations related to restricting competitiveness in the labour market.

In the set priorities for 2024[5], there is no explicit emphasis on maintaining an open and competitive labour market. However, it is noted that the CPC continues to focus its efforts on new and dynamically developing market phenomena, such as e-commerce, sustainability, and labour markets.

The no-poach agreements, also known as the non-hiring clause, is a contractual agreement that restricts the hiring and recruitment of workers from a given enterprise. The no-hiring clause limits competition between parties regarding the recruitment of workers. In business relations, the employees of one employer may come into contact with the employees of another employer. Such interactions create the need to protect workers from potentially being recruited by the opposing party for the purpose of hiring them. It can reasonably be assumed that in

4 See: Annual Report on the activities of the Commission on Protection of Competition, 2023, [https://www.cpc.bg/media/about-kzk/annual-reports/KZK2023.pdf], Accessed 29 September 2024

5 See: Priorities of the Commission on Protection of Competition in 2024, [https://www.cpc.bg/media/about-kzk/annual-reports/KZK2024.pdf], Accessed 29 September 2024

industries where there is a shortage of highly qualified specialists or where stricter protection of trade secrets and know-how is required, no-hiring clauses could be applied more broadly. No-poach clauses in commercial contracts can restrict competition between employers in the labour market. A potential consequence of such a restriction is the creation of obstacles to the growth of competitors. Limiting the movement of the workforce can also lead to lower productivity and higher prices, which can be harmful to consumers.

The Bulgarian competition authority has not yet fully examined the anti-competitive effects of no-poach agreements, despite including it in the 2023 activity priorities. So far, no-poach agreements have been analysed by the CPC primarily in the context of ancillary restrictions during mergers and acquisitions.

The European Commission's report on labour market competition[6], dated May 2, 2024, provides a framework for assessing no-poach agreements, determining whether they are lawful or not. This general framework will also be applied by the CPC.

No-poach obligations between enterprises - employers in commercial relations are not regulated by Bulgarian labour law. The Bulgarian Labour Code only governs the relationship between the employee and the employer. No-poach agreements in commercial contracts, viewed from the perspective of competition law, have a direct or indirect influence on access to the labour market and the exercise of labour rights.

4. LEGISLATION FOR PROTECTING THE EMPLOYER'S ECONOMIC INTEREST AND COMPETITION

4.1. The duty of loyalty in labour law

Each party in an employment relationship seeks to safeguard its interests. Employees aim to work under fair conditions and receive equitable compensation, including the freedom to choose a profession and place of work. The employer's interest is primarily economic, which includes the protection of trade secrets, business relationships with partners, business practices, etc. In this context, the Labour Code contains an explicit obligation of loyalty for the employee. According to Article 126, item 9 of the Labour Code, upon performance of the work on which he or she has agreed, the worker or employee shall be obligated to be loyal to the

[6] Antitrust in Labour Markets/ Competition Policy Brief No 2/2024, [https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en], Accessed 29 September 2024

employer, not to abuse the employer's trust, not to disclose any confidential information regarding the employer, and to protect the reputation of the enterprise.

The obligation under Article 126, item 9 of the Labour Code for loyal conduct towards the employer requires the employee to respect the employer's interests, not to create conditions for unfair competition, to protect confidential information, and to maintain and uphold the employer's reputation with third parties. The forms of breach of trust can vary and include (but are not limited to) abusing the employer's trust, disclosing confidential information about the employer's activities, deals, or financial condition, and damaging the employer's reputation[7]. The prohibition on disclosing the employer's trade secrets is not only an obligation under Article 126, item 9 of the Labour Code but also constitutes a disciplinary violation under Article 187, paragraph 1, item 8[8], and Article 190, paragraph 1, item 4[9] of the Labour Code, for which the employee may be subject to disciplinary sanctions.

4.2. The duty of loyalty in competition law

A breach of the duty of loyalty may also lead to unfair competition under the meaning of the Protection of Competition Act (PCA). This interpretation is supported by the practice of the Commission on Protection of Competition.

A Bulgarian company imports and sells insulation and special construction materials on the Bulgarian market, both independently and through its own distribution network. The company also provides construction services. Two of its employees founded their own commercial company with diverse business activities, including entrepreneurship in the construction sector. The employer filed a complaint with the CPC, alleging a violation of the PCA. The CPC ruled that the establishment of the commercial company by the two employees did not constitute illegal behaviour. The fact that this company had a similar business activity and was a competitor to their employer was also irrelevant. Engaging in activities similar to the employer's business must comply with the rules of fair commercial practice.

During the CPC's proceedings, it was established that the employees held positions involving interaction with clients, sending offers, negotiating terms, and

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7 See: Civil case No. 3829 / 2014, Supreme Court of Cassation

8 The following shall constitute breaches of work discipline: abusing the confidence and damaging the reputation of the enterprise, as well as disclosure of data which is confidential in respect of the enterprise.

9 A dismissal for breach of discipline may be imposed after abusing the employer's confidence or disclosing data which is confidential in respect of the employer.

having access to special pricing offered to certain clients. This implies that they were expected to be loyal to their employer and perform their duties while considering the employer's interests. However, the commercial company owned by these employees, along with the employees themselves, entered into business relations with one of their employer's key clients, offering significantly lower prices. The CPC found this to be an act of unfair client solicitation.

When the dispute was referred to the Supreme Administrative Court[10], the judge in the case recalled that the 1991 Constitution of the Republic of Bulgaria established one of the principles of legal liberalism - citizens and legal entities are free to engage in any conduct not expressly prohibited by law. In other words, the restriction of citizens' and legal entities' rights and opportunities in Bulgaria can only result from an explicit legal provision. The main issue in this case was whether there was a legal prohibition preventing an employee from working for a competing company. The employees who founded their own commercial company effectively had the responsibilities of commercial agents under the Commerce Act. Commercial agents are explicitly prohibited from representing competing traders (Article 44[11] of the Commerce Act). Since such a provision does not exist in the Labour Code, the question arose whether such a prohibition should also apply to employees performing the role of commercial agents under an employment contract. The court's answer was affirmative - employees who are assigned the role of commercial agents under their employment contracts are also prohibited from representing a company that competes with their employer. However, this prohibition does not stem from the Commerce Act but rather from Article 126, item 9 of the Labour Code, which outlines the duty of loyalty to the employer. A violation of this duty also constitutes a breach of public morality, as defined by societal standards of decency. The conclusion reached was that the case involved unfair competition under the meaning of the PCA.

4.3. Confidentiality obligation in the employer's internal acts

Beyond the explicitly stated duty of loyalty for the worker (Article 126, item 9 of the Labour Code), there are other institutes within labour legislation that can be applied to protect the economic interests of the employer.

The CPC conducted a sector analysis regarding competitive issues in pricing within the retail trade of gasoline and diesel fuel. As a result of this analysis, proceed-

[10] See: Administrative case No. 5908/2004, Supreme Administrative Court

[11] The dealer may represent multiple merchants, as long as they do not compete. They may reach agreement with the merchant to be their exclusive representative.

ings were initiated against seven Labour Code commercial companies engaged in wholesale and retail trade of petroleum products to establish possible violations of Article 15, paragraph 1[12] of the PCA. A non-profit association, the Bulgarian Petroleum and Gas Association, which was established to protect the interests of distributors and traders in the petroleum and gas industries by ensuring equality among economic entities and promoting fair competition, was constituted as an interested party in the proceedings.

During the investigation, the CPC discovered a series of electronic communications exchanged among employees of the various commercial companies, sharing data and information about traded fuel volumes, pricing policies, and more. Based on the established facts and characteristics of the fuel markets, under Article 75[13] of the PCA, six[14] of the commercial companies proposed the adoption of measures in the form of internal procedures to ensure that their market behaviour would not contribute to increased market transparency beyond what is objectively imposed by the specifics of the retail gasoline and diesel fuel markets.

The presented case falls under the subject of competition law. However, in light of the topic discussed, the obligations approved by the CPC in this case, proposed by the trading companies, are of particular interest. The trading companies commit to adopting measures in the form of internal procedures that guarantee a ban on contacts and the exchange of any information with competing companies and their employees. They also commit to implementing a ban on any contacts between their employees and those of competing gas stations. The trading companies, in their capacity as employers, will impose the heaviest disciplinary sanction - dismissal for employees who fail to comply with the requirement for confidentiality of commercial information.

This example illustrates that labour law mechanisms, such as the internal acts of the employer, can be effectively used to protect trade secrets and confidential information. In undertaking such actions, the employer is bound by the rules of both competition and labour law.

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12 The following shall be prohibited: all kinds of agreements between undertakings, resolutions of associations of undertakings, as well as concerted practices of two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition within the relevant market, such as: 1. direct or indirect fixing of prices or other trade terms;

13 The respondent under Article 74 (2) may offer to make commitments leading to termination of the actions with respect to which the proceedings were instituted.

14 No violation was found for one of the companies.

4.4. The contract under Article 111 of the Labour Code - additional work for another employer

The current Labour Code came into force on January 1, 1987, and has since undergone numerous amendments and additions due to the socio-political and economic changes in Bulgaria after 1989. Considering the historical context in which the Labour Code was created, concepts such as loyalty to the employer, confidentiality, and competition in the labour market are absent from the legal framework. However, even in the initial version of the code, Article 127, item 11 defines the obligation of the worker "to preserve the good name of the enterprise, not to abuse its trust, and not to disclose confidential information about the enterprise". Subsequently, this provision was supplemented and became the text of Article 126, item 9 of the Labour Code, which was discussed earlier.

Despite the fact that all enterprises were state-owned, the contract for additional work in another enterprise was regulated at the time of the adoption of the Labour Code. According to Article 111 (amendment as of 1987), a worker may conclude an employment contract with another enterprise, and such a contract may be concluded only with one enterprise. The conclusion of a contract for additional work requires prior consent from the employer (paragraph 3). The restriction on concluding only one such contract was removed in 1993, and the requirement for prior consent was eliminated in 2001. After these amendments, the worker is granted relatively unlimited freedom to conclude employment contracts with other employers, with restrictions moving to the level of the employment contract. The worker is free to enter into employment contracts with other employers – "unless otherwise agreed in their individual labour contract under their primary employment relationship". Regarding the specific restrictive clause in the employment contract, there is no requirement, and it entirely depends on the will of the parties. Consequently, the clause in the employment contract can be extremely broad and may prohibit the conclusion of an employment contract with another employer altogether without any justification from the employer.

The text of Article 111 of the Labour Code was amended in 2022. After the change, the prohibition on additional work for another employer has been significantly narrowed. The amendment to Article 111 of the Labour Code aims to guarantee the right to work for employees while also taking into account the need to protect the commercial interests of the employer and to prevent conflicts of interest. The current text of Article 111 of the Labour Code (effective from August 1, 2022) states that the worker or employee may furthermore conclude employment contracts with other employers for performing work outside the established working time under his or her primary employment relationship, unless a prohibi-

tion is provided in his or her individual employment contract under the primary employment relationship to protect a trade secret[15] and/or to prevent conflict of interest. Restrictions for other reasons cannot be imposed on the worker. When working under more than one employment contract, a natural obstacle is the distribution of working hours, which is a separate topic.

Given the brief period of effectiveness of the new text of Article 111 of the Labour Code, there is still no established case law**.**

5. NON-COMPETE CLAUSE IN JUDICIAL PRACTICE

In a highly competitive and sometimes restricted market, employers report that their former and even current employees are disloyal, starting jobs with competing firms or providing identical goods and services through their own commercial companies. The desire of employer companies to implement various mechanisms to protect against such behaviour from their employees is understandable. To safeguard their interests, employers include various restrictive clauses in the employment contract or other accompanying documents. There is established judicial practice regarding the legal effect of such clauses, even when accepted by the employee.

5.1. Prohibition on working for a competing employer

As mentioned, when an employee wishes to enter into an employment contract for additional work with another employer, the protection of the employer is, according to Article 111 of the Labour Code, achieved through the negotiation of the relevant restrictive clause.

The clauses that restrict employees from working for a competing employer after the termination of their current employment contract are of interest not only from a theoretical but also from a practical standpoint. Such a prohibition is linked to a penalty clause. It is precisely in cases involving employers seeking compensation from their former employees that Bulgarian courts have formed a lasting judicial practice. Since 2010, the Supreme Court of Cassation has upheld consistent rulings on this matter.

Until now, there were two positions in the Bulgarian judicial system. Some judges accepted that the penalty clause is an obligation that cannot be included in the employment contract, the content of which is determined by Article 66 of the

[15] See: Andreeva. A.; Aleksandrov, A., *The trade secret concept in the context of the obligations of employees and workers,* in: Society and Law Journal, No. 2, 2020, pp. 44 – 45

Labour Code. Such a clause limits the future employment relationships of the employee and contradicts the constitutional right of every citizen to freely choose their profession and workplace according to Article 48, paragraph 3[16] of the Constitution of the Republic of Bulgaria, thus rendering it invalid.

Other judicial decisions accepted that the penalty clause is part of the optional content of the employment contract under Article 66, paragraph 2[17] of the Labour Code. Within the limits of contractual freedom and the subsidiary applicability of civil law, the parties have the freedom to regulate the property liability of the employee. The purpose of such a clause is to compensate the employer for damages resulting from the dissemination of confidential information and from using specific skills and contacts acquired during the employment. The clause, due to the relativity of the obligation freely assumed by the employee, does not limit the constitutional right to choose a profession and workplace. The employee may choose not to comply with the agreement but must pay the agreed penalty to the employer.

The Supreme Court of Cassation holds that the penalty clause in an employment contract, based on the employee's obligation not to enter into employment or civil relations with a competing employer after the termination of the employment contract, is void due to its contradiction with Article 48, paragraph 3 of the Constitution, as well as based on Article 8, paragraph 4[18] of the Labour Code. Such a clause does not validly bind the parties, and the claim for payment of the agreed penalty is unfounded. Future employment relations are imperatively regulated by Article 48, paragraph 3 of the Constitution. This right is also enshrined in Article 15, § 1 of the Charter of Fundamental Rights of the EU and in Article 1, § 2 of the European Social Charter. This position has been adopted by Bulgarian courts and is applied without deviation.

5.2. Prohibition on the Use of Already Obtained Information

At first glance, a decision by the Appellate Court - Plovdiv in 2023[19] may be seen as a departure from the aforementioned practice. The employee was ordered to pay a penalty to his former employer, but based on different factual and legal grounds.

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16 Every citizen shall be free to choose an occupation and a place of work.

17 Other terms may also be agreed by the employment contract pertaining to the provision of labour force which are not regulated by mandatory provisions of the law, as well as terms which are more favourable for the worker or employee than those established by the collective agreement

18 Labour rights and duties shall be personal. Any renunciation of labour rights, as well as any transfer of labour rights and duties, shall be void.

19 See: Appellate civil case No.54/2023, Appellate Court - Plovdiv

After working for 10 years, the employee's labour contract was terminated. Immediately prior to the termination of the employment contract, the parties signed a confidentiality agreement, according to which the employee undertook an obligation for three years after the termination of the employment relationship to keep, not disclose, and not use the confidential information specified in the agreement. The employee was also prohibited from contacting the employer's clients if he worked in another company in the same industry. In case of a breach of the confidentiality agreement, the parties agreed that a penalty of 20,000 euros would be owed, which they deemed not excessive.

Three months after the termination of the employment contract, the former employee registered his own trading company. The former employer claims that the newly registered company is engaged in identical activities and is a competitor in the relevant market. The manager of the company, who is the former employee, allegedly uses all the information of the employer to which he had access, including information about clients, business relationships, market policy, etc. The claims of the former employer are that the employee has breached the confidentiality agreement, that his behaviour constitutes unfair competition and unfair client solicitation, leading to losses for the employer. Therefore, the employer claims payment of the agreed penalty.

Regarding the confidentiality agreement, the court accepts that it is directly related to and conditioned by the existing employment relationship, concluded during the period of the employment contract, and that the parties have agreed on additional terms related to the provision of labour that are not regulated by mandatory legal provisions. The parties have also regulated their relationships for the time after the termination of the employment contract regarding the protection of confidential information and the prevention of unfair competition, which are directly connected to the existing employment relationship. The court holds that agreements between parties in an employment relationship, regardless of their designation, that regulate rights and obligations related to the performance of labour, including the obligation to pay a penalty in relation to these rights and obligations, have the character of labour law contracts. Such agreements also include confidentiality agreements, respectively contracts for confidentiality, and agreements to prevent unfair competition against the employer, which the parties to the employment relationship establish for the period following the termination of the employment relationship. The agreed penalty aims to protect the employer from unfair competition. The agreed compensation in the form of a penalty does not represent the employee's property liability within the meaning of the Labour Code, as it is not liability for harm caused to the employer, but rather liability

for non-fulfilment of the obligation undertaken by the employee to refrain from certain actions that could cause harm to the employer.

From an economic perspective, it has been established that the clients for whom the newly established company has made deliveries/sales were also clients of the employer during the period when the employment contract was in force. A match has been established with 12 client companies. The total value of transactions with identical subject matter conducted with/for the clients of the company represents 67.35% of the total revenue of the newly established company; the remaining portion of the revenue is from clients different from those of the former employer. Based on these established facts, the employee has been ordered to pay the full agreed penalty.

In this case, the confidentiality agreement does not restrict either the employee's right to work or the right to free economic initiative. The prohibitions relate to the non-disclosure of confidential information about the company that became known during the course of employment. For the purposes of the confidentiality agreement, any commercial, technical, or financial information received in written, oral, or electronic form, including information regarding intellectual property, transactions, business relationships, and the financial condition of the company or its partners, is declared confidential. The employee undertook not to contact the clients of the employer for a period of 3 years if they work in the same industry.

The court holds that it is permissible for the parties in an employment relationship to agree on a penalty as a type of compensation for the non-fulfilment of a specific obligation assumed by the worker. The obligation undertaken by the worker to adhere to certain behaviour for a specific period after the termination of the employment contract does not constitute a waiver of labour rights or a limitation imposed by the employer on the worker's right to work and his entrepreneurial freedom. The worker has the right to work, including the right to engage in activities in the same sector. The restriction is partial - specifically, not to contact the employer's clients for a period of 3 years. The court does not accept that this arrangement disrupts the balance in the relationship between the worker (who is hierarchically and economically dependent on the employer) and the employer, because the worker's right to work is not denied; it is only temporarily limited in order to protect the legitimate right of the employer to defend against unfair competition. It is indisputable that unfair competition is an obstacle to the conduct of business activities and is therefore prohibited by law, which is why the employer has the right to require the worker to behave in accordance with the agreed terms. In this regard, the confidentiality agreement, or clauses within it, do not contradict the provisions of the Labour Code.

This case is just one of many considered by Bulgarian courts. However, it should be noted that the courts' decisions vary because the specific facts, as well as the confidentiality agreements concluded between employers and workers, differ.

6. CONCLUSION

The Bulgarian Commission on Protection of Competition has yet to examine the anti-competitive impact of no-poach agreements on workers, although this has been among its priorities for 2023. But this does not mean that such practices are not applied both among competing companies and in employment relationships.

The obligation of loyalty of the worker is explicitly regulated in the Labour Code and can manifest in various forms. Violating this legal obligation is grounds for imposing disciplinary liability, including disciplinary dismissal.

Judicial practice declares invalid the clauses that restrict employees from working for a competing employer after the termination of the employment contract. While it is practically logical and legally permissible for the worker to continue developing in the same field, this does not mean that they can improperly use the confidential information of the former employer to which they had access. The former worker can freely use the professional experience, knowledge, and personal skills they have accumulated but is obliged to protect the trade secrets of their former employer.

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EU TREATIES

1. Article 101 – 109 TFEU (Lisbon)
2. Protocol No. 27 on the internal market and competition

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

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